

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Implementation of Sections 716 and 717 of the) CG Docket No. 10-213
Communications Act of 1934, as Enacted by the)
Twenty-First Century Communications and Video)
Accessibility Act of 2010)
Coalition of E-Reader Manufacturers Petition for)
Class Waiver of Sections 716 and 717 of the)
Communications Act and Part 14 of the)
Commission's Rules Requiring Access to)
Advanced Communications Services (ACS) and)
Equipment by People with Disabilities)

ORDER

Adopted: October 22, 2013

Released: October 22, 2013

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (CGB or Bureau), pursuant to its delegated authority¹ and section 1.3 of the Commission's rules,² provides temporary relief in response to a petition (Petition) filed by the Coalition of E-Reader Manufacturers (Coalition)³ on May 16, 2013, for a class waiver of the Federal Communications Commission's (Commission's) rules implementing sections 716 and 717 of the Communications Act of 1934, as amended (Act),⁴ which require access to advanced communications services (ACS) and equipment by people with disabilities. Under the phased-in implementation schedule for these rules, beginning October 8, 2013, ACS products or services offered in interstate commerce must be accessible, unless not achievable.⁵ The Coalition

1 47 C.F.R. §§ 0.141(f) and 0.361. See also Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14566, 14640-14641, ¶¶ 19, 197 (2011) (ACS Report and Order) (delegating to CGB the authority to act upon all waiver requests).

2 47 C.F.R. § 1.3 (providing for waiver of the Commission's rules for good cause shown).

3 The Coalition of E-Reader Manufacturers consists of Amazon.com, Inc.; Kobo Inc.; and Sony Electronics Inc.

4 47 U.S.C. §§ 617 and 618. See also 47 C.F.R. §§ 14.1 et seq.

5 See 47 C.F.R. 14.20 and 14.21; ACS Report and Order, 26 FCC Rcd at 14602-14604, ¶¶ 110-111.

requests a waiver of these rules as they apply to “multiple generations”⁶ of a specified class of e-reader equipment that it defines as having all of the following features: (1) the device has no LCD screen; (2) the device has no camera; (3) the device is not offered or shipped to consumers with built-in email, IM, VoIP or other similar ACS client applications and the device manufacturer does not develop ACS applications for its respective device; and (4) the device is marketed to consumers as a reading device and promotional material about the device does not tout the capability to access ACS.⁷ On August 1, 2013, the Commission issued a Public Notice requesting comment on the Petition, with the comment period closing on September 13, 2013.⁸ For the reasons set forth below and pursuant to section 1.3 of the Commission’s rules,⁹ the Bureau issues a temporary waiver, until January 28, 2014, of Part 14 of the Commission’s rules as these rules apply to the specified class of e-reader equipment.¹⁰

II. BACKGROUND

2. On October 8, 2010, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) into law.¹¹ One year later, on October 7, 2011, the Commission adopted a Report and Order implementing section 716 of the Act,¹² which was added by the CVAA and requires ACS and equipment used for ACS¹³ to be accessible to and usable by individuals with disabilities, if achievable, beginning October 8, 2013.¹⁴ The Commission also adopted rules to implement section 717 of the Act,¹⁵ which creates recordkeeping and enforcement provisions for sections 255, 716 and 718 of the Act.¹⁶

3. Section 716(h)(1) of the Act¹⁷ and the Commission’s implementing rules allow the Commission to grant waivers of the ACS requirements for multipurpose equipment or services or classes of multipurpose equipment or services that have features or functions that are capable of accessing ACS, but are nonetheless designed primarily for purposes other than using ACS.¹⁸ In instances where equipment and services may have multiple primary or co-primary purposes, waivers may not be

⁶ Coalition Petition at 12, n.41.

⁷ See *Ex Parte* letter supplementing Coalition of E-Reader Manufacturers Petition for Waiver, CG Docket No. 10-213, filed July 17, 2013 (Coalition Petition Supplement).

⁸ *Request for Comment: Petition for Class Waiver of Commission’s Rules for Access to Advanced Communications Services and Equipment by People with Disabilities*, CG Docket 10-213, Public Notice, 28 FCC Rcd 11147 (CGB 2013).

⁹ 47 C.F.R. § 1.3.

¹⁰ The waiver is retroactive to October 8, 2013.

¹¹ Pub. L. No. 111-260, 124 Stat. 2751 (2010), amended Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections).

¹² 47 U.S.C. § 617.

¹³ ACS is defined as interconnected voice over Internet protocol (VoIP) service; non-interconnected VoIP; electronic messaging service, such as e-mail, instant messaging, and SMS text messaging; and interoperable video conferencing service. 47 U.S.C. § 153(1); 47 C.F.R. § 14.10(c).

¹⁴ *ACS Report and Order*, 26 FCC Rcd 14557. See also 47 C.F.R. § 14.20. Specifically, the ACS rules apply to models or versions of products and services that are introduced or upgraded after the October 8, 2013 date. *ACS Report and Order*, 26 FCC Rcd at 14609, ¶¶ 124-125.

¹⁵ 47 U.S.C. § 618.

¹⁶ 47 U.S.C. §§ 255, 617 and 619. See *ACS Report and Order*, 26 FCC Rcd at 14650-14577, ¶¶ 219-278.

¹⁷ 47 U.S.C. § 617(h).

¹⁸ 47 U.S.C. § 617(h)(1); *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181. See also 47 C.F.R. § 14.5.

warranted.¹⁹ In conducting a waiver analysis, the rules provide for a case-by-case examination of whether the equipment is marketed for its ACS features or functions.²⁰ In order to make this determination, the *ACS Report and Order* directs the Commission to consider “whether the ACS functionality or feature is suggested to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service.”²¹ The Commission may also consider the manufacturer’s market research and the usage trends of similar equipment or services in order to determine whether a manufacturer or provider designed the equipment or service primarily for purposes other than ACS.²² The *ACS Report and Order* further notes that the following factors may be relevant to a primary purpose waiver determination: whether the ACS functionality is designed to be operable outside of other functions or aids other functions, the impact that the removal of the ACS feature has on the primary purpose for which the equipment or services is claimed to be designed, and an examination of waivers for similar products or services.²³ In addition to considering these various factors, the *ACS Report and Order* calls for the Commission, when examining a waiver request, to utilize its general waiver standard, which requires good cause to waive the rules, and a showing that the particular facts the petitioner presents make compliance with the relevant requirements inconsistent with the public interest.²⁴

4. The ACS rules allow the Commission to entertain a waiver for equipment and services individually or as a class, and to limit the time of its coverage, with or without a provision for renewal.²⁵ The Commission will exercise its authority to grant class waivers, which apply to more than one piece of equipment or more than one service, in instances in which classes are carefully defined and the equipment or services share common defining characteristics.²⁶ In addition, the Commission will examine the extent to which the petitioner has explained in detail the expected lifecycle of the equipment or services that are part of the class.²⁷ Substantial upgrades are considered new products or services for the purpose of this waiver analysis.²⁸ To the extent a petitioner seeks a class waiver for multiple generations of similar equipment and services, the Commission will examine the justification for the waiver extending through the lifecycle of each discrete generation.²⁹ All products and services covered by a class waiver that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the

¹⁹ *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 184 (offering as an example of equipment or services that have multiple primary or co-primary purposes, smartphones that are designed for voice communications, text messaging, e-mail, web browsing, video chat, digital video recording, mobile hotspot connectivity, and several other purposes). In other words, multipurpose equipment or services that are capable of accessing ACS and are designed primarily or co-primarily for ACS, do not qualify for a waiver under this provision. 47 U.S.C. § 617(h)(1); 47 C.F.R. § 14.5(a)(1).

²⁰ *ACS Report and Order*, 26 FCC Rcd at 14634, 14640, ¶¶ 182, 196. See also 47 C.F.R. § 14.5(a)(2)(ii).

²¹ *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 185 (footnote omitted).

²² *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 183.

²³ *ACS Report and Order*, 26 FCC Rcd at 14636, ¶ 186.

²⁴ *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188, citing 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

²⁵ *ACS Report and Order*, 26 FCC Rcd at 14638, ¶ 192. See also 47 C.F.R. § 14.5(c).

²⁶ *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193. See also 47 C.F.R. § 14.5(b).

²⁷ *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 194. See also 47 C.F.R. § 14.5(c)(2).

²⁸ *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192. See also *id.* at 14609, ¶ 124 (“Natural opportunities to assess or reassess the achievability of accessibility may include, for example, the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign.”).

²⁹ *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 195.

duration of the life of those particular products or services—*i.e.*, for as long as those particular products or services are sold.³⁰

III. THE COALITION PETITION

5. The Coalition's Petition acknowledges that although the class of e-reader equipment for which it seeks a waiver can allow consumers to access and use ACS,³¹ it is designed, built and marketed primarily to read written material, such as books, magazines, newspapers, and other text documents on a mobile electronic device, rather than to provide access to ACS.³² The Coalition adds that e-readers do not contain apps for ACS, including e-mail, instant messaging, or other electronic messaging services, VoIP, or interoperable video conferencing services, and that the browsers on e-readers are stripped down and not fully featured.³³ The Coalition argues, therefore, that e-readers are designed and built around reading as the primary function,³⁴ that these devices are not designed with ACS as an intended feature, not even on a secondary basis,³⁵ and that this class of equipment qualifies for a waiver from the Commission's ACS rules.³⁶

IV. DISCUSSION

6. The Petition and Coalition Petition Supplement allege a number of elements necessary for the Bureau to consider whether to grant a class waiver of the Commission's ACS rules under section 716(h)(1)(A) and (B) of the Act³⁷ and section 14.5(a) of our rules.³⁸ First, the Coalition proposes to define narrowly the class of equipment for which waiver is sought, and alleges that the equipment in the class share enough common defining characteristics to grant a class waiver.³⁹ The Coalition also alleges that, although e-readers are capable of accessing ACS, they are designed and marketed primarily for the purpose of reading written material, and ACS is neither a primary or co-primary purpose of the equipment.⁴⁰ Finally, the Coalition insists that there is good cause to waive the rules because the public interest will be served by permitting this niche product to survive.⁴¹ The Coalition maintains that compliance with the ACS rules will render e-readers more expensive, less mobile, and undistinguishable from other electronic devices, thereby fundamentally changing and effectively eliminating a niche product.⁴² Further, it argues that individuals with disabilities will not be substantially benefited by

³⁰ *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

³¹ *See* ¶ 1, *supra* for a description of the class of the requested waiver.

³² Coalition Petition at 1-8.

³³ Coalition Petition at 7.

³⁴ Coalition Petition at 3-6.

³⁵ Coalition Petition at 6-8.

³⁶ Coalition Petition at 1-8; Coalition *Ex Parte* Submission (July 10, 2013) at 1-2 (Coalition July 10, 2013 *Ex Parte*); Coalition *Ex Parte* Submission (July 15, 2013) at 1 (Coalition July 15, 2013 *Ex Parte*); Coalition Petition Supplement at 1-2.

³⁷ 47 U.S.C. § 617(h)(1)(A) and (B).

³⁸ 47 C.F.R. § 14.5(a).

³⁹ *See* Coalition Petition Supplement at 1-2, setting forth the definition of the proposed class. *See also* 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193, for the elements required for class waiver.

⁴⁰ Coalition Petition at 1-8.

⁴¹ *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188, citing 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969)).

⁴² Coalition Petition at 8-12.

rendering e-readers' ACS accessible because other products, such as mobile phones, tablets and computers, which are required by the CVAA to be accessible, can be used for reading.⁴³

7. A number of commenters have expressed opposition to this Petition.⁴⁴ For example, the NFB Coalition maintains that e-readers are designed to use ACS as a primary purpose and are marketed as such.⁴⁵ They claim that e-readers can be used to connect to social media, including the electronic messaging functions of social media, and that the online marketing for one e-reader that would fall into the identified class, the Kobo Glo, promotes the ease with which Facebook can be used.⁴⁶ The NFB Coalition also argues that the Petition fails to address the lifecycle of e-readers as required by the *ACS Report and Order*,⁴⁷ and takes issue with the criteria used in the Petition to describe the class for which the waiver is sought, arguing, for example, that specifying no LCD screen in the class would not work if LCD technology were replaced by another, more advanced technology.⁴⁸ The NFB Coalition thus concludes that the public interest would be harmed by granting the class waiver.⁴⁹

8. As noted above, beginning October 8, 2013, ACS products or services offered in interstate commerce must be accessible, unless not achievable.⁵⁰ October 8, 2013 was only three and a half weeks after the reply comment period for the Coalition Petition ended on September 13, 2013. CGB has concluded that additional time is needed to review the record in this proceeding to determine whether the identified class of e-readers has features or functions that are capable of accessing ACS, but nonetheless are designed primarily for purposes other than using ACS. Specifically, among other things, additional time is needed for the Bureau to consider the manufacturers' market research and the usage trends of similar equipment or services, whether the ACS functionality in the specified class of e-readers is designed to be operable outside of other functions or aids other functions, the impact that the removal of the ACS feature would have on the primary purpose for which the class of e-readers is claimed to be designed, and to examine waivers for similar products or services. Also, additional time is needed for examination of the e-reader product lifecycles to determine the duration of the waiver, if granted.

9. In the *ACS Report and Order*, the Commission announced a goal to complete action on waiver applications within 180 days of placing these applications on public notice.⁵¹ In the instant proceeding, 180 days past the release date of the public notice will be January 28, 2014. CGB therefore issues a temporary waiver from compliance with the obligations of section 14.20 and the performance objectives of section 14.21 of our rules,⁵² for the class of e-reader equipment defined in the Coalition

⁴³ Coalition Petition at 8-12.

⁴⁴ See, e.g., National Federation of the Blind, *et al.*, Opposition to Petition for Waiver by Coalition of E-Reader Manufacturers (Sept. 3, 2013) (comment by a coalition of twenty-three consumer organizations opposing the Petition) (NFB Coalition Comments); American Library Association Comment on the Petition for Class Waiver of Commission's Rules for Access to Advanced Communications Services and Equipment by People with Disabilities (Sept. 3, 2013). In addition other organizations and almost 150 individual consumers filed objections to a grant of the Petition.

⁴⁵ See, e.g., NFB Coalition Comments at 4-12.

⁴⁶ NFB Coalition Comments at 9. See also NFB Coalition Comments at 11 (discussing ability to use Kindle Paperwhite to share highlighted sections, notes and meaningful quotes).

⁴⁷ *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192.

⁴⁸ NFB Coalition Comments at 12-13.

⁴⁹ See NFB Coalition Comments at 14-20.

⁵⁰ See 47 C.F.R. 14.20 and 14.21; *ACS Report and Order*, 26 FCC Rcd at 14602-14604, ¶¶ 110-111.

⁵¹ *ACS Report and Order*, 26 FCC Rcd at 14641, ¶ 197.

⁵² 47 C.F.R. §§ 14.20 and 14.21. Although grant of a waiver pursuant to 47 C.F.R. § 14.5 would ordinarily include a waiver of the recordkeeping requirements of 47 C.F.R. § 14.31 and a waiver of the obligation to conduct an achievability analysis during the period of the waiver, see *ACS Report and Order*, 27 FCC Rcd at 14607-14619, ¶¶

(continued...)

Petition and Supplement,⁵³ until January 28, 2014. During this period, the Commission will evaluate the merits of waiving the ACS obligations underlying the waiver request to determine whether a grant or denial would be consistent with our ACS rules and in the public interest.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j) and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j) and 617, and sections 0.141(f), 0.361, and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.141(f), 0.361, and 1.3, this Order IS ADOPTED.

11. IT IS FURTHER ORDERED that the Coalition Petition for Waiver IS GRANTED on a temporary basis from October 8, 2013 until January 28, 2014 to the extent discussed above, and that the Commission reserves judgment as to a permanent disposition of this Petition.

12. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

13. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer and Governmental Affairs Bureau

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119-148, the achievability analysis requirement has been in effect since the rules first took effect on January 30, 2012 and the recordkeeping requirements have been in effect since January 30, 2013. *See ACS Report and Order*, 26 FCC Rcd at 14601-14602, ¶¶ 107-109. Because in this case the waiver is a temporary waiver granted pursuant to 47 C.F.R. § 1.3 and is not a waiver granted pursuant to 47 C.F.R. § 14.5, and manufacturers of e-readers have been required to take accessibility into consideration during the design phase and to comply with the recordkeeping requirements since the applicable effective dates, we will require such manufacturers to continue to meet these obligations during the waiver period.

⁵³ *See* ¶ 1, *supra*.