Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
ENTERTAINMENT SOFTWARE ASSOCIATION	)	CG Docket No. 10-213
	)	CG Docket No.
Petition for Waivers of 47 C.F.R. §§ 14.1 *et. seq.*	)	

To: Chief, Consumer and Governmental Affairs Bureau

PETITION OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

Christian Genetski, Sr. Vice President & General Counsel
Michael Warnecke, Sr. Policy Counsel
Cory Fox, Policy Counsel
Entertainment Software Association
575 7th Street NW, #300
Washington, DC 20004
(202) 223-2400

F. William LeBeau
Leighton T. Brown
Holland & Knight LLP
2099 Pennsylvania Avenue, NW,
Suite 100
Washington, DC 20006
(202) 955-3000
Its Attorneys

March 21, 2012

EXECUTIVE SUMMARY

The Entertainment Software Association urges the Commission to implement the Twenty-First Century Communications and Video Accessibility Act ("CVAA") requirements for "advanced communications services" in keeping with the careful balance Congress intended when it empowered the Commission to protect innovation by granting class and individual waivers for equipment and services that have a "primary purpose" other than ACS.

Video game industry products and services clearly meet that standard. Their primary purpose is *game play*, not ACS. Indeed, the primary purpose of the offerings encompassed by this waiver request is coextensive with the very reason the video game industry exists – to deliver entertaining game play experiences to consumers. Video games have long been recognized—by creators and consumers, fans and critics, curators and regulators—as a distinct entertainment genre. Fundamentally, these products and services are designed to entertain players, not to provide telecommunications service between individuals. Although they may offer online functions, many of those functions do not qualify as ACS. Moreover, to the extent games may incorporate ACS-type capabilities, such as in-game text chat, such capabilities are merely one of many subordinate features of the game product or service, not its defining attribute. In short, game industry products and services have a well-established, clearly recognized primary purpose—game play. As such, they are plainly not the generalized communications services Congress envisioned reaching when it enacted the CVAA; rather, they are precisely the type of distinct offering for which Congress created the class waiver.

Consistent with both the CVAA and the *ACS Order*, the ESA respectfully petitions for waivers for the following three classes of video game industry products and services:

Class I: game consoles, both home and handheld, and their peripherals and integrated online networks, which are designed for multiple entertainment purposes but with a primary purpose of playing games.

Class II: game distribution and online game play services designed for the primary purpose of distributing game software or enabling online game play across a network, regardless of the device from which it is accessed.

Class III: game software designed for the primary purpose of game play.

Each class is a well-defined group of offerings sharing both common features and the same primary purpose of game play, and thus all plainly meet the CVAA waiver standard as implemented by the Commission. As discussed in detail herein, each class merits a waiver because:

- Game industry products and services are first and foremost about game play. The design and marketing of game console systems, online game networks, and game software prioritize game play as the primary purpose.

- As recognized by retailers, consumers, and third party metrics firms, game industry products and services have well-defined characteristics that clearly set them apart from telecommunications and other products and services. Regulators agree. The FCC, the Federal Trade Commission, the Environmental Protection Agency, and the Department of Energy have all recognized game industry products and services as belonging to their own, distinct category.

- Where they exist, ACS-type features in game industry products and services are subordinate to, and typically used to enhance and support, the primary purpose of game play. If there is an emerging secondary purpose of video game consoles and networks, it is entertainment features such as streaming movies, TV shows and music. By contrast, ACS-like features are simply one among a number of ancillary features utilizing online connectivity to augment the game experience, along with multiplayer gaming, tracking leaderboards, administering tournaments, seeing what games others are playing, and downloading new games and software updates.

- This waiver petition does not include "general purpose" devices or platforms. As to hardware, it covers only dedicated game consoles and peripherals. As to platforms, it encompasses only those dedicated to game play or distribution. Significantly, although a gamer may play games or access online game play services or networks from other devices or platforms whose primary purpose is *not* gaming, such as a mobile phone, PC, tablet, or general purpose social network, the proposed waivers do not include these underlying "general purpose" devices or platforms.

- We are not seeking a permanent waiver. To afford the FCC flexibility to monitor changes in the industry, we are proposing initial waivers that generally would cover the lifecycles of the relevant classes based on the current game technology ecosystem.

- Granting the class waivers would be consistent with the public interest because, among other reasons, it would promote further innovation in game industry products and services, foster competition and enable the FCC to focus its resources on products and services generally used for ACS, not on potentially hundreds of game-related waivers annually.

- The industry has made and will continue to make clear progress in improving our products and services to be more accessible to gamers with disabilities, independent of any regulatory mandates.

- Other stakeholders support a waiver for game industry products and services, as evidenced by earlier comments filed by, among others, AT&T Services, the Consumer Electronics Association, the NetCoalition, T-Mobile, the Telecommunications Industry Coalition, and the Voice on the Net Coalition.

Given the lead time needed for the production of game industry products and services, we urge the Commission to move swiftly in addressing our waiver petition to provide the industry with clarity within 90 days, if possible.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
ENTERTAINMENT SOFTWARE ASSOCIATION	)	CG Docket No. 10-213
	)	CG Docket No.
Petition for Waivers of 47 C.F.R. §§ 14.1 *et. seq.*	)	

To: Chief, Consumer and Governmental Affairs Bureau

PETITION OF THE ENTERTAINMENT SOFTWARE ASSOCIATION

I. INTRODUCTION

The Twenty-First Century Communications and Video Accessibility Act ("CVAA") represents an important achievement in America's progress toward ensuring that Americans, regardless of their physical differences, have the tools they need to participate in the communications revolution.[1] The video game industry likewise values inclusiveness, and the many members of the Entertainment Software Association (the "ESA") strive to make their products and services appealing, affordable, and accessible to a broad range of consumers, including persons with disabilities.[2]

[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.) (the "CVAA"). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010). Further references to the CVAA will be to the CVAA as codified in the Communications Act of 1934, as amended, unless otherwise indicated.

[2] *See* Ex Parte Letter from Christian Genetski, ESA General Counsel, to Marlene Dortch, Commission Secretary, CG Docket No. 10-213 (submitted August 17, 2011) ("ESA August Ex Parte"). ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet.

In passing the CVAA, Congress sought to promote innovative solutions for increasing the accessibility of "advanced communications services'' ("ACS") without discouraging other innovation.[3] To achieve that goal, it authorized the FCC to grant class waivers for multipurpose offerings that have some ACS capabilities but were designed primarily for other purposes.[4]

This multipurpose waiver provision underscores that the legislative motivations for the CVAA were to broaden accessibility to services primarily used for general communications on issues that would directly affect their economic well-being or real-world circumstances. For example, the Senate Report expressly noted that, among other reasons, the CVAA was needed because the "economic disparity" faced by persons with disabilities "may increase" if "certain current and emerging technologies are not accessible to the disabled community."[5] The Report further stated that the multipurpose waiver was intended so that CVAA requirements may be waived for products or services that "incidentally provide[] access to ACS or [were] designed primarily for another purpose."[6]

Last spring, the Commission commenced a rulemaking to implement these ACS requirements and, as a part of that rulemaking, invited commenters to recommend potential candidates for class waivers.[7] In response, the ESA submitted a class waiver request for several

[3] *See* 47 U.S.C. § 617(h).
[4] *See, e.g.,* S. Rep. No. 111-386, at 8 (2010) ("Senate Report") (noting that ". . . the Commission may find that to promote technological innovation the accessibility requirements need not apply"); H.R. Rep. No. 111-563, at 26 (2010) ("House Report") (same).
[5] *See, e.g.*, Senate Report at 2 ("For example, in 2008, only 40 percent of working-age people with disabilities were employed, while almost 80 percent of those without disabilities were working. If certain current and emerging technologies are not accessible to the disabled community, this economic disparity may increase. Enhanced accessibility could help diminish this economic divide.") (citations omitted).
[6] *See id.* at 3.
[7] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd 3133

closely related video game industry products and services.[8] Many commenters expressly agreed that video game offerings merited a waiver because they have a primary purpose other than ACS, or because game-related or game-specific communications were not the sort of general communications targeted by the CVAA.

For example, the Voice on the Net Coalition explained that it "is appropriate'' and "judicious'' for the Commission to issue "[c]lass-based waivers'' for "products not designed for ACS, such as [video] gaming products."[9] The Telecommunications Industry Association concurred, stating that "waivers would provide manufacturers and industry participants with added certainty that will spur innovation in new devices that may have incidental ACS components, such as . . . gaming systems."[10] Similarly, NetCoalition specified "gaming service'' as a class of service to which accessibility requirements should not apply.[11] Several other stakeholders agreed that game industry products and services were not the sort of products and services intended to be covered by the CVAA's ACS mandate.[12]

In October 2011, the Commission adopted rules to implement the ACS provisions of the CVAA.[13] Although the FCC ultimately did not rule on any multipurpose class waiver requests in

---

(2011) ("*ACS Notice")*. Unless otherwise noted, comments and reply comments cited are those submitted as part of the *ACS Notice* proceeding.

[8] *See* ESA Reply Comments at 9-20 (responding to query in *ACS Notice* at 3156, ¶ 60 regarding potential class exclusions in the ACS Rules).

[9] VON Comments at 6-7.

[10] TIA Comments at 13-14 (emphasis added).

[11] Comments of NetCoalition at 1, 6-7.

[12] *See, e.g.,* Comments of Consumer Electronics Association at 2 (stating that any offering "with a purely incidental VoIP component (*e.g.*, a gaming system)" should be excluded from scope of accessibility regulations); Comments of AT&T Services at 6-7 (adding that video game consoles are an example of equipment that merits a waiver); Comments of T-Mobile at 6 (naming "gaming or entertainment" offerings as either outside the CVAA or suitable for broad waivers).

[13] *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*, Report and Order and Further Notice of Proposed

the *ACS Order*, the Commission adopted rules permitting waivers, and expressly encouraged the ESA and other stakeholders to submit waiver petitions.[14]

Consistent with both the CVAA and the *ACS Order*, the ESA respectfully petitions for waivers from the requirements of the *ACS Order* for the following three narrowly circumscribed classes of video game industry products and services, each of which shares the primary purpose of game play:

> **Class I**: game consoles, both home and handheld, and their peripherals and integrated online networks, which are designed for multiple entertainment purposes but with a primary purpose of playing games.
>
> **Class II**: game distribution and online game play services designed for the primary purpose of distributing game software or enabling online game play across a network, regardless of the device from which it is accessed.
>
> **Class III:** game software designed for the primary purpose of game play.

Although these classes are distinctly defined, they also are highly interdependent. The products and services captured in the three classes are designed to function together and complement one another as part of an integrated ecosystem aimed at a common deliverable—game play.[15] This interdependence reflects the purpose-driven nature of the video game industry, and distinguishes the industry from other products and services subject to the *ACS Order*'s requirements. Accordingly, to ensure the continued smooth functionality and interoperability of these products and services, consistent treatment across classes is important. We urge the Commission to grant the waiver petition in a manner consistent with

---

Rulemaking, 26 FCC Rcd 14557 (2011) (*"ACS Order")*. The *ACS Order* promulgated rules to implement the relevant aspects of the CVAA, which were published in the Federal Register as of December 30, 2011. *See* 47 C.F.R. §§ 14.1 *et seq.* (the "ACS Rules").

[14] *See ACS Order*, ¶¶ 179-200.

[15] As a result, some services reside in multiple classes. For example, some console-based online networks may be accessed from multiple devices (e.g., the console itself, a PC, tablet, or mobile phone) and thus may be encompassed in both proposed Class I and Class II.

the interdependent and mutually reinforcing nature of the three classes that define this single gaming ecosystem.

II. OVERVIEW OF GAME INDUSTRY PRODUCTS AND SERVICES

Forty years ago this summer the video game industry launched its first home console, the Magnavox Odyssey. Games like *Table Tennis* and *Football: Passing & Kicking* delighted consumers and spawned an entire new form of entertainment. In the decades since, the game industry has strived to deliver great game experiences that consumers love to play. Today's games and game systems offer more realistic graphics, simplified ways to control game play, additional channels for acquiring game content, and expanded options for playing against and engaging other gamers. The video game industry has developed both hardware platforms, including home consoles and handheld devices, and software platforms, including web portals and cloud services, that are dedicated to delivering game content and enabling game play. And game publishers develop video game software for both of these dedicated platforms as well as other multipurpose platforms, including mobile phones, tablets and PCs, on which games may be played. The storied history of this distinct genre of art and entertainment is presently on display as the subject of "The Art of Video games" exhibition at the Smithsonian Art Museum.[16]

The current U.S. home console market consists of three major systems—Microsoft's Xbox 360, Nintendo's Wii, and Sony's PlayStation 3—which share several common characteristics indicative of the fact that game consoles are optimized to deliver rich game experiences to consumers. Each of the console makers publishes games for their respective

[16] *See* Ellen Gamerman, *'Space Invaders' As Art: A New Look at Video Games*, **Wall Street Journal**, March 15, 2012, *available at* http://online.wsj.com/article/SB10001424052702304692804577281692261363850.html.

systems only, with dozens of third-party game publishers supplying a constant stream of additional games. Each of the console systems has a companion online network specific to that platform and tightly integrated with the console's operating system. Those networks provide a wide array of functions in support of game play, including enabling multiplayer game play, downloading of games, announcements for new games, expansion packs and updates, tournaments, tracking of trophies and achievement badges, and customization of avatars. The consoles also offer some non-game entertainment services, including media playback options for watching movies and TV shows, and listening to music. Each of the consoles works with specialized controllers designed for game play on that particular system. Each of the current generation consoles implements parental controls based on a game's content to help parents make informed decisions about what games their children may play and other aspects of the game play experience. Dedicated handheld game systems, such as the Nintendo 3DS and the Sony PlayStation Vita, share many of these same features, and are also part of the proposed Class I.[17]

In addition to physical game consoles and their associated networks, consumers also may access, obtain, and play video games through online game platforms, such as networks like EA's Origin, Microsoft's Games for Windows Live, and Valve Corp.'s Steam, or game streaming services such as OnLive.[18] All of these Class II services permit games to be played on a range of

[17] Throughout this filing, when we refer to "game consoles," we intend to include both home consoles and dedicated handheld game devices, unless otherwise noted.

[18] *See* Exhibit B-3. With these game streaming services, both the copy of the game software and the bulk of the processing occur on remote cloud servers, from which the audio-visual output is streamed to the user, and the user's commands are sent back in real time.

multipurpose devices, such as personal computers and tablets, but are themselves uniquely dedicated to supporting the distribution and play of video games.

Finally of course, video game publishers create a plethora of rich interactive video game software designed to play on dedicated game consoles and handhelds, alternate game platforms, or multipurpose devices like PCs, tablets, and mobile phones. In addition to game play on consoles or dedicated gaming platforms, the game industry has developed games for play on other general-purpose platforms. Computer games, for example, have a long history in the industry, stretching back decades to the early text-based adventure games available for the first home computers up through today's highly sophisticated massively multiplayer online games ("MMOs"), which enable numerous gamers to compete or collaborate in a game that has many participants. Such game software is now designed for play on both Windows and Mac OS platforms. More casual game software designed to be played through a web browser or on a mobile device is an increasingly convenient and attractive option for some consumers. Some game software may include its own in-game chat features as a game play enhancement, whereas other game software may utilize similar functionality offered by a console or other game platform. However, all game software shares the single defining characteristic of Class III products: delivery of an entertaining, interactive experience in which a player overcomes progressively difficult obstacles in pursuit of one or more goals.

In sum, video games have a colorful history, a vibrant present, and a bright future. Game publishers have created and will continue to create a diverse array of video game titles in genres ranging from sports to role-playing to first person shooter to open world to logic puzzles. Game console makers and game platform developers will continue to build systems

designed to better harness the power of this software and deliver richer game experiences. In pursuit of these aims, the game industry has carved out an unmistakable, clearly defined place of its own within the entertainment space, and produced generations of products and services dedicated to serving it.

III. A CLASS WAIVER IS WARRANTED WHERE THE "PRIMARY PURPOSE" OF THE PRODUCT OR SERVICE IS SOMETHING OTHER THAN ACS.

The *ACS Order* established a threshold test for granting waivers from the ACS requirements, consistent with congressional intent: Waivers should be granted upon a showing that the service or equipment is (i) capable of accessing ACS; and (ii) designed for multiple purposes, and primarily for purposes other than using ACS.[19] In evaluating the "primary purpose" of the equipment or service, the FCC will consider (i) whether the manufacturer designed the offering primarily to be used for ACS by the general public or for another primary reason; and (ii) whether the manufacturer or provider marketed the equipment or service primarily for its ACS features or functions.[20] In addition, the *ACS Order* identified two other potential factors: whether ACS supports another feature, purpose, or task; and what impact removal of the ACS feature would have on the "primary purpose" of the equipment or service.[21] The general "good cause" requirement, implicit in all waivers of the Commission's rules, also applies.

[19] 47 C.F.R. §14.5(a)(1), which tracks the statutory thresholds. *Compare* 47 C.F.R. §14.5(a)(1) *with* 47 U.S.C. § 617(h)(1). Because all offerings of the classes proposed in this petition share the common purpose of game play, any other purpose would cause them to have multiple purposes and thus be eligible for a waiver under this Rule. Conversely, any of these offerings that does not have any ACS function is not subject to the ACS Rules at all, and does not require a waiver. *See infra* n. 66.

[20] With respect to the first of these two criteria, the *ACS Order* expressly notes that a manufacturer's or provider's market research, usage trends of similar offerings, and other information may be relevant.

[21] *ACS Order*, ¶ 186.

Beyond these considerations, the *ACS Order* provided additional criteria with respect to properly framing the scope of a class waiver. The products and services within the class should be similar and "share[] common defining characteristics."[22] Also, the petitioner should address: (i) the "expected lifecycle'' for the offerings within the class; and (ii) each generation, if multiple generations of an offering are to be covered within the class.[23] Finally, the *ACS Order* notes that a single petition may request waivers for multiple "classes of equipment and services."[24]

Each of the three proposed classes satisfies these requirements. First, the classes cover products and services that clearly have a primary purpose of game play. Game consoles have operating systems and hardware optimized for game play and specialized controllers designed for game applications. Game distribution and online game play services provide a platform for distributing new game content and/or supporting game play. Video game software shares a common primary purpose of game play. Many of these products and services include ACS-type features or functions, but those features are subservient to and primarily designed to enhance the game play experience by enabling, for example, planning strategy in a multiplayer game, organizing matches, or meeting with other avatars in a virtual environment. Beyond the design of the products and services, the industry's marketing materials clearly indicate that game play

[22] 47 C.F.R. §14.5(b). Based on the rule and the *ACS Order*, we understand that any class waiver would include, by implication, a waiver for each individual item within the class on a stand-alone basis.
[23] *ACS Order*, ¶¶ 194-95.
[24] *Id. at* ¶ 193; *see id. at* nn. 521 & 540 (as example, authorizing separate waiver requests for equipment and for services as part of single petition). Under the CVAA and the ACS Rules, the ESA has the necessary regulatory standing to petition for a class waiver on behalf of its members, who collectively account for the majority of game software sold at retail in the United States and include the three leading game-console manufacturers. *See* 47 C.F.R. § 14.5(a)(1); *ACS Order*, ¶ 182 (noting that under the CVAA and Section 14.5(a)(1), a waiver petition may be made by "any interested party").

is the salient feature and, to the extent that an ACS-type feature is mentioned at all, it is positioned as an ancillary feature.

Second, each class encompasses products and services that have common, well-defined characteristics that easily distinguish them from scores of other products and services in the marketplace. Retailers, third party metrics firms, consumers, museum curators, and several federal agencies all recognize that game industry products and services are a clearly defined category separate from other forms of software, Internet services, entertainment media, and consumer electronics. Third, we have addressed the relevant lifecycle for each class.

Finally, there is good cause to grant the industry's waiver requests because doing so would further the public interest by promoting innovation in the marketplace and by conserving the Commission's limited resources. In addition, the products and services covered by the waivers do not provide the sort of real-time (or near real-time) communications service that were the focus of the CVAA and the ACS Rules.[25] While they may offer online functions, many of those functions—including posting to leaderboards or downloading games—do not qualify as ACS. Even to the extent they have ACS-type capabilities, such as in-game text chat, these capabilities are not designed to provide the sort of flexible advanced communications services intended to be regulated by the CVAA. Accordingly, the proposed waivers will not materially or adversely affect the key goals of the legislation.

[25] *See ACS Order,* ¶¶ 43-44 & n. 50 (agreeing that CVAA defined ACS to involve real-time voice communications or real-time (or near real-time) non-voice messages "between individuals" while incorporating those definitions into the ACS Rules).

IV. VIDEO GAME CONSOLE SYSTEMS MERIT AN ACS WAIVER.

A. Class I Systems Are Designed and Marketed Primarily for Game Play, Not ACS.

1. Design attributes, government findings, and usage trends clearly demonstrate that game play, not ACS, is the "primary purpose" of game console systems.

Game console systems are first and foremost meant for playing games. That is their primary purpose, not ACS. And this primary purpose is plainly evident from their design. Each successive generation of game console emphasizes technological advances directed to game play. These include state-of-the-art Central Processing Units and Graphics Processing Units, increased memory and storage capacity, more advanced yet easier-to-use controllers or control features, enhanced capabilities for multiplayer game play, and robust online marketplaces. All of these advances push the boundaries of what is possible with a video game, enabling games of increased complexity and depth while simultaneously providing consumers fresh new ways to acquire games and enjoy them with their friends. Other entertainment functions of today's game consoles include the downloading or streaming of movies, TV shows and music, but these additional functions have not changed the primary purpose of game consoles.[26]

As further evidence of the design focus on game play, consoles use specialized controllers optimized for games, not messaging. Here are examples from the Xbox 360, the Sony PlayStation 3, and the Nintendo Wii, respectively:

[26] *See* Xbox Marketplace http://marketplace.xbox.com/en-US/Video/All?xr=shellnav; PlayStation Network http://us.playstation.com/psn/; and Wii Channels http://www.nintendo.com/wii/built-in-entertainment/#/netflix.

Any ACS functionality of the proposed class is limited and is offered as a discrete, add-on feature designed to supplement and enhance the device's primary game play purpose. For example, when Microsoft launched the Xbox LIVE online service for the Xbox game console in the spring of 2002, it described its aspirations for the service this way in its press release:

> It was designed by gamers for gamers and includes features such as delivery of real-time scores and statistics so gamers can compare themselves to the best players in the world; quick and easy game launches; fast downloads; the ability to find friends online across games with only one click; and the ability to maintain a single identity across all games with a single password.[27]

None of the features described above constitutes ACS in the sense meant by the CVAA, which was intended to address real-time voice communications or text messaging between individuals.[28] Even the press release's mention of an ACS-type functionality—real-time voice communications—similarly emphasized its specific game play purpose, not one meant for

[27] *Microsoft Unveils Xbox Live Heralding the Next Frontier in Video Games*, Microsoft Press Release, May 20, 2002, available at http://www.microsoft.com/presspass/press/2002/May02/05-20E3XboxLivePR.mspx. The press release's mention of voice communications similarly emphasized its game play purpose: "Voice communication is integrated with all Xbox Live multiplayer games and enables voice interaction with teammates and opponents." *Id.*

[28] *See ACS Order,* ¶¶ 43-44 & n. 50 (agreeing that CVAA defined ACS to involve real-time voice communications or real-time or near real-time non-voice messages "between individuals" while incorporating those definitions into the ACS Rules).

general communications: "Voice communication is integrated with all Xbox Live multiplayer games and enables voice interaction with teammates and opponents."[29]

Sony's marketing for the PlayStation 3 likewise emphasizes the connection between chat and game play. In the context of describing the PlayStation 3's multiplayer gaming options and other online features, Sony's PlayStation web site adds this point:

> Use text, voice or video chat for real-time communication. See who's online, what they're playing, and what trophies they've won. Meet up with your friend's avatars at PlayStation® Home and send out invites to get a team together for an online multiplayer game.[30]

These statements confirm the manufacturers' clear intent that the online features, including in-game chat, are designed to support game play.[31]

Other federal agencies have determined that game consoles have a primary purpose other than ACS. In December 2011, the U.S. Department of Energy noted that "the primary use of a video game console is to play video games."[32] The Energy Department recognized that video game consoles may have a "variety'' of functions, as required by Section 14.5(a)(1) of the rules, but it expressly identified its single primary function as game play. And just last month,

---

[29] *Id.*

[30] *See* PlayStation 3 Online Features, available at http://us.playstation.com/ps3/features/ps_ps3_connectivity.html.

[31] In-game chat supports game play in a number of ways, including: providing a mechanism for players to plan strategy in a multiplayer game, learning useful information from other gamers, and organizing matches. This clear supporting role also demonstrates that Class I systems merit a waiver under the additional waiver factor that asks whether ACS "supports" another primary purpose.

[32] Department of Energy, RULEMAKING OVERVIEW AND PRELIMINARY MARKET AND TECHNOLOGY ASSESSMENT: ENERGY EFFICIENCY PROGRAM FOR CONSUMER PRODUCTS: Set-top Boxes and Network Equipment (December 2011) at 3-10 (available at http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/stb_framework_prelimassessment.pdf).

the Environmental Protection Agency ("EPA") released a draft specification defining a video game console as a device "whose primary use is to play video games."[33]

Stakeholders commenting in recent FCC proceedings also have distinguished game industry products and services. In summarizing the many comments to the *ACS Notice*, the Commission noted that "the majority of commenters" that addressed the issue in a 2009 proceeding thought that video games should not be grouped with wireless communications or any other media or communications segments.[34] In the *CSVA Report*, the Commission identified the following separate categories of content or platforms: Television, Audio-Only Programming, Non-Networked Devices, Internet, Wireless Devices, and Video Games.[35] Notwithstanding its recognition that some games included "chat" features, the Commission said nothing in its *Report* to suggest that video games should be considered a communications service.[36]

Even taking into account the evolving nature of today's game consoles, it is evident that the leading uses of game consoles are game play and other entertainment experiences, not ACS. Recent usage trend data confirms this. According to a Nielsen study released in full on January 30, 2012, consumers as a whole used their home console systems for gaming the majority of the time in both 2010 and 2011.[37]

---

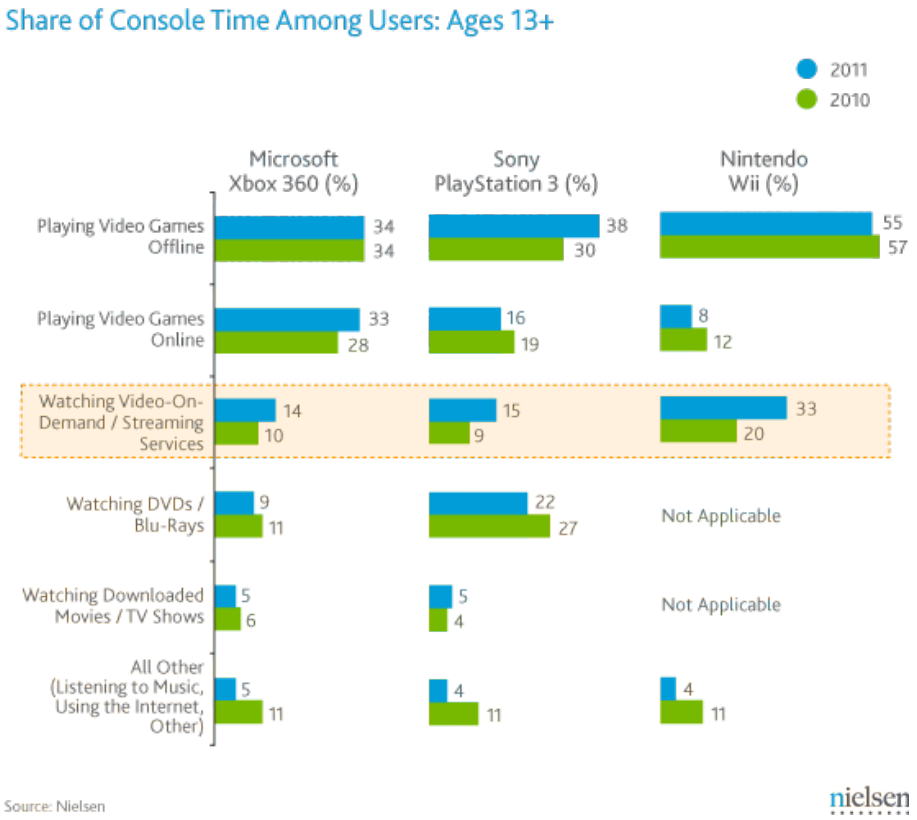
[33] Environmental Protection Agency, Proposed Performance Requirements for Game Consoles (rel. February 21, 2012) (available at http://www.energystar.gov/ia/partners/prod_development/revisions/downloads/game_console/ES_GC_V1_Draft2_recog.pdf?120e-96f6).

[34] *See Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, Report, 24 FCC Rcd 11413, 11450-51 (¶¶ 85-88) (2009) (the "*CSVA Report*").

[35] *See id.* at 11413-14.

[36] *See id.* at 11451.

[37] *See* http://blog.nielsen.com/nielsenwire/online_mobile/video-streaming-on-game-consoles-on-the-rise/ ("Nielsen 2012 Study"). This study, which was fully released on January 30, 2012, and most recently conducted in



Of particular note, this data illustrates the following:

- Of the six possible subcategories, offline game play remained the single leading use of console systems.
- The only other significant non-game play uses of these console systems in 2010 or 2011 do not relate to ACS, but to entertainment services, including viewing DVDs or video streams.
- Although Class I systems have ACS capabilities outside of any game function, this very recent data did not track such ACS usage as its own separate category. Indeed, *all* Internet use independent of gaming, presumably including non-game ACS usage, was an insignificant and declining fraction of user time on all three console systems.

To the extent this data illustrates any other significant purpose of these systems, it is media streaming, not ACS. All three consoles offer media streaming, and, as the Nielsen study shows, this functionality is the most popular non-game activity on all three consoles.

October 2011, apparently includes, as does Class I generally, the consoles' integrated online networks as part of its analysis.

Accordingly, such entertainment services only corroborate the data's clear conclusion: ACS is clearly not the primary purpose of game consoles, nor is it even the preferred secondary purpose.

ESA has no knowledge about the actual features or functions of any next generation game console system beyond the limited publicly available information regarding the forthcoming Nintendo Wii U.[38] But given historical trends, it is evident that playing games continues to be the driving force behind consumer interest in game consoles. Indeed, just last month Sony emphasized the fundamental importance of gaming as part of its release of the newest handheld on the U.S. market.[39] Based on such evidence, there is no reason to believe that consumers' long-standing preference to use game consoles first and foremost to play games, or our industry's response to satisfying that preference, will radically change in the future. To the extent that console makers may emphasize other non-game features in future consoles, the usage data suggests it is likely to be media streaming, not ACS. In any event, a time-limited waiver, such as the one we propose, provides the Commission ample flexibility to revisit marketplace conditions as consoles evolve.

2. Industry marketing materials and retailers' positioning of game console systems within their stores emphasize the primacy of game play.

[38] Last year, Nintendo announced its next generation console, the Wii U. The features and marketing of that device thus far have shown a clear primary purpose of game play. *See* Nintendo's E3 website, available at http://e3.nintendo.com/hw/#/introduction.

[39] *See* David M. Ewalt, *PlayStation Chief Jack Tretton: We Are In The Fashion Business*, **Forbes**, Feb. 27, 2012, available at http://www.forbes.com/sites/davidewalt/2012/02/27/jack-tretton-sony-playstation-vita/ (quoting Jack Tretton, Sony Computer Entertainment America President and CEO, "I think every device has a core competency. Our competency is gaming[]" with respect to the recently launched handheld game console, the Sony PlayStation Vita).

Industry marketing of game consoles spotlights game play, not ACS, as the primary reason to buy the devices, as is evident from an assortment of recent industry advertisements. To the extent the ads mention ACS, it is typically in the context of supporting game play.[40] Similarly, although some ads reference the consoles' respective online networks, the clear focus is again on game play.[41] To the extent that ads for Class I offerings emphasize functions beyond game play, it is typically the entertainment services, such as streaming of movies or downloading of TV shows.[42]

This emphasis on game play is likewise evident in the way retailers position game consoles within their stores. Typically, big box retailers and online department stores sell Class I devices in a section of the store devoted to "Video Games." Here are two examples, from Best Buy and Target:[43]

[40] *See* Exhibit A.
[41] *Id. See also,* David M. Ewalt, *PlayStation Chief Jack Tretton: We Are In The Fashion Business*, **Forbes**, Feb. 27, 2012, available at http://www.forbes.com/sites/davidewalt/2012/02/27/jack-tretton-sony-playstation-vita/ (Quoting Jack Tretton, Sony Computer Entertainment America President and CEO, "What we've really done with our [PlayStation Vita] campaigns recently are to call on the passion of gaming…").
[42] *See* Exhibits A-1, A-6 and A-15.
[43] *See also*, *e.g.*, http://www.amazon.com/computer-video-games-hardware-accessories/b/ref=sa_menu_cvg10?ie=UTF8&node=468642 ; www.Gamestop.com.

Retailers typically highlight the game play features, as is the case with this example from Amazon.com's "Console Buying Guide," within its "Video Games" department:[44]

	Wii	PS3 PlayStation 3	XBOX 360
Models and Prices	Wii with Mario Kart Wii - $149	160 GB memory - $299 250 GB memory - $349	4 GB memory - $199 250 GB memory - $299
What's in the Box?			
Motion Gaming	Already included	Playstation Move	Kinect for Xbox 360
Colors	Black and White	Black	Black
Drive Type	CD	CD/DVD/Blu-ray	CD/DVD
Online Play	WiiWare	PLAYSTATION Network	XBOX LIVE
Additional Accessories	Additional controllers - $10 - $45	Additional controllers - $40 - $50	Additional controllers - $40 - $50
Price Range of Games	New releases: $30 - $50 Downloadable: $5 - $10	New releases: ~$60 Motion: ~$40 Downloadable: $5-$15	New releases: ~$60 Motion: ~$50 Downloadable: $5-$15
Backward Compatibility	Plays all GameCube game titles	Offer compatibility with PS1 games	Over 300 original Xbox titles are currently compatible
Graphic Quality	480p	1080p	1080p
Great for	From Junior to Grandma - Family fun, party games	High-powered and highly customizable system for the technical-minded consumer	Offers a wide selection of games and accessible entertainment, with user friendly social tools

B. The Class Is Well-Defined and Appropriately Circumscribed.

Console systems are a distinct class that "share[] common defining characteristics.'' Game console systems, both home consoles and handheld game systems, with their integrated networks and associated peripherals, share many similar characteristics, including: custom hardware and operating systems designed for game play; an integrated online network and marketplace unique to that platform and that emphasizes game play functions while also providing ancillary functions; and parental control systems. All of these characteristics underscore the primary purpose of console systems as a game-playing device.

Class I includes only video game consoles and handhelds,[45] along with their integrated online networks and peripherals, to the extent such offerings would be subject to the *ACS*

[44] *See* Amazon.com's Console Buying Guide, available at http://www.amazon.com/b/ref=sv_vg_10?ie=UTF8&node=2404622011.

Rules.[46] It does not include general purpose devices with ACS features or functions, such as PCs or mobile phones, even if those devices have an ancillary game play purpose.

As already noted, federal agencies and other expert stakeholders have consistently concluded that game consoles constitute a separate class. Market research, such as that by the NPD Group, similarly has categorized game console systems as a distinct category separate from telecommunications services or equipment, including phones, VoIP providers, email services, and general Internet communication companies.[47]

Console systems share a similar lifecycle. Historically, console makers have released new systems approximately every five to seven years; [48] however, that duration has proven longer this cycle on account of console makers' significant mid-cycle improvements to current

---

[45] Some handheld game devices may be able to connect directly, if temporarily, with similar nearby devices without connecting to the Internet. These simple devices may not require a waiver, as they may connect without a communications network. However, to ensure regulatory clarity for these offerings, these devices have been included in Class I.

[46] We appreciate that other waiver requests may focus solely on equipment or on services. *See ACS Order*, ¶¶ 67-68. However, all three leading manufacturers of console/handheld game systems tightly integrate online networks into their systems, and the hardware and network operates in tandem to provide ACS-type features. Separating them for regulatory purposes would be inconsistent with their unified nature and unnecessarily confusing to consumers. For that reason, we have included game hardware and their integrated or dedicated online networks software as a unit for purposes of Class I.

[47] *See, e.g.*, Video Games Market Research, NPD, available at https://www.npd.com/wps/portal/npd/us/industryexpertise/videogames/!ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3iT4JAAU09LYwMDE2dnA8_QQCPzECdvAwMjA6B8JJK8u7sXUN4oxNAxJDjY0MLNnIBuL_2o9Jz8JKA94SCb8ZsEkjfAARwN9P088nNT9QtyIyqDA9IVAVQ2BbM!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfRks1NTlNVDMxR1IwNzBJVUE5R01BMTM2TTM!/?WCM_GLOBAL_CONTEXT= (analyzing video game offerings as category separate from telecom or entertainment); http://www.mobilecommercedaily.com/2010/12/22/tablets-ereaders-most-popular-consumer-electronics-holiday-gifts-survey; (categorizing video games as distinct from other forms of consumer electronics).

[48] To use home console systems as examples, the Nintendo Game Cube was released in November 2001, and discontinued in February 2007, which was shortly after the launch of the current Wii system. Based on publicly available information, the release of the new Wii U may occur as soon as this year. The sixth-generation Microsoft Xbox was originally released in November 2001 in North America; the seventh-generation Xbox 360 was released in November 2005, and remains the currently sold console. The sixth-generation PlayStation 2, which is still on the market, was released in October 2000, and the seventh generation PlayStation 3 was released in November 2006.

generation consoles.[49] Also, because the term "lifecycle'' intends to include the period during which a typical consumer is likely to purchase or continue to use the product, that duration will vary by consumer, as most consumers do not automatically upgrade to the new system when it is released. In fact, a majority of the sales occur several years after launch, as the following data from the NPD Group illustrates.[50]

Console/Portable Hardware Units

	2004	2005	2006	2007	2008	2009	2010	2011
Nintendo DS	1,225,000	2,611,000	5,305,000	8,530,000	9,970,000	11,217,000	8,578,000	3,841,000
Wii	0	0	1,088,000	6,288,000	10,227,000	9,597,000	7,066,000	4,537,000
PlayStation Portable	0	3,622,000	3,016,000	3,830,000	3,840,000	2,499,000	1,660,000	1,389,000
PlayStation 3	0	0	693,000	2,560,000	3,550,000	4,332,000	4,333,000	4,518,000
Xbox 360	0	605,000	3,911,000	4,628,000	4,747,000	4,774,000	6,763,000	7,254,000

Accordingly, for the vast majority of consumers, the useful lifespan of their console is not "synced" to the game console launch cycle. Console makers are well aware of this phenomenon, and in fact continue to support legacy systems for years after launch of the newer systems. Microsoft enabled users of the original Xbox to access Xbox LIVE, the console's online network, for several years after it launched the Xbox 360, [51] and Sony still sells PlayStation 2 consoles in the North America market, over five years after it launched the

[49] David M. Ewalt, *PlayStation Chief Jack Tretton: We Are In The Fashion Business*, **Forbes**, Feb. 27, 2012, available at http://www.forbes.com/sites/davidewalt/2012/02/27/jack-tretton-sony-playstation-vita/. In an interview with Forbes, Jack Tretton suggests that the lifecycle for the recently released PlayStation Vita could be up to a decade.
[50] Data provided by The NPD Group, Inc/Retail Tracking Service.
[51] *See* Major Nelson, Xbox LIVE being discontinued for Original Xbox consoles and games, available at http://majornelson.com/2010/02/05/xbox-live-being-discontinued-for-original-xbox-consoles-and-games/ (discussing the discontinuation of Xbox Live service for the original Xbox on April 15, 2010).

PlayStation 3. In sum, the lifecycle for a game console is likely to be much longer than suggested by merely measuring the period of time between the launch of successive systems.[52] Accordingly, we estimate that the average lifecycle for a game console ranges from 5 to 10 years.[53]

C. The Historic Lifecycle for Console Systems Supports a Waiver of Eight or More Years.

In light of these considerations and the record of innovation, design, and development within the industry, the appropriate initial waiver for Class I should be, at a minimum, eight years. Based on recent history, the proposed initial duration of the waiver may be expected to apply to generations of Class I offerings that either (i) already are on the market; or (ii) constitute the single next generation of hardware, to the extent it is offered to the public during the proposed initial waiver period.[54]

Although we believe that a permanent waiver would be appropriate here, we are requesting a time-limited initial waiver in order to allow the Commission to monitor developments in the industry. The proposed waiver is consistent with the purpose of the CVAA

---

[52] Similarly, although the lifecycle of peripherals or online networks may vary, all of these offerings with Class I are inextricably linked to their associated console or handheld. Accordingly, the lifecycle for these generally is comparable to the lifecycle of their associated console.

[53] *See, e.g.* Tor Thorsen, *Sony chief warns PS3 will be "expensive"; PS2 hits sales highs*, **CNET Australia** (July 25, 2005) (available at http://www.cnet.com.au/sony-chief-warns-ps3-will-be-expensive-ps2-hits-sales-highs-240056080.htm) (discussing a 10 year lifecycle for the Playstation 3).

[54] Per the *ACS Order*, the proposed waiver intends to include all class offerings introduced into the market while the waiver is in effect for the duration of the life of those particular products and services. As noted, the proposed Class I waiver is intended to apply to the current and next generations -- commonly known, with respect to home consoles as the seventh and eighth generations -- as well as the few remaining sixth generation devices on the market. Because the sixth generation generally has fewer ACS capabilities than the current generation, all points in favor of the waiver for the current generation apply even more strongly to the older sixth generation. However, the focus of this request is on the current and next generation of hardware, and their associated systems. Similarly, earlier handheld game consoles, such as the Nintendo DS, are included within the class as well. The waiver request thus has sought to note any publicized and material differences between the current and next generation of Class I offerings, to the extent known.

and the *ACS Order* and will do much to protect ongoing innovation and development in game console and handheld systems in the near term. The ESA respectfully requests that the term of the waiver commence at the end of the current phase-in period and be renewable provided that the petitioner submits an appropriate showing at least 90 days prior to the end of the waiver period.

V. GAME DISTRIBUTION AND ONLINE GAME PLAY SERVICES MERIT AN ACS WAIVER.

A. Online Distribution and Game Play Services Are Designed and Marketed Primarily for Distributing Game Software or Enabling Online Game Play, Not ACS.

1. Common design and development characteristics as well as established usage trends demonstrate the primary purpose of Class II services.

Our industry has long been a leader in leveraging new technologies to improve the entertainment experience we offer our video game consumers. Those efforts extend beyond the technical achievements of game production to include making it easy and fun for gamers to discover new games and get more out of the games they currently play.

Class II captures online services that share a common primary purpose of distributing games and enabling game play, but that are not games themselves. By way of example, it includes game download services, game streaming services, web sites directed to hosting games or game-related support services, and online game networks (including those associated with game consoles, when accessed through devices *other* than a game console).[55] These services typically offer online features such as leaderboards, the ability to find other users to

[55] *See* Exhibit B. Some specific Class II services include such offerings as EA Origin, EA Pogo, and Steam, as well as some game services that also are within Class I, such as Xbox LIVE or the PlayStation Network, when consumers, from time to time, access those networks, including their gaming and entertainment services, from devices other than consoles.

compete against, tournaments, chat, and downloading new games. Online game distribution platforms may offer dozens or even hundreds of game titles for download. That feature is the reason the service exists, and it is the main draw for consumers. Operators include other features that enhance the consumer experience to make their service more attractive. For example, instead of just downloading the sequel to a favorite franchise sports title, the gamer can also see what trophies or achievement badges he or she has earned, what tournaments may be upcoming, and what special downloadable content may be available for purchase. All of this is designed to enhance the game play experience.

Even a casual examination of the catalog of titles associated with these services underscores that these services are digital superstores for buying games and game-related content and, in the case of console-based online services, additional entertainment content. The distribution focus of these services is evident from the extensive catalog of game titles they offer.[56] For example, EA's Pogo offering, which is its casual online game service, offers hundreds of server-based online games and some downloadable games. Another example is Valve Corp.'s Steam service, a distribution platform for PC games. In early 2011, Forbes reported that Steam sales constituted 50% to 70% of the $4 billion market for downloaded PC games.[57]

The design of the Origin and Steam business models also points to their primary purpose of game distribution and enabling game play. In both cases, it is free for a consumer to download their client software and access various ancillary aspects of their services, such as

[56] *See, e.g.,* EA Origin, available at http://store.origin.com.
[57] Chiang, Oliver, The Master of Online Mayhem, **Forbes** (Feb. 28, 2011) (available at: http://www.forbes.com/forbes/2011/0228/technology-gabe-newell-videogames-valve-online-mayhem.html).

chat. What drives user interest is the ability to browse a large catalog of game titles and easily purchase and download the games users want.

2. Game distribution and online game play services are marketed primarily for distributing game software or enabling online game play, not ACS.

The marketing of game networks clearly identifies game delivery and/or support of game play as the primary purpose. For example, EA Origin's web site highlights at least seven distinct benefits of Origin, all of which are tied directly to gaming. Only one of the seven mentions ACS-type functionality, and it refers to that functionality solely in the context of game play: "You can even chat with your friends right from the Origin application while you play."[58] As Origin would have every reason to emphasize ACS functionality on its own web site page if it viewed it as a primary purpose of the service, this single, brief game-related mention is compelling evidence that ACS is not a primary purpose of this network.

Similarly, on Microsoft's Games for Windows LIVE, a distribution platform for PC games, the web site's landing page clearly emphasizes the game distribution function.[59] Also, in discussing the other online features of the service, including chat, the marketing collateral clearly ties those into the service of game play:[60]

> We created Games for Windows LIVE with the same philosophy that inspired the creation of Xbox LIVE for the console — to create a service that improves the gaming experience by connecting users to their friends, letting them compete or play cooperatively, earn achievements, download new add-on content, and have easy ways to find and play games, with voice chat built right in.

[58] Origin "About" page, available at www.origin.com/about (page grab available at Exhibit B-4).
[59] *See* Microsoft Xbox Games for Windows website, available at http://www.xbox.com/en-US/Live/PC.
[60] Games for Windows Website FAQ page, available at http://www.xbox.com/en-US/live/pc/FAQ.

Similarly, Valve Corp., the operator of the computer game distribution service Steam, emphasizes the distribution function of the service, putting this feature at the top of the list and noting that "[o]ver 1,100 games are available to purchase, download, and play from any computer."[61] The landing page references the service's chat features, but in a context that clearly emphasizes their role in service to game play:[62]

> **Chat with your friends while gaming.** See when your friends are online or playing games and easily join the same games together. Chat with your buddies, or use your microphone to communicate in any game.

Exhibit B details other instances in which providers of game distribution and online game play services market them primarily for their game-related features.

3. Other considerations support a Class II waiver.

As noted, the online features of these services, including ACS functions, enhance or support game play. For instance, leaderboards enable gamers to track which players are doing particularly well in a given game. Friend lists and cross-game chat enable gamers to identify live games to join, rally friends to participate in a tournament, and coordinate strategy for multiplayer games, among other game-related activities.[63]

For game distribution services, including EA Origin or Steam, the primary focus is on delivering game content to the consumer. ACS is not required to deliver the game from the remote server to the gamer's computer or other device, and so the removal of ACS would not impair these services' primary purpose as a distribution platform.

---

[61] *See* Valve's Steam "About" page, available at http://store.steampowered.com/about/.
[62] *Id.*
[63] As noted previously, some chat features available through Class I consoles may be operated independently of a live game session. Although chat in this context may not directly support game play, it nonetheless is focused on connecting with other gamers and supporting other entertainment experiences on the console.

B. The Class Is Well-Defined and Appropriately Circumscribed.

The class, as defined, includes only online networks and services with the primary purpose of distributing games and enabling game play.[64] Significantly, the class does not include general communications services, including general social networking services that may offer the ability to play games as an ancillary feature (e.g., Facebook). Nor does it include generalized digital distribution platforms originating outside of the game industry (e.g., iTunes).

Class II services have similar lifecycles, which are largely dependent upon market and business factors, including their interdependence on other game offerings. Unlike a physical product, an online game service is upgraded and refined, incrementally, over the duration the gamer uses the service. These changes do not constitute a separate or distinct generation of the underlying offering.[65] Because a gamer may choose to use these services as long as they provide features of interest, it is not possible to attribute a definitive lifecycle to them. Accordingly, although a specific lifecycle for Class II offerings may not be as determinate as other game offerings based on the historical record, the continued viability of all Class II services remains subject to common considerations.

[64] These offerings include such online game networks as EA Origin, EA Pogo, OnLive, Nintendo Network, PlayStation Network, Steam, and Xbox LIVE. As noted, there may be some overlap among the few online services covered in Class I and those within Class II so that the specific affected network is not treated differently if accessed through different hardware.

[65] Per the *ACS Order*, the ESA recognizes the important difference between an update to a current offering and either a new service or a substantial alteration that "change[s] the nature of the product or service," which may require further or separate analysis. *See ACS Order*, ¶ 192. As one example, EA Pogo has evolved over its decade-plus years. However, it is distinct from EA Origin, which was launched independently and clearly is a separate service.

C. Class II Offerings Merit a Waiver of At Least Eight Years.

Although Class II offerings may not have a specific lifecycle, they do not exist in a vacuum. As demonstrated, their primary purpose is distributing game software and enabling online game play. This close relationship with games means that major changes to Class II offerings are likely to track or result from significant changes in other game hardware and software, such as the release of new consoles or other major new game technology. Accordingly, the waiver period should track any waiver granted for Class I and Class III offerings. In addition, to the extent the Commission grants only a time-limited waiver, the ESA respectfully requests that the term of the waiver commence at the end of the current phase-in period and be renewable, provided that a petitioner submits an appropriate showing at least 90 days prior to the end of the waiver period.

VI. GAME SOFTWARE MERITS AN ACS WAIVER.

A. Class III Game Software Is Designed and Marketed Primarily for Game Play, Not ACS.

1. Common design and development characteristics as well as established market and usage trends demonstrate that game play is the primary purpose of game software, not ACS.

The primary purpose of video game software is self-evident. Video game software titles are copyrighted, creative works that are by their very definition designed to provide consumers with a game play experience. Although games differ significantly in terms of their subject matter and intended audience, they all fundamentally implicate the same design elements and development processes. These typically include: (i) coding the software; (ii) acquiring valuable intellectual property licenses; (iii) creating artwork and animation; (iv) writing the storyline and non-player character dialog; (v) commissioning a musical score; (vi) developing the landscape

and architecture of a fantasy world; (vii) designing elaborate missions; (viii) preparing multiple game levels of increasing difficulty and complexity; (ix) deploying customer service teams to serve a wide range of community needs; and (x) building dozens or perhaps hundreds of virtual items, background props, and non-player characters to populate the game world. These efforts reflect the singular purpose of game software no matter its type or subject — to create an immersive game play experience that consumers will enjoy. Although game designers may have added ACS-type features to their games as Internet connectivity has become prevalent, the primary design purpose behind games has not changed. [66]

Video games were popular with American consumers decades before broadband Internet made mass market ACS-type features possible. Millions of consumers embraced our industry's games and consoles long before the term "online chat" entered the American lexicon. ACS is an evolutionary feature that some game designers have added as Internet connectivity has become prevalent to enhance game play, but it does not define our key value proposition to consumers or change the primary design purpose behind games. Games are about game play and are not a generalized communications platform.

Indeed it would be cumbersome and inefficient to use in-game chat for this purpose. The mechanics of game play typically require constant attention and input by the user or the

[66] Many games do not offer any human-to-human communications that qualify as ACS, nor extend to the consumer an ability to engage in ACS, as described in paragraphs 43-44, 63-65 and 84-88 of the *ACS Order*. As such, the ACS Rules do not apply and no waiver for those games is needed. To the extent that the Commission changes the scope of software that is subject to the rules of the *ACS Order*, see, e.g., Telecommunications for the Deaf, Inc. et al., Petition for Reconsideration (submitted Jan. 30, 2012) (urging changes in Commission interpretation of software and ACS provision), ESA intends the proposed waiver to cover game software or applications that may later become subject to the ACS Rules.

game session ends, terminating the user's ability to communicate.[67] While people can, to a degree, chat and play at the same time, it would be highly unlikely for someone who is primarily looking to communicate with others to resort to game play just for this ancillary feature. If all the user really wants to do is communicate, there is a long list of cheaper and more efficient alternatives than purchasing a game, loading it onto a game console or booting it from a PC, and engaging in game play. Also, in-game chat by its nature is limited to those gamers who happen to be playing the game or who are otherwise logged onto the game network. [68]

Usage trends confirm that game software is primarily designed for game play, not ACS. For example, the January 2012 Nielsen study determined that the most popular way to play the current generation of console games continues to be offline, which means gamers commonly choose not to use *any* ACS or other online functionality. Other data confirms that game play is the main attraction.[69] For example, in the casual game "Scrabble," a mobile game implementation of the classic board game, Electronic Arts' statistical data indicates that only a small percentage of "Scrabble" players use chat to any significant degree.[70] If publishers designed games with ACS as their primary purpose, we would expect the level of online engagement to be much higher if not nearly universal.

---

[67] *See* Microsoft Comments at 9. For instance, when a player uses the ACS feature in Microsoft's popular Halo game, "the user's eyes are focused on the game play on the screen and both hands are busy using the controller to maneuver the user's character through the game sequences." Accordingly, in-game ACS "clearly was not designed to be used by users whose hands and visual attention would be free to sign or watch ASL, read lips, or type on a keyboard."

[68] For in-game chat to work in a console game, the game software typically relies upon the console's online network to establish the communications link. Because of this interdependence, it is important for both the game software and the game network to receive waivers. A waiver just for games or just for consoles would create significant regulatory uncertainty.

[69] *See supra* page 16.

[70] *See* "Declaration of Kerry Hopkins," Exhibit D.

2. Game software is marketed primarily for game play, not ACS.

The marketing of video games leaves no doubt that game play is the primary purpose of these products. Video games are typically categorized by genre (*e.g.,* racing, role-playing, sports, first-person shooter). Each of these genres suggests a different type of game play is available, signaling that the primary purpose is indeed game play. For example, the Interactive Achievement Awards, presented by the Academy of Interactive Arts & Sciences, are categorized based on genre, artistic skill and platform, but not level of communication. Award categories include "Adventure Game of the Year," "Outstanding Achievement in Animation" and "Handheld Game of the Year." [71]

Exhibit C includes many examples of Class III advertisements. To the extent ACS features appear in marketing materials, they are clearly in the context of furthering game play, including online multiplayer gaming. Indeed, all of the advertisements focus on game play, and many do not mention ACS functionality at all.

The advertisement for *DC Universe Online* is instructive.[72] This is a Massively Multiplayer Online Game (commonly known as an "MMO"), based on the very popular DC Comic Universe. Like many other MMOs, players of this game can interact with others, either cooperatively or competitively, in order to advance in the game. However, the marketing of *DC Universe* focuses on the tag line "The Next Legend Is You." The tagline seeks to excite gamers by showing them their opportunity to immerse themselves in a comic-book storyline and become the "legend." The marketing of this immersive game experience indicates that the

[71] *See* 2012 Interactive Achievement Awards, available at http://www.interactive.org/awards/2012_15th_awards.asp.
[72] *See* Exhibit C-21.

primary purpose of *DC Universe Online* is not chat or other communications features, but game play.

Another popular example is the *Madden NFL* series. Electronic Arts has been producing a version of *Madden NFL* since 1988. Every year since, the EA team has gone to great effort to reproduce the NFL experience in a video game format. In recent years, EA has added online game play and the ability to create "Online Communities" allowing Madden players to meet up with their friends online, play with and against each other, and compare scores. The "sell sheet" provided by EA and reproduced in Exhibit C-29, indicates EA's marketing plan for *Madden NFL 12*. The vast majority of the text highlights the features and the realism of the game play experience in *Madden*. In the one entry that describes the online community feature, only the abilities to customize the rules, play against each other and compare scores on leaderboards are noted. The ability to chat within the online communities is not even mentioned.[73]

B. The Class Is Well-Defined and Appropriately Circumscribed.

Games are a distinct class of products. The class covers game software in all its forms, including online games, but the class as a whole is easily distinguishable from other software and entertainment media. As discussed above, the industry organizes games into well-defined genres (*e.g.,* strategy, racing, sports, music), which consumers readily understand. When sold by a big box retailer, online retailer, or app store, the stores typically group games in a "Video

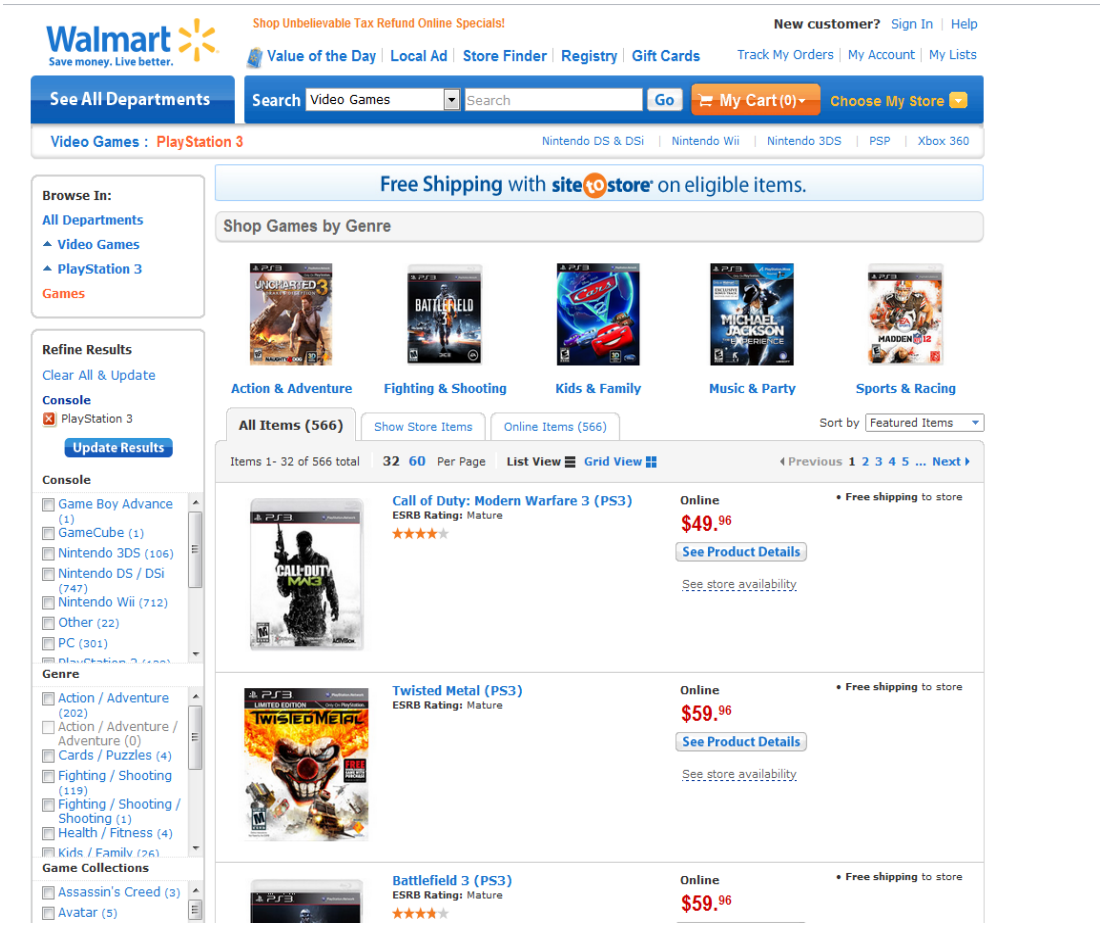
[73] *See* Exhibit C-29.

Games" or "Games" category.[74] A national retailer, GameStop, exists entirely to sell video games to consumers. GameStop describes itself as "committed to delivering great games to customers."[75] Accordingly, GameStop does not sell word processing, spreadsheet, accounting or other productivity software. GameStop's website is organized first by game platform (e.g., Xbox 360, PC, etc.) and then by genre (e.g., Action, Sports, Role Playing). Its focus is on a clearly defined category of software: video games.

Nearly all games sold at retail outlets in the United States carry an ESRB rating. The ESRB provides parents with age-based ratings and over 30 content descriptors that highlight features of a game that factored into the rating or may be of interest or concern (*e.g.,* "comic mischief," "blood and gore," and "strong language"). [76] ESRB's age ratings and content descriptors appear prominently on game packaging. Most retailers, including national chains, have policies to only stock or sell games that carry an ESRB rating. In 2011, ESRB completed 1,332 rating assignments.[77] According to a survey conducted by Peter D. Hart Research Associates for the ESRB, 86 percent of parents with children who play video games are aware of the ESRB rating system, and 75 percent regularly check a game's ratings before making a purchase.[78] Taken together, this information clearly shows that both the industry and consumers view video games as a unique product category distinct from other entertainment media and software.

---

[74] *See, e.g.* http://www.amazon.com/gp/site-directory/ref=topnav_sad (listing "Digital Games and Software," "PC Games," and "Video Games" as categories separate from other offerings).
[75] *See* GameStop Corporate "About Us" Page, available at http://news.gamestop.com/about_us.
[76] *See* ESRB web site, http://www.esrb.org/ratings/ratings_guide.jsp
[77] *See* "Declaration of Patricia Vance," Exhibit D.
[78] *See* http://www.theesa.com/newsroom/esa_newsletter/may2011/index.html)



Games also share a similar, limited range of ACS functionality. Games generally have text and voice chat, to the extent they offer any ACS features or functions at all.

Although the lifecycle of particular game software varies, the games are generally designed for a lifecycle of several years. Given that time and resource investment, it is not surprising that publishers often develop their games to have a useful commercial lifespan that extends well beyond the year in which the publisher launched the game. Even popular games that may be released annually, such as EA's *Madden NFL*, are not routinely purchased annually by consumers, as many choose to use an older version of the game for multiple years. Although the lifespan of a particular Class III offering may vary, they all share a common

defining characteristic: so long as the game is successful in the marketplace, it will be supported and endure.

C. Class III Offerings Merit a Waiver of At Least Eight Years.

Although games, like Class II services, may not have a specific or predictable lifecycle, games depend on the underlying hardware and network technology. New console systems or computing hardware is not retroactively compatible indefinitely. The interdependency of Class III offerings with game hardware and online game networks means that major changes to Class III offerings are likely to track or result from significant changes in these other classes, such as the release of new consoles or other major new game technology. [79] Accordingly, the proposed waiver should track any waiver granted for Class I and Class II offerings. In addition, to the extent the Commission grants only a time-limited waiver, we respectfully request that the term of the waiver commence at the end of the current phase-in period and be renewable, provided that a petitioner submits an appropriate showing at least 90 days prior to the end of the waiver period.

VII. EACH OF THE PROPOSED WAIVERS IS CONSISTENT WITH THE PUBLIC INTEREST.

This waiver petition is consistent with the "good cause" standard.[80] The proposed waivers promote the public interest in several ways, including: (i) advancing innovation consistent with the CVAA; (ii) fostering competition and limiting economic impacts; (iii) promoting administrative efficiency by reducing the need for the Commission to consider a large number of individual waiver requests from multiple parties within the game industry; and

[79] As with the products and services covered by Class I and Class II, we trust that game titles released during the waiver period would be covered for their lifetime.
[80] *See ACS Order*, ¶ 188.

(iv) facilitating voluntary efforts to increase accessibility elements by the game industry to the many elements of games not covered by the CVAA or the ACS Rules.

The proposed waivers will advance the public interest by fostering innovation and eliminating uncertainty and post-rule confusion, especially among manufacturers, publishers, or providers who may decline to experiment with new ACS features for fear that such experimentation may trigger unclear regulatory obligations disproportionate to the value of the feature to the overall product or service.[81] Because lengthy design cycles are common in the video game industry,[82] development of many upcoming video game products and services began prior to the *ACS Notice* or passage of the CVAA. Continued manufacture or development of these offerings may be adversely impacted by uncertainty regarding the outcome of many separate waiver petitions.

The proposed waivers will advance the public interest by ensuring a level playing field and promoting administrative efficiency. A class waiver ensures that competing manufacturers, publishers, and providers will receive equal, non-arbitrary treatment under the new rules.[83] It also is more administratively efficient for the Commission than contending with a large number of individual waiver requests from a variety of industry participants. As noted, ESRB reviewed more than a thousand video games last year alone.[84] If analyzed on a case-by-case basis, potential individual video-game waivers would require considerable Commission resources, which would be better spent to implement the ACS rules with respect to products and services

[81] *See*, *e.g.*, Microsoft Comments at 6-7; Verizon Comments at 9. *See also* ESA Comments at 5 (noting the Commission's waiver of its equipment regulations to "facilitate the rapid deployment of innovative mobile DTV products and services").
[82] *See* ESA Comments at 10; *supra* note 48 (relating recent development cycles for video game systems).
[83] *See* ESA Comments at 14; TechAmerica Comments at 5.
[84] *See* "Declaration of Patricia Vance," Exhibit D.

more widely used for general advanced communications or otherwise more clearly within the congressional goals of the CVAA.

In addition, the proposed waivers will not have far-ranging negative effects. A game's ACS features are "intended to allow competing players to communicate about the game play as they experience it;" they "are not designed to be used for more general communications purposes."[85] Conversely, video game offerings, including ACS features solely or largely used in video game contexts, generally have limited direct effects outside of the game play environment. Accordingly, accessibility of other forms of advanced communications services are far more likely to have meaningful real-world implications than the limited and focused ACS functions of video games, which means that the waivers will not adversely affect the fundamental congressional concerns that propelled the Act.[86]

The industry has made and will continue to make clear progress in improving our products and services to make them more accessible to gamers with disabilities, independent of any regulatory mandates.[87]

[85] Microsoft Comments at 9. For instance, when a player uses the ACS feature in Microsoft's popular *Halo* game, "the user's eyes are focused on the game play on the screen and both hands are busy using the controller to maneuver the user's character through the game sequences." Accordingly, in-game ACS "clearly was not designed to be used by users whose hands and visual attention would be free to sign or watch ASL, read lips, or type on a keyboard." *Id.* at 10 (adding that "the gaming experience would need to be fundamentally altered in order for in-game VoIP to be made accessible. Consequently, subjecting in-game VoIP services to Section 716's requirements would impose significant burdens on business without offering any corresponding user benefit.").

[86] *See, e.g.*, Senate Report at 2 ("For example, in 2008, only 40 percent of working-age people with disabilities were employed, while almost 80 percent of those without disabilities were working. If certain current and emerging technologies are not accessible to the disabled community, this economic disparity may increase. Enhanced accessibility could help diminish this economic divide.") (citations omitted).

[87] *See* Ex Parte Letter from Christian Genetski, ESA General Counsel, to Marlene Dortch, Commission Secretary, CG Docket No. 10-213 (submitted August 17, 2011) ("ESA August Ex Parte").

VIII. CONCLUSION

The central question before the Commission is whether the products or services covered in ESA's proposed classes have a primary purpose of ACS. If they do not, then, consistent with the CVAA, the Commission should grant our waiver petition. Game console systems, online game networks, and game software are first and foremost about game play and related functions, as we have demonstrated in our commentary throughout these proceedings.

In the *ACS Order*, the Commission recognized "the importance of expeditious consideration of waiver petitions to avoid delaying the development and release of products and services."[88] Accordingly, the ESA respectfully requests that the Commission resolve these waiver requests in 90 days, and adopt each of the proposed waivers for the classes of equipment and services set forth above.

Respectfully submitted,

ENTERTAINMENT SOFTWARE ASSOCIATION

By: /s/ F. William LeBeau

Christian Genetski, Sr. Vice President & General Counsel
Michael Warnecke, Sr. Policy Counsel
Cory Fox, Policy Counsel
Entertainment Software Association
575 7th Street NW, #300
Washington, DC 20004
(202) 223-2400

F. William LeBeau
Leighton T. Brown
Holland & Knight LLP
2099 Pennsylvania Avenue, NW,
Suite 100
Washington, DC 20006
(202) 955-3000
Its Attorneys

March 21, 2012

[88] *ACS Order*, ¶ 197 & n. 530 (citing, among others, ESA Comments at 15-17).