

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

In the Matter of)	
)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010)	CG Docket No. 10-213
)	
Amendments to the Commission’s Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996)	WT Docket No. 96-198
)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision)	CG Docket No. 10-145
)	

**NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
PETITION FOR WAIVER**

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INTRODUCTION AND SUMMARY

The National Cable & Telecommunications Association (NCTA)¹ respectfully requests that the Commission waive the recently adopted accessibility requirements for advanced communications services (ACS) as applied to a single class of devices: set-top boxes leased by cable operators to their customers and manufactured before July 1, 2016. Under the proposed waiver, all the ACS rules, including the recordkeeping and enforcement rules, would not apply to

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

any and all cable operator-supplied set-top boxes manufactured before July 1, 2016 for the life of the device.

NCTA respectfully submits that the requested waiver meets the statutory criteria set forth in section 716(h) of the Communications Act of 1934, as amended (the Act), the ACS waiver standard set forth in section 14.5 of the Commission's rules, and the Commission's general public interest waiver standards set forth in section 1.3 of the Commission's rules. Under the statutory and ACS waiver standard, the Commission is directed to grant waivers of the ACS accessibility requirements for "carefully defined" classes of devices that are multipurpose and "capable of accessing" ACS, but for which the primary purpose is something other than ACS. Congress further explained that the waiver process should be used to "promote technological innovation."² Cable operator-supplied set-top boxes meet these standards:

- First, set-top boxes leased to consumers by cable operators are a "carefully defined" class of devices. The Commission is familiar with these devices, and with the "common defining characteristics" that they share. Cable operator-supplied set-top boxes easily qualify as a distinct class of devices for purposes of the waiver request.
- Second, a time-limited waiver would be appropriate because the primary purpose of set-top boxes is to access video programming services, not ACS. Although set-top box technology is advancing rapidly, and some set-top boxes being deployed and manufactured today are capable of accessing a limited number of services or features that may qualify as ACS, set-top boxes provided by cable operators remain devices primarily used to access video programming services and are marketed by manufacturers for this purpose.
- Third, the requested waiver would serve the public interest by promoting technological innovation and greater predictability and certainty for all stakeholders. Cable operators and set-top box manufacturers are working together to develop and deploy next generation features and functionalities that will improve the experience of a broad range of consumers, including individuals with disabilities, but imposing accessibility requirements on cable operator-supplied set-top boxes already in development or manufactured

² H.R. Rep. No. 111-563, at 26 (2010) (House Report).

threatens to stymie this innovation, contrary to Congress’s expressly stated goals.

Leveraging technologies like Internet Protocol (IP) and Enhanced Binary Interchange Format (EBIF), cable operators are working to develop exciting, innovative new features that will be incorporated into their set-top boxes and will fundamentally improve the consumer experience, including for consumers with disabilities. Potential applications range from caller ID features to instant messaging, from interactive advertising to customizable sports scores and news, traffic, and weather information. It is unclear whether any of these new features would qualify as ACS, and this waiver request does not concede that these features are in fact subject to the ACS requirements. Nevertheless, out of an abundance of caution and consistent with Congress’s directive to use the waiver process to promote technological innovation, NCTA urges the Commission to grant the requested waiver as expeditiously as possible.

I. CABLE OPERATOR-SUPPLIED SET-TOP BOXES QUALIFY AS A DISTINCT CLASS OF DEVICES

The ACS waiver standard under the statute and the Commission’s rules requires that the waiver be applicable to a “carefully defined” class of devices that “share common defining characteristics.”³ Cable operator supplied set-top boxes satisfy this standard. Specifically, set-top boxes are standalone devices that are primarily designed to convert the video signals delivered by cable systems to consumers’ homes and transmit the converted signal to television sets or other display devices for viewing. These devices typically are manufactured by third-

³ *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket Nos. 10-213, 10-145, WT Docket No. 96-198, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14639, ¶ 193 (2011) (*ACS Order*); *see also* 47 U.S.C. §617(h)(1); 47 C.F.R. §14.5.

party vendors, including, but not limited to, Motorola Mobility, Cisco, and Pace, and leased to end-user customers by the respective cable operator.

The Commission is familiar with cable operator-supplied set-top boxes and the “common characteristics” that they share as a class. Set-top boxes are a form of “navigation device,” which the Commission has defined as “devices...used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.”⁴ Set-top boxes, as defined for purposes of this request, include limited functionality devices, such as digital transport adapters, as well as more advanced devices that can support, among other things, video-on-demand and digital video recording capabilities.⁵

Importantly, this request is time-limited in that it will not apply to set-top boxes manufactured after July 1, 2016. The development, manufacturing, and deployment cycle for set-top boxes typically lasts approximately six years, consisting of approximately two to three years of development work plus approximately three years of manufacturing and deployment of the devices. For example, devices that cable operators will begin deploying to customers later this year have been in development since at least 2010, and likely will be deployed to customers until early 2016. Set-top box manufacturers and cable operators will soon turn to the task of developing the *next* generation of set-top boxes – devices that we can expect to see deployed sometime in mid-2016. In other words, this waiver request is designed to apply only to set-top boxes that already have been – or are being – manufactured today, as well as the generation of

⁴ 47 C.F.R. § 76.1200(c).

⁵ The class is limited to cable operator-supplied devices because most other devices that consumers use to access cable services (*i.e.*, devices available at retail) would be covered by either the waiver request filed by the Consumer Electronics Association (CEA) or the waiver request filed by the Electronic Software Association (ESA). *See* Consumer Electronics Association, Petition for Waiver, CG Docket No. 10-213 (Mar. 22, 2012) (CEA Waiver Request); Entertainment Software Association, Petition for Waiver, CG Docket No. 10-213 (Mar. 22, 2012) (ESA Waiver Request).

set-top boxes currently in development, for the life of each particular device. Consistent with the Commission's statements regarding the timeframe for waivers, subsequent generations of set-top boxes would *not* be covered by this waiver.⁶

II. CABLE OPERATOR-SUPPLIED SET-TOP BOXES ARE USED PRIMARILY TO ACCESS VIDEO PROGRAMMING

The focus of the Commission's waiver analysis is whether a class of devices "has a feature or function that is capable of accessing ACS but is nonetheless designed primarily for purposes other than using ACS."⁷ The class for which this waiver is sought is limited by its very definition only to those devices whose primary function is the reception, conversion, and presentation of video signals delivered by the cable system. Because this primary function does not entail the provision or use of ACS, these devices satisfy the statutory standard for a waiver.

The initial inquiry set forth by the Commission in the *ACS Order* to determine whether equipment or service is designed primarily for purposes other than using ACS is "whether the equipment or service was designed to be used for advanced communications service purposes by the general public."⁸ Cable operator-supplied set-top boxes historically have been designed solely for the purpose of receiving video signals and delivering those signals to consumer displays and recording devices. When set-top boxes were first deployed in the 1980s, they were used primarily to convert an incoming channel so it could be watched on the TV.⁹ Since that time, cable operators have digitized their cable systems, and boxes are used ubiquitously by

⁶ See *ACS Order*, 26 FCC Rcd at 14640, ¶ 195 ("To the extent a class waiver petitioner seeks a waiver for multiple generations of similar equipment and services, we will examine the justification for the waiver extending through the lifecycle of each discrete generation.")

⁷ *Id.* at 14634, ¶ 181.

⁸ *Id.* at 14634, ¶ 183.

⁹ See Murali Nemani, "A Brief History of Set-Top Box Innovation," Cisco Blog, March 23, 2010, at http://blogs.cisco.com/sp/a_brief_history_of_set-top_box_innovation/.

cable customers today to access digital cable services, including, among other things, high-definition programming, video-on-demand, and digital video recording services.¹⁰

The Commission also said that, as part of the waiver analysis, it would “examine whether the equipment or service is marketed for the ACS features or functions.”¹¹ A review of literature provided by manufacturers of set-top boxes and service providers, as well as press coverage of the development and deployment of these devices, demonstrates that these devices are marketed primarily for the reception and delivery of video programming. For example, Motorola advertises that one of its high-end set-top boxes “allows cable operators to deliver a powerful combination of interactive and entertainment services, such as personal video recording (PVR), high-definition television (HDTV), and other processing intensive applications.”¹² Likewise, Cisco touts its newest generation of set-top boxes’ ability to deliver “high quality video, audio, DVR, and two-way capabilities that cable operators have come to expect.”¹³ And Pace says that its newest HD-DVR model set-top box includes the “latest advanced video technology in a feature rich and cost effective HD-DVR.”¹⁴ As discussed further below, cable operators are developing and deploying technologies that potentially would allow these devices to access limited ACS features, but there is no doubt that the primary purpose of the set-top box is still the delivery of cable services.

¹⁰ *Id.*

¹¹ *ACS Order*, 26 FCC Rcd at 14635, ¶ 185.

¹² See *DCT6200 SERIES, Advanced High-Definition Set-tops*, Motorola Mobility, Inc., at http://broadband.motorola.com/catalog/product_documents/506897-001.pdf (last visited May 25, 2012).

¹³ See *Cisco Explorer 8652HDC DVR with M-Card Interface Data Sheet*, Cisco Systems, Inc., at <http://www.cisco.com/en/US/prod/collateral/video/ps8611/ps8612/ps8613/7014687A.pdf> (last visited May 25, 2012).

¹⁴ See *Pace TDC787X HD-DVR*, Pace plc, at <http://www.pace.com/americas/products-capabilities/products/tdc787x/> (last visited May 25, 2012).

Finally, the Commission advised in the *ACS Order* that “an examination of the impact of the removal of the ACS feature or function on a primary purpose for which the equipment or service is claimed to be designed may be relevant to a demonstration of the primary purpose for which the equipment or service is designed.”¹⁵ In this case, such an examination would be dispositive because today many of the cable operator-supplied devices to which the requested waiver would apply are used for the reception and delivery of video services and *do not* incorporate ACS (or, in most cases, any feature besides the reception and delivery of the cable service). That some newer model set-top boxes do incorporate additional features that are ancillary to the reception and delivery of video programming does not change the conclusion.

Although these advances hold significant promise for enabling cable operators to leverage existing infrastructure to deliver innovative new capabilities, features, and services to consumers, they do not alter the primary purpose of the device.¹⁶ And, as discussed below, imposing significant new regulatory burdens at the very infancy of these new features potentially would undercut the business case for continuing this type of innovation.

III. THE REQUESTED WAIVER WILL ADVANCE THE PUBLIC INTEREST.

The instant waiver request is consistent with the ACS waiver standard as set forth in the *ACS Order*¹⁷ and the legislative history of the Twenty-First Century Communications and Video

¹⁵ *ACS Order*, 26 FCC Rcd at 14636, ¶ 186.

¹⁶ In other words, this is not a case where “[c]onvergence results in multipurpose equipment and services that may be equally designed for multiple purposes, none of which are the exclusive primary use or design purpose.” *Id.* at 14635, ¶ 184. Rather, even with convergence and the incorporation of new features and functionality, cable operator-supplied set-top boxes remain primarily designed (by manufacturers and service providers) and used (by consumers) for the reception and delivery of cable services.

¹⁷ *See id.* at 14639, ¶ 193 (“We will exercise our authority to grant class waivers . . . when doing so would promote greater predictability and certainty for all stakeholders.”).

Accessibility Act of 2010 (Accessibility Act),¹⁸ as well as the Commission’s general public interest waiver standard.¹⁹ Specifically, a time-limited waiver would serve the public interest because it would (1) promote technological innovation, including innovation that would potentially help consumers with disabilities, by providing greater certainty and predictability; (2) facilitate greater competition and investment in innovative technologies; and (3) encourage the efficient use of Commission resources. And, because this waiver would be time-limited, it would not unnecessarily prolong the implementation of the ACS accessibility requirements. Failure to grant the waiver could stymie this innovation and defeat the goals of the statute.

First, the instant waiver request will advance the public interest because it will promote technological innovation by enabling cable operators to develop and deploy new technologies and features that will add to the diverse array of services they can deliver to their customers. Cable operators are leveraging IP and EBIF technologies to incorporate features that supplement – but do not change – the primary purpose of the set-top box as a video reception device. Potential applications range from caller ID features to instant messaging, from interactive advertising to customizable sports scores and news, traffic, and weather information.²⁰ However, there is substantial uncertainty regarding whether the ACS rules would apply and, more importantly, whether accessibility for these features is achievable today, and this uncertainty – combined with potentially harsh penalties for alleged noncompliance – could cause service

¹⁸ House Report at 26 (explaining that the Commission may waive the ACS requirements “to promote technological innovation”).

¹⁹ The Commission said that it would consider waiver requests in the context of its general public interest waiver authority under section 1.3 of its rules. *See ACS Order*, 26 FCC Rcd at 14637, ¶ 188; 47 C.F.R. §1.3.

²⁰ *See* Press Release, CableLabs, CableLabs® ETV Interop Showcases Wide Variety of Interactive Apps (Feb. 21, 2012), at http://www.cablelabs.com/news/pr/2012/12_pr_ETV_Interop_022112.html.

providers to delay the deployment of these features or, worse, reconsider whether to deploy these features at all.

For example, advances in set-top box technology potentially could allow cable operators to leverage devices that are already deployed to deliver some of these prospective new features and services.²¹ Unlike personal computers, tablets, smartphones, and other devices that already serve as a platform for multiple services and applications, however, these set-top boxes are inherently used for delivering a single service – video service – and whether the set-top box will succeed as a platform for delivering additional features or enhancements is still an open question. But the potential need to retrofit millions of devices to comply with the ACS requirements before using EBIF or other technologies to upgrade these devices with additional apps and features is daunting and could significantly alter the business case for these features.

Granting the waiver will provide the certainty and predictability necessary to allow providers to innovate and experiment with set-top boxes as a platform for delivery of these features by removing a potential cost overhang. To the extent that these features are successful, cable operators and set-top box manufacturers would have sufficient time to ensure that accessibility features are built into future generations of set-top boxes.

Second, this waiver will encourage administrative efficiency. Many of NCTA's member companies are undertaking similar efforts to determine how they can leverage advances in set-top box technology to deliver innovative new features to their customers. If the Commission were to require that each company file its own waiver request – or, worse still, that each company file a separate waiver request for each piece of equipment or each potential ACS

²¹ EBIF Primer, at <http://www.ebif.tv/files/EBIFend-to-end.pdf> (“Recall that the blessing of EBIF is its reach – to nearly every digital set-top ever put in consumer homes.”) (last visited May 25, 2012).

feature – the Commission would potentially have to address dozens of waiver requests. Such case-by-case review would impose significant demands on Commission resources. It also would *increase* uncertainty and delay the introduction of innovative new technologies. A class waiver of the kind that NCTA has requested here is much more consistent with both the letter and spirit of the waiver provisions of the Accessibility Act.

Finally, consistent with its general public interest waiver standard, the Commission in the *ACS Order* explained that it will waive certain rules whenever “particular facts would make strict compliance inconsistent with the public interest.”²² Moreover, the Commission also grants waivers when “deviation from the general rule...will serve the public interest.”²³ In this case, there is an overriding interest in ensuring that strict compliance with the recently adopted accessibility rules for ACS does not stifle innovation and investment in new technologies and services – many of which may benefit individuals with disabilities. It would be particularly self-defeating if rules designed to ensure that individuals with disabilities will be able to access “the incredible and innovative communications technologies of the 21st century”²⁴ actually prevent parties from developing and deploying innovative new features and services in the first place.

²² *ACS Order*, 26 FCC Rcd at 14637, ¶ 188; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)).

²³ *Northeast Cellular*, 897 F.2d at 1166.

²⁴ *ACS Order*, 26 FCC Rcd at 14559, ¶ 1.

CONCLUSION

In light of the foregoing, and consistent with section 716 of the Act and applicable Commission rules, NCTA respectfully requests that the Commission waive the ACS rules as set forth above. Such a time-limited waiver request would promote technological innovation and greater predictability, thereby satisfying the ACS waiver standard and advancing the public interest.

Respectfully submitted,

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