6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 6, 7, and 14

[CG Docket No. 10-213; WT Docket No. 96-198; CG Docket No. 10-145; FCC 11-151]

Implementing the Provisions of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules that implement provisions of section 104 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), Pub. L. 111-260, the most significant accessibility legislation since the passage of the Americans with Disabilities Act (ADA) in 1990. A Proposed Rule relating to implementation of section 718 of the Communications Act of 1934, as enacted by the CVAA, is published elsewhere in this issue of the Federal Register. This proceeding amends the Commission's rules to ensure that people with disabilities have access to the incredible and innovative communications technologies of the 21st-century. These rules are significant and necessary steps towards ensuring that the 54 million Americans with disabilities are able to fully utilize and benefit from advanced communications services (ACS). People with disabilities often have not shared in the benefits of this rapid technological advancement. The CVAA implements steps in addressing this inequity by advancing the accessibility of ACS in a manner that is consistent with our objectives of promoting investment and innovation. This is consistent with the Commission's commitment to promote rapid deployment of and universal access to broadband services for all Americans.

DATES: Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER],** except 47 CFR 14.5, 14.20(d), 14.31, 14.32, and 14.34 through 14.52, which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the Federal Register announcing the effective date of those sections.

FOR FURTHER INFORMATION CONTACT: Rosaline Crawford, Consumer and Governmental Affairs Bureau, at 202-418-2075 or rosaline.crawford@fcc.gov; Brian Regan, Wireless Telecommunications Bureau, at 202-418-2849 or brian.regan@fcc.gov; or Janet Sievert, Enforcement Bureau, at 202-418-1362 or janet.sievert@fcc.gov.

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams, Federal Communications Commission, at (202) 418-2918, or via e-mail Cathy.Williams@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 11-151, adopted and released on October 7, 2011. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, (202) 488-5300, facsimile (202) 488-5563, or via e-mail at fcc@bcpiweb.com. The complete text is also available on the Commission's Website at http://hraunfoss.fcc.gov/edocs_public/attachment/FCC-11-151A1doc. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format),

send an email to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau 202-418-0530 (voice), 202-418-0432 (TTY).

FINAL PAPERWORK REDUCTION OF 1995ANALYSIS

This document contains new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in document FCC 11-151 as required by the PRA of 1995, Pub. L. 104-13. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Pub. L. 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

In this proceeding, we adopt new recordkeeping rules that provide clear guidance to covered entities on the records they must keep to demonstrate compliance with our new rules. We require covered entities to keep the three categories of records set forth in section 717(a)(5)(A) of the CVAA. We also require annual certification by a corporate officer that the company is keeping the required records. We have assessed the effects of these rules and find that any burden on small businesses will be minimal because we have adopted the minimum recordkeeping requirements that allow covered entities to keep records in any format they wish. This approach takes into account the variances in covered entities (e.g., size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Furthermore, this approach provides the greatest flexibility to small businesses and minimizes the impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small

businesses. Moreover, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities. Finally, we adopt a requirement that consumers must file a "Request for Dispute Assistance" with the Consumer and Governmental Affairs' Disability Rights Office as a prerequisite to filing an informal complaint with the Enforcement Bureau. This information request is beneficial because it will trigger Commission involvement before a complaint is filed and will benefit both consumers and industry by helping to clarify the accessibility needs of consumers. It will also encourage settlement discussions between the parties in an effort to resolve accessibility issues without the expenditure of time and resources in the informal complaint process. We also note that we have temporarily exempted small entities from the rules we have adopted herein while we consider, in the Accessibility FNPRM, whether we should grant a permanent exemption, and what criteria should be associated with such an exemption.

SYNOPSIS

I. EXECUTIVE SUMMARY

1. In this Report and Order, we conclude that the accessibility requirements of section 716 of the Act apply to non-interconnected VoIP services, electronic messaging services, and interoperable video conferencing services. We implement rules that hold entities that make or produce end user equipment, including tablets, laptops, and smartphones, responsible for the accessibility of the hardware and manufacturer-provided software used for e-mail, SMS text messaging, and other ACS. We also hold these entities responsible for software upgrades made available by such manufacturers for download by users. Additionally, we conclude that, except for third-party accessibility solutions, there is no liability for a manufacturer of end user

equipment for the accessibility of software that is independently selected and installed by the user, or that the user chooses to use in the cloud. We provide the flexibility to build-in accessibility or to use third-party solutions, if solutions are available at nominal cost (including set up and maintenance) to the consumer. We require covered entities choosing to use third-party accessibility solutions to support those solutions for the life of the ACS product or service or for a period of up to two years after the third-party solution is discontinued, whichever comes first. If the third-party solution is discontinued, however, another third-party accessibility solution must be made available by the covered entity at nominal cost to the consumer. If accessibility is not achievable either by building it in or by using third-party accessibility solutions, equipment or services must be compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless such compatibility is not achievable.

2. We also conclude that providers of advanced communications services include all entities that offer advanced communications services in or affecting interstate commerce, including resellers and aggregators. Such providers include entities that provide advanced communications services over their own networks, as well as providers of applications or services accessed (i.e., downloaded and run) by users over other service providers' networks. Consistent with our approach for manufacturers of equipment, we find that a provider of advanced communications services is responsible for the accessibility of the underlying components of its service, including software applications, to the extent that doing so is achievable. A provider will not be responsible for the accessibility of components that it does not provide, except when the provider relies on a third-party solution to comply with its accessibility obligations.

3. We adopt rules identifying the four statutory factors that will be used to conduct an achievability analysis pursuant to section 716: (i) the nature and cost of the steps needed to meet the requirements of section 716 of the Act and this part with respect to the specific equipment or service in question; (ii) the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; (iii) the type of operations of the manufacturer or provider; and (iv) the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points. Pursuant to the fourth achievability factor, we conclude that covered entities do not have to consider what is achievable with respect to every product, if such entity offers consumers with the full range of disabilities products with varied functions, features, and prices. We also conclude that ACS providers have a duty not to install network features, functions, or capabilities that impede accessibility or usability.

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

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

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

7. We adopt a timeline for consideration of waiver requests similar to the Commission's timeline for consideration of applications for transfers or assignments of licenses or authorizations relating to complex mergers. We delegate to the Consumer and Governmental Affairs Bureau the authority to act upon all waiver requests, and urge the Bureau to act promptly

with the goal of completing action on each waiver request within 180 days of public notice. In addition, we require that all public notices of waiver requests provide a minimum 30-day comment period. Finally, we note that these public notices will be posted and highlighted on a webpage designated for disability-related information in the Disability Rights Office section of the Commission's website.

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

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

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

small entity exemption rules adopted pursuant to the Further Notice of Proposed Rulemaking released simultaneously with this order ("Accessibility FNPRM"), or (2) October 8, 2013.

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

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

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

complainants to file informal complaints prior to filing formal complaints.

II. REPORT AND ORDER

1. Advanced Communications Services

a. General

14. Section 3(1) of the Act defines "advanced communications services" to mean (A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service. We will adopt into our rules the statutory definition of "advanced communications services." We thus agree with commenters that urge us to include all offerings of services that meet the statutory definitions as being within the scope of our rules. In doing so, we maintain the balance that Congress achieved in the CVAA between promoting accessibility through a broadly defined scope of covered services and equipment and ensuring industry flexibility and innovation through other provisions of the Act, including limitations on liability, waivers, and exemptions.

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

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

b. Interconnected VoIP Service

16. ,Section 3(25) of the Act, as added by the CVAA, provides that the term “interconnected VoIP service” has the meaning given in § 9.3 of the Commission's rules, as such section may be amended from time to time. Section 9.3, in turn, defines interconnected VoIP as a service that (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible CPE; and (4) permits users generally to receive calls that originate on the public switched telephone network (“PSTN”) and to terminate calls to the PSTN. As urged by commenters, we adopt the definition of “interconnected VoIP service” as having the same meaning as in § 9.3 of the Commission's rules, as such section may be amended from time to time. Given that this definition has broad reaching applicability beyond this proceeding, we find that any changes to this definition should be undertaken in a proceeding that considers the broader context and effects of any such change.

17. We confirm that section 716(f) means that section 255, and not section 716, applies to telecommunications and interconnected VoIP services and equipment offered as of October 7, 2010. Our proposed rule read, in part, that “the requirements of this part shall not apply to any equipment or services . . . that were subject to the requirements of section 255 of the Act on October 7, 2010.” We decline to amend our proposed rule by substituting the word “were” with the word “are,” as urged by NCTA. The statute makes clear that any equipment or service that was subject to section 255 on October 7, 2010, should continue to be subject to section 255, regardless of whether that equipment or service was offered before or after October 7, 2010. With respect to a new service (and equipment used for that service) that was not in

existence on October 7, 2010, we believe we have the authority to classify the service as a service subject to either section 255 or section 716 (or neither). In addition, Congress anticipated that the definition of interconnected VoIP service may change over time. In that event, it is possible, for example, that certain non-interconnected VoIP services that are currently subject to section 716 may meet a future definition of interconnected VoIP services and yet remain subject to section 716.

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

accessible to people with disabilities. Such an approach would, therefore, undermine the very purpose of the CVAA.

19. Due to the large number of multipurpose devices, including smartphones, tablets, laptops and desktops, that are on the market, if section 716(f) were interpreted to mean that section 716 applies only to equipment that is used exclusively for advanced communications services, and that section 255 applies only to equipment that is used exclusively for telecommunications and interconnected VoIP services, almost no devices would be covered by section 716 and only stand-alone telephones and VoIP phones would be covered by section 255. That reading would undercut Congress's clear aim in enacting the CVAA. Such a result is also contrary to how section 255 is currently applied to multipurpose equipment and services. Under Commission rules implementing section 255, "multipurpose equipment . . . is covered by section 255 only to the extent that it provides a telecommunications function" and not "to all functions . . . whenever the equipment is capable of any telecommunications function." Similarly, "[a]n entity that provides both telecommunications and non-telecommunications services . . . is subject to section 255 only to the extent that it provides a telecommunications service." We also disagree with commenters that suggest that such multipurpose devices should be governed exclusively by section 716. Such an interpretation would render section 716(f) meaningless.

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

a given context.

c. Non-interconnected VoIP Service

21. Section 3(36) of the Act, as added by the CVAA, states that the term "non-interconnected VoIP service" means a service that "(i) enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and (ii) requires Internet protocol compatible customer premises equipment" and "does not include any service that is an interconnected VoIP service." The IT and Telecom RERCs urge us to modify the statutory definition of non-interconnected VoIP to read "any VoIP that is not interconnected VoIP." They are concerned that the language in section 3(36) which reads "does not include any service that is an interconnected VoIP service" could be interpreted to mean that if a service "includes both interconnected and non-interconnected VoIP, then all the non-interconnected [VoIP] is exempt because it is bundled with an interconnected VoIP service." In response to these concerns, we clarify that a non-interconnected VoIP service is not exempt simply because it is bundled or provided along with an interconnected VoIP service. Accordingly, we agree with other commenters that it is unnecessary and not appropriate to change the statutory definition and hereby adopt the definition of "non-interconnected VoIP service" set forth in the Act.

d. Electronic Messaging Service

22. Section 3(19) of the Act, as added by the CVAA, states that the term "electronic messaging service" "means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks." We adopt, as proposed, the definition of "electronic messaging service" contained in the Act. We agree with most commenters and find it consistent with the Senate and House Reports that electronic

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

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

24. We conclude that section 2(a) of the CVAA exempts entities, such as Internet service providers, from liability for violations of section 716 when they are acting only to

transmit covered services or to provide an information location tool. Thus, service providers that merely provide access to an electronic messaging service, such as a broadband platform that provides an end user with access to a web-based e-mail service, are excluded from the accessibility requirements of section 716.

e. Interoperable Video Conferencing Service

25. An "interoperable video conferencing service" is one of the enumerated "advanced communications services" in the CVAA. Such a service is defined by the CVAA as one "that provides real-time video communications, including audio, to enable users to share information of the user's choosing." Many commenters argue that that the word "interoperable" cannot be read out of the statute, and we agree. Congress expressly included the term "interoperable," and therefore the Commission must determine its meaning in the context of the statute. We find, however, that the record is insufficient to determine how exactly to define "interoperable," and thus we seek further comment on this issue in the Accessibility FNPRM.

26. We also find that the inclusion of the word "interoperable" does not suggest that Congress sought to require interoperability, as some commenters have suggested. There simply is no language in the CVAA to support commenters' views that interoperability is required or should be required, or that that we may require video conferencing services to be interoperable because "interoperability" is a subset of "accessibility," "usability," and "compatibility" as required by section 716.

27. We reject CTIA's argument that personal computers, tablets, and smartphones should not be considered equipment used for interoperable video conferencing service, because these devices are not primarily designed for two-way video conferencing, and accessibility should be required only for equipment designed primarily or specifically for interoperable video

conferencing service. Consumers get their advanced communications services primarily through multipurpose devices, including smartphones, tablets, laptops and desktops. If section 716 applies only to equipment that is used exclusively for advanced communications services, almost no devices would be covered by section 716, and therefore Congress's aims in enacting the statute would be undermined.

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

29. Finally, we agree with commenters that non-real-time or near-real-time features or functions of a video conferencing service, such as video mail, do not meet the definition of "real-time" video communications." We defer consideration to the Accessibility FNPRM as to whether we should exercise our ancillary jurisdiction to require that a video mail service be accessible to individuals with disabilities when provided along with a video conferencing service. We also do not decide at this time whether our ancillary jurisdiction extends to require

other features or functions provided along with a video conferencing service, such as recording and playing back video communications on demand, to be accessible.

2. Manufacturers of Equipment Used for Advanced Communications Services

30. Section 716(a)(1) states the following:

> a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, shall ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.

31. In the Accessibility NPRM the Commission proposed to find that developers of software that is used for advanced communications services and that is downloaded or installed by the user rather than by a manufacturer are covered by section 716(a). The IT and Telecom RERCs support that proposal on the grounds that coverage should not turn on how a manufacturer distributes ACS software (pre-installed on a device or installed by the user). Microsoft and the VON Coalition, on the other hand, argue that section 716(a) must be read as applying only to manufacturers of equipment, that "software" is not "equipment," and that our proposal would impermissibly extend the Commission's authority beyond the limits set by Congress in the CVAA.

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

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

34. Under a second possible reading, the phrase "manufacturer of equipment" would be given its common meaning as referring to makers of physical machines or devices. If such equipment is used for advanced communications services, then the equipment manufacturer is responsible for making it accessible. Under this reading, the phrase "including end user equipment, network equipment, and software" makes clear that both end user equipment and network equipment, as well as the software included by the manufacturer in such equipment, must be consistent with the CVAA's accessibility mandate. We have modified the definitions of "end user equipment" and "network equipment" that are proposed in the Accessibility NPRM to make clear that such equipment may include both hardware and software components. Thus, to the extent that equipment used for advanced communications services include software components -- for example, operating systems or e-mail clients -- the manufacturer of the equipment is responsible for making sure that both "the equipment and software that such

manufacturer offers for sale or otherwise distributes in interstate commerce" is accessible.

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

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

716(a)(1) produces a more logical result, in that section 716(j), as it applies to manufacturers of equipment, has the same scope as section 716(a).

37. Examining the legislative history of the CVAA, we find no indication in either the Senate Report or the House Report that Congress intended to instruct the Commission to regulate directly software developers that are neither manufacturers of equipment nor providers of advanced communications services -- a class of businesses that the Commission historically has not regulated. There is, on the other hand, evidence that Congress had makers of physical objects in mind when it made "manufacturers of equipment" responsible for accessibility. For example, the Senate Report states that the Act requires manufacturers of equipment used for ACS and providers of ACS to "make any such equipment, which they design, develop, and fabricate, accessible to individuals with disabilities, if doing so is achievable." The Senate Report further says that sections 716(a) and 716(b) "require that manufacturers and service providers, respectively, make their devices and services accessible to people with disabilities." Likewise, the House Report states that sections 716(a) and 716(b) "give manufacturers and service providers a choice regarding how accessibility will be incorporated into a device or service." Software is not fabricated, nor are software programs or applications referred to as devices. Particularly in light of this legislative history, we are doubtful that Congress would have significantly expanded the Commission's traditional jurisdiction to reach software developers, without any clear statement of such intent.

38. We disagree with commenters that suggest that the Commission's interpretation of CPE in the Section 255 Report and Order compels us to find that software developers that are neither manufacturers of ACS equipment nor providers of ACS are covered under section 716(a). First, in the Section 255 Report and Order, the Commission found that CPE "includes software

integral to the operation of the telecommunications function of the equipment, whether sold separately or not." Although the statutory definition of CPE did not reference software, the Commission found that it should construe CPE similarly to how it construed "telecommunications equipment" in the Act, which Congress explicitly defined to include "software integral to such equipment (including upgrades)." The Commission did not in the Section 255 Report and Order reach the issue of whether any entity that was not a manufacturer of the end user equipment or provider of telecommunications services had separate responsibilities under the Act.

39. Second, in the CVAA, Congress gave no indication that it intended the Commission to incorporate, when defining the scope of "equipment and software" for purposes of section 716(a)(1), the definitions we have established for the different, but analogous, terms ("telecommunications equipment" and "customer premises equipment") used in section 255. Here, we interpret the statutory language to include all software, including upgrades, that is used for ACS and that is a component of the end user equipment, network equipment, or of the ACS service – and do not limit software to meaning only software that is integral to the network equipment or end user equipment. As we discuss further in paragraph 58, infra, if software gives the consumer the ability to engage in advanced communications, the provider of that software is a covered entity, regardless of whether the software is downloaded to the consumer's equipment or accessed in the cloud.

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

41. Advanced communications services are delivered within a complex and evolving ecosystem. Communications devices are often general-purpose computers or devices incorporating aspects of general-purpose computers, such as smartphones, tablets, and entertainment devices. In the Accessibility NPRM the Commission observed that such systems are commonly described as having five components or layers: (1) hardware (commonly referred to as the "device"); (2) operating system; (3) user interface layer; (4) application; and (5) network services. We agree with ITI that three additional components in the architecture play a role in ensuring the accessibility of ACS: (1) assistive technology ("AT") utilized by the end user; (2) the accessibility application programming interface ("API"); and (3) the web browser.

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

43. We believe that end user equipment manufacturers, in collaboration with the developers of the software components of the equipment and related service providers, are best equipped to be ultimately responsible for ensuring that all of the components that the end user equipment manufacturer provides are accessible to and usable by individuals with disabilities. Manufacturers are responsible for the software components of their equipment whether they pre-install the software, provide the software to the consumer on a physical medium such as a CD, or require the consumer to download the software. The manufacturer is the one that purchases those components and is therefore in a position to require that each of those components supports accessibility. Similarly, as we discuss further below, the provider of an advanced

communications service is the entity in the best position to make sure that the components (hardware, software on end user devices, components that reside on the web) it provides and that make up its service all support accessibility.

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

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

716(a) to ensure that consumers receive the benefits intended by Congress.

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

47. Finally, the narrower interpretation of the scope of section 716(a) that we adopt herein makes this statutory program more cost-effective than would the more expansive interpretation. Covered entities are subject not only to the substantive requirement that they make their products accessible, if achievable, but also to an enforcement mechanism that includes recordkeeping and certification requirements. This type of enforcement program imposes costs on both industry and the government. Congress made a determination, which we endorse and enforce, that these costs are well justified to realize the accessibility benefits that the CVAA will bring about. But the costs of extending design, recordkeeping, and certification requirements to software developers would be justified only if they were outweighed by substantial additional accessibility benefits.

48. As explained above, it appears that the benefits of accessibility, as envisioned by Congress and supporters of the CVAA, can be largely (and perhaps entirely) realized under the narrower, less costly interpretation of section 716(a)(1). Furthermore, the biennial review requirement of section 717(b)(1) ensures that, if our prediction proves incorrect, the Commission will have an occasion to examine whether application of the CVAA's requirements directly to developers of consumer-installed software is warranted, and make any necessary adjustments to our rules to achieve accessibility in accordance with the intent of the CVAA. This biennial

review process gives us additional confidence that applying the statute more narrowly and cautiously in our initial rules is the most appropriate policy at this time.

49. With respect to the definition of "manufacturer," consistent with the Commission's approach in the Section 255 Report and Order and in the Accessibility NPRM, we define "manufacturer" as "an entity that makes or produces a product." As the Commission noted in the Section 255 Report and Order, "[t]his definition puts responsibility on those who have direct control over the products produced, and provides a ready point of contact for consumers and the Commission in getting answers to accessibility questions and resolving complaints." We believe this definition encompasses entities that are "extensively involved in the manufacturing process – for example, by providing product specifications." We also believe this definition includes entities that contract with other entities to make or produce a product; a manufacturer need not own a production facility or handle raw materials to be a manufacturer.

50. TechAmerica argues that section 716(a) should apply only to equipment with a "primary purpose" of offering ACS. We reject this interpretation. As discussed above, consumers commonly access advanced communications services through general purpose devices. The CVAA covers equipment "used for ACS," and we interpret this to include general purpose hardware with included software that provides users with access to advanced communications services.

51. Commenters also expressed concerns about the impact of software upgrades on accessibility. The IT and Telecom RERCs state that "[u]pgrades can be used to increase accessibility . . . or they can take accessibility away, as has, unfortunately occurred on numerous occasions." Wireless RERC urges that "[e]nd-users who buy an accessible device expect manufacturer-provided updates and upgrades to continue to be accessible." We agree that the

purposes of the CVAA would be undermined if it permitted equipment or services that are originally required to be accessible to become inaccessible due to software upgrades. In accordance with our interpretation of section 716(a)(1) above, just as a manufacturer of a device is responsible for the accessibility of included software, that manufacturer is also responsible for ensuring that the software developer maintains accessibility if and when it provides upgrades. However, we agree with CTIA that a manufacturer cannot be responsible for software upgrades "that it does not control and that it has no knowledge the user may select and download."

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

53. A manufacturer, however, has a responsibility to consider how the components in the architecture work together when it is making a determination about what accessibility is achievable for its product. If, for example, a manufacturer decides to rely on a third-party software accessibility solution, even though a built-in solution is achievable, it cannot later claim that it is not responsible for the accessibility of the third-party solution. A manufacturer of end-user equipment is also responsible for the accessibility of software offered to subscribers if the manufacturer requires or incentivizes a purchaser to use a particular third-party application to access all the features of or obtain all the benefits of a device or service, or markets its device in

conjunction with a third-party add-on.

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

3. Providers of Advanced Communications Services

55. Section 716(b)(1) of the Act provides that, with respect to service providers, after the effective date of applicable regulations established by the Commission and subject to those regulations, a "provider of advanced communications services shall ensure that such services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities," unless these requirements are "not achievable."

56. Consistent with the proposal in the Accessibility NPRM, we agree with commenters that state that we should interpret the term "providers" broadly and include all

entities that make available advanced communications in whatever manner. Such providers include, for example, those that make web-based e-mail services available to consumers; those that provide non-interconnected VoIP services through applications that consumers download to their devices; and those that provide texting services over a cellular network.

57. As is the case with manufacturers, providers of ACS are responsible for ensuring the accessibility of the underlying components of the service, to the extent that doing so is achievable. For example, a provider of a web-based e-mail service could meet its obligations by ensuring its services are coded to web accessibility standards (such as the Web Content Accessibility Guidelines (WCAG)), if achievable. For services downloaded onto the OS of a desktop or mobile device, service providers could meet their obligations by ensuring, if achievable, that their services are coded so they can work with the Accessibility API for the OS of the device. Accessibility APIs are specialized interfaces developed by platform owners, which software applications use to communicate accessibility information about user interfaces to assistive technologies. Those that provide texting services over a cellular network, for example, must ensure that there is nothing in the network that would thwart the accessibility of the service, if achievable.

58. COAT raises the concern that some software used for ACS may be neither a component of the end user equipment nor a component of a service and thus would not be covered under the statute. Specifically, COAT argues that H.323 video and audio communication is peer-to-peer and does not require a service provider at all. Similarly, it argues that it is possible to have large-scale examples of peer-to-peer systems without service providers and that models used in the non-ACS context could be expanded to be used for ACS. We believe that COAT construes the meaning of "provider of advanced communications services"

too narrowly. If software gives the consumer the ability to send and receive e-mail, send and receive text messages, make non-interconnected VoIP calls, or otherwise engage in advanced communications, then provision of that software is provision of ACS. On the other hand, provision of client software such as Microsoft Outlook is not provision of ACS. While consumers use such client software to manage their ACS, the client software standing alone does not provide ACS. The provider of that software would be a covered entity, and the service, including any provided through a small-scale or large-scale peer-to-peer system, would be subject to the requirements of the statute. We also disagree with COAT's suggestion that ACS used with an online directory would not be covered. While online directories are excluded from coverage under the limited liability provisions in section 2(a)(2) of the CVAA, the ACS used with such directories are covered. This is true regardless of whether the software is downloaded to the consumer's equipment or accessed in the cloud.

59. We disagree with Verizon's assertion that the requirement in section 716(e)(1)(C) that the Commission shall "determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks" compels the conclusion that developers of applications have their own independent accessibility obligations. We note that the regulations that the Commission must promulgate pursuant to section 716(e) relate to the substantive requirements of the Act found in sections 716(a)-(d) encompassing accessibility (sections 716(a) and 716(b)); compatibility (section 716(c)); and network features, functions, and capabilities (section 716(d)). Each of these obligations applies to manufacturers of ACS equipment and/or providers of ACS. There are no independent substantive requirements in these sections that apply to "providers of applications or services accessed over service provider networks." We believe the most logical interpretation of this

phrase is the one proposed in the NPRM: that providers of advanced communications services include entities that provide advanced communications services over their own networks as well as providers of applications or services accessed (i.e., downloaded and run) by users over other service providers' networks. We adopt this interpretation, which we believe comports with our analysis above that providers of ACS are responsible for ensuring the accessibility of the underlying components of the service, including the software applications, to the extent that doing so is achievable.

60. We find, however, that a provider of advanced communications services is not responsible for the accessibility of third-party applications and services that are not components of its service and that the limitations on liability in section 2(a) of the CVAA generally preclude such service provider liability. This approach is consistent with commenters that argue that service providers and manufacturers should be responsible only for those services and applications that they provide to consumers. They explain that they have no control over third party applications that consumers add on their own and that such third party applications have the potential to significantly alter the functionality of devices. Notwithstanding that conclusion and consistent with section 2(b) of the CVAA, we also agree with commenters that the limitation on liability under section 2(a) does not apply in situations where a provider of advanced communications services relies on a third-party application or service to comply with the accessibility requirements of section 716.

61. We also confirm that providers of advanced communications services may include resellers and aggregators, which is consistent with the approach the Commission adopted in the Section 255 Report and Order. Several commenters support that conclusion. We disagree with Verizon's suggestion that, to the extent that a carrier is strictly reselling an advanced

communications service as is (without alteration), the sole control of the features and functions rests with the underlying service provider, not the reseller, and the reseller should not have independent compliance obligations. To the extent that the underlying service provider makes those services accessible to and usable by individuals with disabilities in accordance with the CVAA mandates, those services should remain accessible and usable when resold as is (without alteration). Resellers offer services to consumers who may or may not be aware of the identity of the underlying service provider. It is both logical and in keeping with the purposes of the CVAA for consumers to be able to complain against the provider from whom they obtain a service, should that service be inaccessible. While a reseller may not control the features of the underlying service, it does have control over its decision to resell that service. Its obligation, like that of any other ACS provider, is to ensure that the services it provides are accessible, unless that is not achievable.

62. Because the networks used for advanced communications services are interstate in nature, and the utilization of equipment, applications and services on those networks are also interstate in nature, we conclude that the phrase "in or affecting interstate commerce" should be interpreted broadly. Nonetheless, the IT and Telecom RERCs suggest that an entity that has its own network "completely off the grid, that it creates and maintains, and that does not at any time connect to another grid" would not be covered. We agree that advanced communication services that are available only on a private communications network that is not connected to the Internet, the public switched telephone network ("PSTN"), or any other communications network generally available to the public may not be covered when such services are not "offered in or affecting interstate commerce." An example of a private communications network is a company internal communications network. Nonetheless, where such providers of advanced

communications services are not covered by section 716, they may have accessibility obligations under other disability related statutes, such as section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990.

4. General Obligations

63. Section 716(e)(1)(C) of the Act requires the Commission to "determine the obligations…of manufacturers, service providers, and providers of applications or services accessed over service provider networks." Below, we discuss the obligations of manufacturers and service providers, including the obligations of providers of applications or services accessed over service provider networks.

a. Manufacturers and Service Providers

64. As set forth below, we adopt into our rules the general obligations contained in sections 716(a)-(e). As the Commission did in the Section 255 Report and Order, we find that a functional approach will provide clear guidance to covered entities regarding what they must do to ensure accessibility and usability. Consistent with AFB's comments, we modify our rules as proposed to make clear that any third party accessibility solution that a covered entity uses to meet its accessibility obligations must be "available to the consumer at nominal cost and that individuals with disabilities can access."

- With respect to equipment manufactured after the effective date of the regulations, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless such

requirements are not achievable.

- With respect to services provided after the effective date of the regulations, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless such requirements are not achievable.

- If accessibility is not achievable either by building it into a device or service or by using third-party accessibility solutions available to the consumer at nominal cost and that individuals with disabilities can access, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, unless such compatibility is not achievable.

- Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.

- Advanced communications services and the equipment and networks used to provide such services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment, or networks.

65. We further adopt in our rules the following key requirements, supported by the IT and Telecom RERCs, with some non-substantive modifications to clarify the rules proposed in the Accessibility NPRM. These requirements are similar to §§ 6.7 – 6.11 of our section 255 rules but are modified to reflect the statutory requirements of section 716:

- Manufacturers and service providers must consider performance objectives at the design

stage as early and as consistently as possible and must implement such evaluation to the extent that it is achievable.

- Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.
- Equipment used for advanced communications services must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats, or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.
- Manufacturers and service providers must ensure access by individuals with disabilities to information and documentation it provides to its customers, if achievable. Such information and documentation includes user guides, bills, installation guides for end user devices, and product support communications, in alternate formats, as needed. The requirement to provide access to information also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.

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

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

66. Section 716(e)(1)(C) requires the Commission to "determine the obligations under . . . section [716] of manufacturers, service providers, and providers of applications or services accessed over service provider networks." As noted previously, to the extent they provide advanced communications services, "providers of applications or services accessed over service provider networks" are "providers of advanced communications services" and have the same obligations when those services are accessed over the service provider's own network or over the network of another service provider. No party suggested that any additional obligations apply to this subset of providers of ACS, and we do not adopt any herein.

c. Network Features

67. According to section 716(d) of the Act, "[e]ach provider of advanced communications services has the duty not to install network features, functions, or capabilities that impede accessibility or usability." As proposed in the Accessibility NPRM, we adopt rules that include the requirements set forth in section 716(d), just as our section 255 rules reflect the language in section 251(a)(2). Commenters generally agree that the duty not to impede accessibility is comparable to the duty set forth in section 251(a)(2) of the Act.

68. As stated above, this obligation applies when the accessibility or usability of ACS is incorporated in accordance with recognized industry standards. We agree with industry and consumer commenters that suggest that stakeholder working groups should be involved in developing new accessibility standards. As explained in the next section, we believe that there are several potential mechanisms to develop these standards. Accordingly, we recommend that stakeholders either use existing working groups or establish new ones to develop standards that

will ensure accessibility as the industry applies network management practices, takes digital rights management measures, and engages in other passive or active activities that may impede accessibility. We do not agree, however, that we should wait to require compliance with our rules governing network features until an industry working group "formulates and offers such standards for the industry." We agree with ACB that "existing standards and expertise will ensure that manufacturers have sufficient functional approaches" on which to base accessibility and that "[f]urther experience and products will improve this process." We believe this approach provides certainty through the use of recognized industry standards while at the same time recognizing the importance of not unnecessarily delaying the development of accessibility solutions.

d. Accessibility of Information Content

69. As proposed in the Accessibility NPRM, we adopt a rule providing that "advanced communications services and the equipment and networks used with these services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks." This rule incorporates the text of section 716(e)(1)(B) and is also consistent with the Commission's approach in the Section 255 Report and Order. We believe that this rule is broad enough to disapprove of accessibility information being "stripped off when information is transitioned from one medium to another" and thus find it unnecessary to add this specific language in the rule itself, as originally suggested by the IT and Telecom RERCs.

70. The legislative history of the CVAA makes clear that the requirement not to impair or impede the accessibility of information content applies "where the accessibility of such content has been incorporated in accordance with recognized industry standards." We agree with

the IT and Telecom RERCs that sources of industry standards include: (1) international standards from an international standards body; (2) standards created by other commonly recognized standards groups that are widely used by industry; (3) de-facto standards created by one company, a group of companies, or industry consortia that are widely used in the industry. We believe that these examples illustrate the wide range of recognized industry standards available that can provide guidance to industry without being overly broad or requiring covered entities to engineer for proprietary networks. We therefore decline to adopt CEA's proposal that "recognized industry standards are only those developed in consensus-based, industry-led, open processes that comply with American Standards Institute ("ANSI") Essential Requirements."

71. At this time, we are unable to incorporate any aspects of the Access Board criteria or the WCAG into our rules relating to accessibility of information content. The WCAG are technical specifications developed by industry, disability, and government stakeholders for those who develop web content, web authoring tools, and web accessibility evaluation tools. As such, we believe it may be appropriate to consider the WCAG an "industry recognized standard" for purposes of applying our rule (i.e., the requirements of our rule would apply where the accessibility of the content has been incorporated consistent with WCAG specifications), rather than incorporating aspects of the WCAG into our rules. Because the Access Board's process for developing guidelines is still not complete, we believe that it would be premature and inefficient to adopt them at this juncture. We acknowledge, however, that the IT and Telecom RERCs support the WCAG developed by the W3C and argue that "these web standards in the proposed Access Board revisions to [sections] 508 and 255 … should definitely be incorporated in the rules." Because technology is changing so quickly, we encourage stakeholders to use existing or form new working groups to develop voluntary industry-wide standards, including on issues

such as encryption and other security measures. We will monitor industry progress on these issues and evaluate the Access Board guidelines when they are finalized to determine whether any amendments to our rule might be appropriate.

72. Finally, we agree with CEA and the IT and Telecom RERCs that, consistent with the CVAA's liability limitations, manufacturers and service providers are not liable for content or embedded accessibility content (such as captioning or video description) that they do not create or control.

5. Phased in Implementation

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

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

utilized phase-in periods previously in similarly complex rulemakings. Below, we discuss details of the phase-in process.

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

76. Beginning one year after the effective date of these regulations, covered entities recordkeeping obligations will become effective. We note that certain information collection requirements related to recordkeeping adopted herein are subject to the Paperwork Reduction Act and will be submitted to the OMB for review. Those requirements will become effective after OMB approval but no earlier than one year after the effective date of rules promulgated pursuant to section 716(e). After OMB approval is obtained, the Consumer and Governmental Affairs Bureau will issue a public notice instructing covered entities when and how to file their annual certification that records are being maintained in accordance with the statute and the rules adopted herein. As we further explain below, we require covered entities to keep and maintain records in the ordinary course of business that demonstrate that the advanced communications products and services they sell or otherwise distribute are accessible to and usable by individuals with disabilities or demonstrate that it was not achievable for them to make their products or services accessible.

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

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

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

79. In addition, on October 8, 2013, consumers may begin filing complaints. Prior to that date, the Commission will issue a public notice describing how consumers may file a request for dispute assistance with the CGB Disability Rights Office and informal complaints with the

Enforcement Bureau. Formal complaints must be filed in accordance with the rules adopted in this Report and Order. While the CVAA complaint process will not be available to consumers until 2013, we remind industry that it has a current obligation to ensure that telecommunications services and equipment are accessible to and usable by individuals with disabilities. Consumers may file complaints at any time under our existing informal complaint procedures alleging violations of the accessibility requirements for telecommunications manufacturers and service providers under section 255 of the Communications Act. Furthermore, separate from the complaint process, the Disability Rights Office in CGB will be available to assist consumers, manufacturers, service providers and others in resolving concerns about the accessibility and usability of advanced communications services and equipment as of the effective date of our rules (i.e., October 8, 2013).

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

B. Nature of Statutory Requirements

1. Achievable Standard

a. Definitions

(i) Accessible to and Usable by

81. Given that commenters generally agree that the Commission's definitions of "accessible" and "usable" in §§ 6.3(a) and 6.3(l), respectively, are "well established," we will continue to define "accessible to and usable by" as the Commission did with regard to

implementation of section 255. We agree with the Wireless RERC that this approach will "reduce both the potential for misunderstanding as well as the regulatory cost of compliance" and promote "the objective of consistency." We also plan to draw from the Access Board's guidelines once they finalize them.

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

(ii) Disability

83. Section 3(18) of the Act states that the term "disability" has the meaning given such term under section 3 of the ADA. The ADA defines "disability" as with respect to an individual: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . ." Having received only one comment on this issue and finding that our current rules incorporate the definition of "disability" from section 3 of the ADA, we adopt this definition, as proposed, in our section 716 rules as well. To provide additional guidance to manufacturers and service providers, as the Commission did in the Section 255 Report and Order, we note that the statutory reference to "individuals with disabilities" includes people with hearing, vision, movement, manipulative, speech, and cognitive disabilities. The definition of "disability," however, is not limited to these specific groups. Determinations of whether an

individual has a disability are decided on a case-by-case basis.

b. General Approach

84. As provided in the CVAA and its legislative history, we adopt the Commission's proposal in the Accessibility NPRM to limit our consideration of achievability to the four factors specified in section 716 and to weigh each factor equally when considering whether accessibility is not achievable. We agree with AFB that the CVAA requires covered entities to make their products accessible unless it is "not achievable" to do so and that the section 716 standard is different from the section 255 "readily achievable" standard. ACB suggests adding seven more factors to the achievability analysis. These proposed factors, which address the commitment of the manufacturer or service provider to achieving accessibility, include (1) engagement of upper level executives; (2) the budgeting process for accessibility as compared to the overall budget; (3) consideration of accessibility early in the planning process; (4) covered entity devotion of personnel during planning stages to achieving accessibility; (5) inclusion of people with disabilities in testing; (6) devotion of resources to the needs of people with disabilities; and (7) record of delivering accessible products and services. While we do not adopt these as additional achievability factors, we do believe they are useful guidance that will help covered entities meet their obligations under the statute.

85. We will be applying the four achievability factors in the complaint process in those cases in which a covered entity asserts that it was "not achievable" to make its equipment or service accessible. Thus, as proposed by AT&T and supported by many of the commenters, we will be taking a flexible, case-by-case approach to the determination of achievability. We reject the suggestion by Words+ and Compusult that the Commission should evaluate products and services on a category-by-category basis. Words+ and Compusult are concerned that the

Commission will not be able to evaluate the many products that are introduced each year. This will not be necessary, since the Commission will be evaluating only those products that are the subject of a complaint. The approach suggested by Words+ and Compusult would not be consistent with the four factors mandated by Congress. We also share the concerns expressed by NFB and supported by the Consumer Groups that flexibility should not be so paramount that accessibility is never achieved.

86. We note that nothing in the statute limits the consideration of the achievability of accessibility to the design and development stage. While we believe in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle, there may be other "natural opportunities" for consideration of accessibility. Natural opportunities to assess or reassess the achievability of accessibility features may include, for example, the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign. If, however, a covered entity is required by the Commission to make the next generation of a product or service accessible as a result of an enforcement proceeding, an achievability analysis may not be used for the purpose of determining that such accessibility is not achievable. We agree with Consumer Groups that new versions of software or services or new models of equipment must be made accessible unless not achievable and "that this burden is not discharged merely by having shown that accessibility is not achievable for a previous version or model."

87. We expect that accessibility will be considered throughout the design and development process and that during this time "technological advances or market changes" may "reduce the effort and/or expense needed to achieve accessibility." We reject CTIA's argument

that requiring manufacturers and service providers to reassess the accessibility of products and services at key development stages would result in companies refraining from issuing new versions of their products. Beyond this conclusory statement, nothing in the record supports this contention. We note that no party has asserted that the identical requirement in the section 255 context hampered innovation and competition, and there appears to be no reason to believe that it will have such an impact here.

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

c. Specific Factors

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

89. Consistent with the House Report, we find that if the inclusion of an accessibility feature in a product or service results in a fundamental alteration of that product or service, then it is per se not achievable to include that accessibility function. We find that the most appropriate definition of "fundamental alteration" can be found in the Section 255 Report and Order, where the Commission defined it to mean "reduce substantially the functionality of the product, to render some features inoperable, to impede substantially or deter use of the product by individuals without the specific disability the feature is designed to address, or to alter substantially and materially the shape, size or weight of the product." We caution, however, that in many cases, features such as voice output can be added in ways that do not fundamentally

alter the product, even if earlier versions of the product did not have that capability. Since all accessibility enhancements in one sense require an alteration to the design of a product or service, not all changes to a product or service will be considered fundamental alterations. Rather, the alteration to the product or service must be fundamental for the accessibility feature to be considered per se not achievable. As we explained in the Section 255 Report and Order, "the 'fundamental alteration' doctrine is a high standard and . . . the burden of proof rests with the party claiming the defense."

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

91. We also reject CEA's assertion that this factor requires us to consider "the entire cost of implementing the required accessibility functionality relative to the production cost of the product." Under the first factor, the Commission is required to consider the cost of the steps needed to meet the requirements of this section with respect to the specific equipment or service in question. The first factor, however, does not provide that the costs should be compared to the

production cost of the product; indeed, the factor does not provide for a comparison of the costs at all. As explained further below, this inquiry more directly fits under the second factor, which examines directly the economic impact of the cost of the accessibility features.

(ii) Technical and Economic Impact on the Operation

92. The second factor in determining whether compliance with section 716 is "achievable" requires the Commission to consider the "technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies." We find that to determine the "economic impact of making a product or service accessible on the operation of the manufacturer or provider," it will be necessary to consider both the costs of making a product or service accessible and an entity's total gross revenues. Consistent with the Section 255 Report and Order, we will consider the total gross revenues of the entire enterprise and will not limit our consideration to the gross revenues of the particular subsidiary providing the product or service. CEA argues that the Commission should not be able to consider an entity's entire budget in evaluating the cost of accessibility because Congress dropped from the final version of the statute a fifth achievability factor which specifically considered "the financial resources of the manufacturer or provider." We disagree. CEA does not suggest a reason why Congress eliminated this language and does not address the possibility that Congress may have found the factor to be redundant in light of the fact that under the second factor we consider the "economic impact on the operation of the manufacturer or provider."

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

as stated in the language of section 716(g)(2). The need to provide an accessibility feature, however, can have a greater impact on a smaller entity than a larger one. In other words, the provision of a particular feature may have negligible impact on a large company but may not be achievable with reasonable effort or expense for a small business. For example, a small start up manufacturer may not have the resources to evaluate all the design considerations that must be considered to make a potential product accessible, even though a larger manufacturer might have the resources to do so as a matter of course. A smaller service provider looking for accessible customer premises equipment to provide to its customers may find that the models with accessibility features are available only to larger service providers, or if they are available to the smaller provider, the acquisition price is considerably higher than the price for a larger carrier, thereby rendering such devices cost prohibitive for the smaller provider. Similarly, while a larger service provider may perform as a matter of course a network upgrade that would include the addition of accessibility features, it may not be achievable with reasonable effort or expense for a smaller service provider to perform a similar network upgrade, either because the upgrade is not yet available to the smaller provider or it is cost-prohibitive to the company at that time.

94. Some commenters argue that the Commission should consider the cost of implementing accessibility relative to the production cost of the product. CEA suggests that if the cost of accessibility significantly raises the cost of a particular device, it may result in overpricing the device for consumers, which could result in fewer devices being purchased. Similarly, TechAmerica argues that if the cost of an accessibility feature exceeds the cost of having the product in the marketplace, then that accessibility feature is per se not achievable. We decline to adopt this per se approach. The Commission does recognize, however, that if the nature and cost of the steps needed for accessibility would have a substantial negative technical

or economic impact on the ability to produce a product or service, that fact may be taken into consideration when conducting the overall achievability analysis. To completely ignore this fact altogether could discourage manufacturers and service providers from introducing new and innovative products that, for some reason, would require extremely costly accessibility features relative to the cost of the product. Congress's balanced approach in the statute, including its desire to refrain from hampering innovation and investment in technology, require us to consider the cost of accessibility relative to the cost of producing a product in certain situations.

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

to that product or service.

(iii) Type of Operations

96. The third factor in determining whether compliance with section 716 is "achievable" requires the Commission to consider "[t]he type of operations of the manufacturer or provider." Consistent with the legislative history, we will take into consideration whether a covered entity has experience in the advanced communications services market or related markets when conducting an achievability analysis. We disagree with Words+ and Compusult's argument that this factor will necessarily provide a competitive advantage to a new entrant. All companies that do not qualify for the small business exemption, whether new entrants or incumbents, must engage in an achievability analysis. All companies are required to provide accessibility unless it cannot be done "with reasonable effort or expense." Given the multitude of factors that affect a company's prospects in the marketplace, we do not see much of a competitive advantage arising from the ability of a new entrant to assert this third factor as a defense to a complaint.

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

98. In addition, as suggested by the IT and Telecom RERCs and ACB, when applying

this factor, we will take into consideration the size of the company. We agree that a small start-up company, which may need time to develop its financial resources and learn the field and its requirements, should be treated differently than a larger company with the resources available to more rapidly achieve accessibility features. While we reject TIA's suggestion that the size of the company should not matter when applying this factor, we agree with TIA that a company's size alone is not a proxy for determining whether accessibility can be achieved. Consistent with the legislative history, we find that the existence of substantial financial resources does not, by itself, trigger a finding of achievability.

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

99. The fourth factor in determining whether compliance with section 716 is "achievable" requires the Commission to consider "[t]he extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points." To satisfy the fourth achievability standard, a covered entity is required by the CVAA to offer people with each type of disability (this includes people with multiple disabilities) accessibility features within a line of products that includes the full range of functionality within the product line as well as a full range of prices within the product line, if achievable. We interpret the plain language of the statute and legislative history to mean that covered entities generally need not consider what is achievable with respect to every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at differing price points. Although a range of accessible products with

varying degrees of functionality and features, at differing price points must be offered across a product line for people with the full range of disabilities if achievable, in the context of a complaint proceeding, only the facts of the complaint will be considered. In other words, a complaint proceeding will not consider the accessibility of a product for types of disabilities that are not the subject of the complaint.

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

101. Because section 716(g)(4) specifically calls for "varying degrees of functionality and features, and offered at differing price points," we emphasize that accessibility features must be made available within a line of products that includes the full range of functionality and prices for that line of products. In other words, if a line of products includes low-end products, it is just as important that low-end products and services be accessible as high-end products and services if achievable.

102. We decline to mandate ACB's proposal that, for the purpose of making available a range of devices that fit various price ranges along with corresponding accessible features, the

devices may be divided into classes, making certain that each class has at least one option that is fully accessible. We agree with CEA that mandating such a proposal would be unworkable for some manufacturers and service providers, given that technology and consumer preferences are constantly evolving.

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

104. We find that ITI misunderstands sections 716(g)(4) and 716(j) when it asserts that covered entities are compliant "so long as some reasonable subset of features and services are accessible," because such an approach could result in lack of accessibility over the full range of functionality and prices. After carefully considering section 716(j), we find a more reasonable interpretation to be that there may be some devices with accessibility features for people with one type of disability, different devices with accessibility features for people with other types of disabilities, and yet other devices that are not accessible because accessibility is not achievable for those particular devices or because the entity offers a full range of accessible products with varying degrees of functionality and features, at differing price points to discharge its responsibility under section 716. In other words, section 716(j) provides a rule of reason when

interpreting section 716(g).

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

2. Industry Flexibility

106. Sections 716(a)(2) and (b)(2) of the Act provide manufacturers and service providers flexibility on how to ensure compliance with the accessibility requirements of the CVAA. As urged by several commenters, we confirm that section 716 allows covered entities the flexibility to provide accessibility through either built-in solutions or third-party solutions, so long as the third-party solutions are available at nominal cost to consumers. As suggested by TIA, we find that manufacturers and service providers should be able to rely on a wide range of third-party accessibility solutions and whether such solutions meet the accessibility requirements should be decided on a case-by-case basis. Moreover, by putting the decision in the hands of the

manufacturers and service providers – those who are in the best position to determine the most economical manner of compliance – we ensure that the aims of the statute will be met in the most cost-effective manner. At the same time, we encourage such manufacturers and service providers who wish to use third party accessibility solutions, to consult with people with disabilities about their accessibility needs because these individuals will be best equipped to provide guidance on which third-party accessibility solutions will be able to meet those needs. Consultation with the disability community will best achieve effective and economical accessibility solutions.

107. The Commission acknowledged in the Accessibility NPRM that "universal design," which is "a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies), and products and services that are interoperable with assistive technologies," will continue to play an important role in providing accessibility for people with disabilities. At the same time, the Commission acknowledged that, while section 255 had relied primarily on universal design principles, the industry flexibility provisions of the CVAA reflect that there are new ways to meet the needs of people with disabilities that were not envisioned when Congress passed section 255. We agree with Consumer Groups that new and innovative technologies may now be able to more efficiently and effectively meet individual needs by personalizing services and products, than services and products built to perform in the same way for every person. Accordingly, as supported by several commenters, we affirm that the Commission should afford manufacturers and service providers as much flexibility to achieve compliance as possible, so long as each does everything that is achievable in accordance with the achievability factors.

108. As supported by several commenters, we adopt the Commission's proposal in the Accessibility NPRM that "any fee for third-party software or hardware accessibility solutions be 'small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires.'" We will apply this definition in accordance with the proposal submitted by AFB that in considering whether the cost to the consumer is nominal, we must look at the initial purchase price, including installation, plus the ongoing costs to the consumer to keep the third-party solution up to date and in good working order, and that the total cost to the consumer must be nominal as perceived by the consumer. We believe that this approach, which emphasizes the definition of nominal cost as perceived by the consumer, addresses the IT and Telecom RERCs' concerns that our proposed definition of nominal cost provides insufficient guidance and does not take into account that many people with disabilities are poor and already face greater costs for nearly every aspect of their lives. In other words, the definition of nominal cost as perceived by the consumer will take into account the financial circumstances generally faced by people with disabilities.

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

110. Several commenters also express concerns about the Commission's proposal in the Accessibility NPRM that a third-party solution not be more burdensome to a consumer than a built-in solution would be, arguing that this test would not be workable because it would result in

no third-party solutions. In response to these concerns, we clarify how we intend to interpret those requirements to ensure their workability. Because adaptive communications solutions are often not available with mainstream products and finding these solutions often has been difficult for people with disabilities in the past, we agree with those commenters that assert that a manufacturer or service provider that chooses to use a third-party accessibility solution has the responsibility to identify, notify consumers of, find, and arrange to install and support the third-party technology along with the covered entity's product to facilitate consumer access to third-party solutions. Although we will not adopt the testing requirements proposed by the IT and Telecom RERCs because we believe that the other requirements we adopt herein with respect to third-party solutions will ensure accessibility of ACS products and services to consumers with disabilities, we nevertheless encourage covered entities to test third-party accessibility solutions with people with disabilities to ensure that such third-party solutions work as intended. We find that the covered entity must support the third-party solution for the life of the ACS product or service or for a period of up to two years after the third-party solution is discontinued, whichever comes first, provided that another third-party accessibility solution is made available by the covered entity at nominal cost to the consumer. In other words, to ensure accessibility of products and services covered by the CVAA, if another third-party solution is not made available by the covered entity at nominal cost to the consumer, then the covered entity may not discontinue support for the original third-party solution. We believe that the requirement to provide support for a replacement third-party accessibility solution addresses the concern expressed by the IT and Telecom RERCs.

111. We agree with those commenters that suggest that we should not impose a requirement to bundle third-party solutions with ACS products and services, because a bundling

requirement would provide industry with less flexibility than Congress intended. Therefore, third-party solutions can be made available after-market, rather than at the point of purchase, provided that such third-party solutions are made available around the same time as when the product or service is purchased. This will ensure that the consumer has access to the product near the time of purchase, allow for additional implementation steps that may be needed, and promote innovation by reducing the likelihood of being locked into the accessibility solutions available at the time the product was offered for sale.

112. As explained in the preceding paragraphs, the total cost to the consumer of the third-party solution, including set-up and maintenance, must be nominal. We expect the set-up and maintenance for a third-party accessibility solution to be no more difficult than the set-up and maintenance for other applications used by consumers. If the third-party solution by its nature requires technical assistance with set-up or maintenance, we find that the covered entity must either provide those functions, including personnel with specialized skills if needed, or arrange for a third party to provide them.

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

3. Compatibility

114. We adopt the definition of "peripheral devices" proposed in the Accessibility NPRM. We agree with the vast majority of commenters that peripheral devices can include mainstream devices and software, as long as they can be used to "translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities" and the devices and software are "commonly used by individuals with disabilities to achieve access." We did not receive comments on the IT and Telecom RERCs proposal to expand our definition of peripheral devices and decline to adopt their proposal at this time. However, we seek further comment in the Accessibility FNPRM on its proposal.

115. We also adopt the same definition of specialized CPE as is used in our section 255 rules and proposed in the Accessibility NPRM. The Commission has traditionally interpreted CPE broadly to include wireless devices such as cellular telephone handsets, and we retain the flexibility to construe the scope of specialized CPE consistent with Commission precedent. Therefore, changing the regulatory definition of CPE, as the IT and Telecom RERCs suggest, to explicitly include mobile devices carried by the user is unnecessary. We also note that a mobile device could meet the definition of a peripheral device to the extent that it is used to "translate, enhance, or otherwise transform advanced communications services into a form accessible to people with disabilities."

116. Consistent with the Commission's decision in the Section 255 Report and Order, we will require manufacturers and service providers to exercise due diligence to identify the types of peripheral devices and specialized CPE "commonly used" by people with disabilities with which their products and services should be made compatible. We also find that when determining whether a particular device is commonly used by individuals with disabilities, a

manufacturer or provider should look at the use of that device among persons with a particular disability. In addition, we agree with AFB that for compatibility to be achieved, a third party add-on must be an available solution that the consumer can access to make the underlying product or service accessible. Compliance is not satisfied because a device's software architecture might someday allow a third party to write an accessibility application. We agree with ITI, however, that "a manufacturer or service provider need not make its equipment or service compatible with every peripheral device or piece of customer equipment used to achieve access." Covered entities are also not required to test compatibility with every assistive technology device in the market.

117. Consistent with the Section 255 Report and Order, we decline to maintain a list of peripheral devices and specialized CPE commonly used by individuals with disabilities or to define how covered entities should test devices which are "commonly used" by people with disabilities, given how quickly technology is evolving. For the same reason, we agree with the IT and Telecom RERCs that covered entities do not have a duty to maintain a list of all peripheral devices and specialized CPE used by people with disabilities. At this time, we also decline to limit the definition of "existing" peripheral devices and specialized customer premises equipment to those that are currently sold, as ITI proposes. As discussed above, we believe that "existing" peripheral devices and specialized customer premises equipment include those which continue to be "commonly used" by people with disabilities. For example, a particular screen reader may no longer be manufactured, but could still be "commonly used." We do note, however, that peripheral devices and specialized customer premises equipment that are no longer sold will eventually cease being "commonly used." We also believe that covered entities have an ongoing duty to consider how to make their products compatible with the software and

hardware components and devices that people with disabilities use to achieve access and to include this information in their records required under section 717(a)(5).

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

119. Finding that the four criteria used in our section 255 rules for determining compatibility remain relevant in the context of advanced communications services, we adopt the following factors for determining compatibility: (i) external access to all information and control mechanisms; (ii) existence of a connection point for external audio processing devices; (iii) TTY connectability; and (iv) TTY signal compatibility. The Commission declines, at this time, to eliminate or modify (iii) and (iv) of this criteria. The Commission agrees with Consumer Groups that at this time, "[a] forced phase-out of TTY would impose considerable hardship on a large segment of the population the CVAA is intended to protect." Therefore, we shall maintain the existing rules for TTY compatibility until alternative forms of communication, such as real-time text, are in place. Until a real time text standard is adopted, we believe that it would be premature to modify the third and fourth criteria as the IT and Telecom RERCs suggest. The

provision of real-time text as communications technologies, including those used for 9-1-1 emergency services by people with disabilities, transition from the PSTN to an IP-based environment is being examined by the EAAC.

120. At this time, the Commission will not incorporate criteria related to APIs or software development kits (SDKs) into our definition of compatibility. We do agree with commenters, however, that APIs "can facilitate both accessibility (via third-party solutions) as well as compatibility" and "reduce the work needed by both mainstream and assistive technology (AT) developers." We encourage stakeholders to use existing working groups -- or form new ones -- to develop and distribute voluntary industry-wide standards, since this approach will offer the industry flexibility in advancing the goals of compatibility articulated in sections 716 and 255.

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

C. Waivers and Exemptions

1. Customized Equipment or Services

122. Section 716(i) states that the accessibility requirements of section 716 "shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities

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

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

123. We also conclude that section 716's accessibility requirements do not extend to public safety communications networks and devices, because such networks and devices are "equipment and services that are not offered directly to the public." As Motorola points out, this conclusion is consistent with the Commission's recent proposal not to apply its hearing aid compatibility requirements to public safety equipment. In that proceeding, the Commission proposed to find that insofar as public safety communications networks have different technical, operational, and economic demands than consumer networks, the burdens of compliance would outweigh the public benefits. For the same reasons, we find that section 716 should not be imposed on public safety equipment.

124. We disagree with commenters such as Consumer Groups, and Words+ and Compusult who posit that public safety networks and devices should not be exempt from section 716 because their employees should be covered like the general population. These commenters argue that exempting public safety networks will create barriers to employment for people with disabilities employed in the public safety sector. We note, however, that employers, including public safety employers, are subject to accessibility obligations imposed under the ADA. Because employees of public safety institutions are protected by the ADA, and because the equipment we exempt is customized for the unique needs of the public safety community, we conclude that imposing the accessibility requirements of section 716 on such equipment would create an unnecessary burden on the development of public safety equipment without any concomitant benefit for employees with disabilities. Nonetheless, we agree with CSD that "to the extent possible, public safety systems should be designed to accommodate the needs of deaf [and] hard-of-hearing employees and employees with other disabilities."

125. We agree with CEA that products customized by a manufacturer for an enterprise that are not offered directly to the general public are exempt, even if such products are "used by members of the general public." We also agree with the IT and Telecom RERCs that if a customized product built to an enterprise customer's unique specifications is later made directly available to the public, it then becomes subject to the CVAA. Although the legislative history specifies that the exemption set forth in section 716(i) encompasses equipment/services customized to the "unique specifications requested by an enterprise customer," we find that where a customized product is subsequently offered directly to the public by the originating manufacturer or service provider, that product is then not serving the unique needs of an enterprise customer and thus should not be exempt from the accessibility requirements of section

716.

126. We disagree with commenters such as Consumer Groups, the IT and Telecom RERCs, and Words+ and Compusult who advocate that we expand the definition of "public" as used in section 716(i), to include government agencies, educational organizations, and public institutions. While Congress clearly meant to draw a distinction between equipment or a service that has been "customized to the unique specifications requested by an enterprise customer" from "equipment and services designed for and used by members of the general public" in enacting the exemption in section 716(i), there is no support for the proposition that the use of the term "public" in the foregoing phrase was meant to extend to public institutions. Furthermore, there are many instances where public institutions, acting as enterprise customers, order customized equipment, such as library cataloging systems, whereby such systems would never be designed for, sold to, and used directly by members of the general public. Under Consumer Groups' approach, a public institution could never be considered an enterprise customer, even when procuring specialized equipment that would not be offered to the public or even other enterprise customers. There is nothing in the statute demonstrating that Congress intended to treat public institutions differently from other enterprise customers who are in need of customized or specialized equipment. Therefore, we decline to expand the definition of the word "public" as used in section 716(i) to public institutions. Equipment, such as general purpose computers, that are used by libraries and schools without customization, and are offered to the general public – *i.e.*, library visitors and students, would not fall within the exemption and must meet the accessibility requirements of section 716.

127. We further conclude that customizations to communications devices that are merely cosmetic or do not significantly change the functionalities of the device or service should

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

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

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

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

130. Section 716(h)(1) of the Act grants the Commission the authority to waive the requirements of section 716. We adopt the Commission's proposal to focus our waiver inquiry on whether a multipurpose equipment or service has a feature or function that is capable of

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

131. We will exercise the authority granted under section 716(h)(1) to waive the requirements of section 716 (a waiver of the obligations of section 716 also consequently relieves the waived entity from the recordkeeping and annual certification obligations of section 717) through a case-by-case, fact-based analysis on our own motion, or upon petition of a manufacturer of ACS equipment, a provider of ACS, or any interested party. AT&T and CEA generally support this approach. As we discuss in more detail below, the rule we adopt provides specific guidance on the two factors that we will use to determine whether equipment or service is designed primarily for purposes other than using ACS.

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

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

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

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

below.

135. Several commenters suggest additional factors that we should consider when examining the primary purpose for which equipment or service is designed. While some of these factors may be valuable in some cases, we decline to incorporate these factors directly into our rules. However, these factors may help a petitioner illustrate the purpose for which its equipment or service is primarily designed. For instance ESA suggests we examine "[w]hether the ACS functionality intends to enhance another feature or purpose." Microsoft similarly suggests we examine "[w]hether the offering is designed for a 'specific class of users who are using the ACS features in support of another task' or as the primary task." Whether the ACS functionality is designed to be operable outside of other functions, or rather aides other functions, may support a determination that the equipment or service was or was not designed primarily for purposes other than ACS. Similarly, an examination of the impact of the removal of the ACS feature or function on a primary purpose for which the equipment or service is claimed to be designed may be relevant to a demonstration of the primary purpose for which the equipment or service is designed. Further, ESA suggests we examine "[w]hether there are similar offerings that already have been deemed eligible for a . . . waiver." An examination of waivers for similar products or services, while not dispositive for a similar product or service, may be relevant to whether a waiver should be granted for a subsequent similar product or service. These and other factors may be relevant for a waiver petitioner, as determined on a case-by-case basis.

136. Conversely, we believe there is little value in examining other suggested factors on the record. We do not believe that the "processing power or bandwidth used to deliver ACS vis-à-vis other features" is relevant. No evidence provided supports the notion that there is a direct relationship between the primary purpose for which equipment or service is designed and

the processing power or bandwidth allocated to that purpose. For example, text messaging on a wireless handset likely consumes less bandwidth than voice telephony, but both could be co-primary purposes of a wireless handset. Further, we do not believe that an examination of whether equipment or service "provides a meaningful substitute for more traditional communications devices" adds significantly to the waiver analysis. The waiver analysis requires an examination of whether the equipment or service is designed primarily for purposes other than using ACS. The inquiry therefore is about the design of the multipurpose service or equipment, not the nature of the ACS component.

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

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

139. The factors we establish here will promote regulatory certainty and predictability

for providers of ACS, manufacturers of ACS equipment, and consumers. We intend for these factors to provide clear and objective guidance to those who may seek a waiver and those potentially affected by a waiver. Providers of ACS and ACS equipment manufacturers have the flexibility to seek waivers for services and equipment they believe meet the waiver requirements. While a provider or manufacturer will expend some level of resources to seek a waiver, the provider or manufacturer subsequently will have certainty regarding its obligations under the Act whether or not a waiver is granted. A manufacturer or provider that receives a waiver will avoid the cost of compliance. A manufacturer or provider that is not granted a waiver can determine its obligations under the Act following an achievability analysis. The opportunity cost to seek a waiver is low since the alternative is compliance with the Act. If a waiver is warranted, the provider or manufacturer can then efficiently allocate resources to other uses.

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

141. The Commission will entertain waivers for equipment and services individually or as a class. With respect to any waiver, the Commission may decide to limit the time of its

coverage, with or without a provision for renewal. Individual waiver requests must be specific to an individual product or service offering. This does not preclude combining multiple specific products with common attributes in the same waiver request. New or different products, including substantial upgrades that change the nature of the product or service, require new waivers. For example, a petitioner that manufactures many similar types of products – similar products of varying design, or similarly designed products with different product numbers – the petitioner must seek a waiver for each discrete product individually. This is analogous to rules implementing section 255, which require entities to consider "whether it is readily achievable to install any accessibility features in a specific product whenever a natural opportunity to review the design of a service or product arises." Individual waiver petitioners must explain the anticipated lifecycle for the product or service for which the petitioner seeks a waiver. Individual waivers will ordinarily be granted for the life of the product or service. However, the Commission retains the authority to limit the waiver for a shorter duration if the record suggests the waiver should be so limited.

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

categorical waivers. Several commenters urge us to adopt rules that waive the requirements of section 716 for whole categories of equipment or services. We decline to adopt waivers for broad categories of equipment or services because we believe that the facts specific to each product or product type within a category may differ such that the ACS feature or function may be a primary purpose for which equipment or service within the category is primarily designed. We will utilize a fact-specific, case-by-case determination of all waiver requests.

143. In addition, we will examine whether petitioners have explained in detail the expected lifecycle for the equipment or services that are part of the class. Thus, the definition of the class should include the product lifecycle. All products and services covered by a class waiver that are introduced into the market while the waiver is in effect will ordinarily be subject to the waiver for the duration of the life of those particular products and services. As with ordinarily granting individual waiver requests for the life of the product or service, the Commission retains the authority to limit a class waiver for a shorter duration if the record suggests the waiver should be so limited. For products and services already under development at the time when a class waiver expires, the achievability analysis conducted at that time may take into consideration the developmental stage of the product and the effort and expense needed to achieve accessibility at that point in the developmental stage.

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

include the multiple generations of the covered products or services in the class.

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

146. Several commenters urge us to adopt a time period within which the Commission must automatically grant waiver petitions if it has not taken action on them. We decline to do so. As the Commission noted in the Accessibility NPRM, in contrast to other statutory schemes, the CVAA does not specifically contemplate a "deemed granted" process. Nonetheless, we recognize the importance of expeditious consideration of waiver petitions to avoid delaying the development and release of products and services. We hereby delegate to the Consumer and Governmental Affairs Bureau ("Bureau") the authority to decide all waiver requests filed pursuant to section 716(h)(1) and direct the Bureau to take all steps necessary to do so efficiently and effectively. Recognizing the need to provide certainty to all stakeholders with respect to waivers, we urge the Bureau to act promptly to place waiver requests on public notice and to give waiver requests full consideration and resolve them without delay. The Commission also hereby adopts, similar to its timeline for consideration of applications for transfers or assignments of licenses or authorizations relating to complex mergers, a timeline for consideration of applications for waiver of the rules we adopt herein. This timeline represents the Commission's goal to complete action on such waiver applications within 180 days of public notice. This 180-day timeline for action is especially important in this context, given the need to provide certainty to both the innovators investing risk capital to develop new products and

services, as well as to the stakeholders with an interest in this area. Therefore, it is the Commission's policy to decide all such waiver applications as expeditiously as possible, and the Commission will endeavor to meet its 180-day goal in all cases. Finally, although delay is unlikely, we note that delay beyond the 180-day period in a particular case would not be indicative of how the Commission would resolve an application for waiver.

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

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

149. ESA urges the Commission to exclude from final rules the class "video game

offerings," which it defines to include video game consoles, operating systems, and games. CEA seeks a waiver for "[t]elevision sets that are enabled for use with the Internet," and "[d]igital video players that are enabled for use with the Internet." We decline to adopt or grant these requests at this time. Instead, we believe that petitioners will benefit from the opportunity to re-file these waiver requests consistent with the requirements of this Report and Order. Because of the phase-in period for implementation of these rules, petitioners will have flexibility to seek a waiver subsequent to this Report and Order without incurring unreasonable compliance expense. We encourage petitioners to seek a waiver for their respective classes of equipment and services consistent with the rules we adopt herein. For example, a petition for a waiver of equipment and services may need to seek a waiver for each as individual classes, although they may file for them in the same petition. We will specify in our biennial Report to Congress any waiver requests granted during the previous two years.

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

150. Section 716(h)(2) states that "[t]he Commission may exempt small entities from the requirements of this section." We do not have before us a sufficient record upon which to grant a permanent exemption for small entities. The record also lacks sufficient information on the criteria to be used to determine which small entities to exempt. We therefore seek comment on such an exemption in the Accessibility FNPRM. To avoid the possibility of unreasonably burdening "small and entrepreneurial innovators and the significant value that they add to the economy," we exercise our authority under the Act to temporarily exempt from the obligations of section 716, and by effect section 717, all manufacturers of ACS equipment and all providers of ACS that qualify as small business concerns under the SBA's rules and size standards,

pending development of a record to determine whether small entities should be permanently exempted and, if so, what criteria should be used to define small entities. We find that good cause exists for this temporary exemption.

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

152. We temporarily exempt entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA's rules and size standards. A small business concern, as defined by the SBA, is an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." Entities are affiliated under the SBA's rules when an entity has the power to control another entity, or a third party has the power to control both entities, as determined by factors including "ownership, management, previous relationships with or ties to another concern, and contractual relationships." A concern's primary industry is determined by the "distribution of receipts,

employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year," and other factors including "distribution of patents, contract awards, and assets."

153. The SBA has established maximum size standards used to determine whether a business concern qualifies as a small business concern in its primary industry. The SBA has generally adopted size standards based on the maximum number of employees or maximum annual receipts of a business concern. The SBA categorizes industries for its size standards using the North American Industry Classification System ("NAICS"), a "system for classifying establishments by type of economic activity."

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

155. The temporary exemption will begin on the effective date of the rules adopted in this Report and Order. The temporary exemption will expire on the earlier of (1) the effective date of small entity exemption rules adopted pursuant to the Accessibility FNPRM; or (2)

October 8, 2013.

D. Additional Industry Requirements and Guidance

1. Performance Objectives

156. As proposed in the Accessibility NPRM, we adopt as general performance objectives the requirements that covered equipment and services be accessible, compatible and usable. We incorporate into these general performance objectives the outcome-oriented definitions of accessible, compatibility and usable, contained in §§ 6.3 and 7.3 of the Commission's rules. Most commenters in the record support this approach. The IT and Telecom RERCs, however, disagree and propose that we reframe our Part 6 requirements as goals and testable performance criteria. Because the IT and Telecom RERCs filed their proposal in their Reply Comments, we seek comment in the accompanying Accessibility FNPRM on the IT and Telecom RERCs' general approach and on specific testable performance criteria.

157. We do not adopt specific performance objectives at this time. As we discuss in greater detail in the Accessibility FNPRM, we will defer consideration of specific performance criteria until the Access Board adopts Final Guidelines. As proposed in the Accessibility NPRM, we will wait until after the EAAC provides its recommendations on issues relating to the migration to IP-enabled networks, including the adoption of a real-time text standard, to the Commission in December 2011 to update our performance objectives, as appropriate.

2. Safe Harbors

158. We decline, at this time, to adopt any technical standards as safe harbors. The majority of commenters either oppose the Commission adopting technical standards as safe harbors or only support the adoption of safe harbors subject to important limitations and

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

3. Prospective Guidelines

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

E. Section 717 Recordkeeping and Enforcement

1. Recordkeeping

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

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

- the nature and cost of the steps needed to make equipment and services accessible in the design, development, testing, and deployment process to make a piece of equipment or software in the case of a manufacturer, or service in the case of a service provider, usable by individuals with disabilities. Expert affidavits, attesting that accessibility for a product or service was not achievable, created after a complaint is filed or the Commission launches its own investigation would not satisfy this burden.

Samuelson-Glushko TLPC argues that "[u]ser testing requirements are vital to ensure usable and viable technology access to citizens with disabilities." While we will not impose specific user testing requirements, we support the practice of user testing and agree with Samuelson-Glushko that user testing benefits individuals with a wide range of disabilities. While we do not define here what cost records a covered entity should keep, in reviewing a defense of not achievable, we will expect such entities to produce records that will assist the Commission in identifying the incremental costs associated with designing, developing, testing, and deploying a particular piece of equipment or service with accessibility functionality versus the same equipment or service without accessibility functionality. Additionally, with respect to services, covered entities should be prepared to produce records that identify the average and marginal costs over the expected life of such service. Records that front load costs to demonstrate that accessibility was not achievable will be given little weight.

- the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;
- the type of operations of the manufacturer or service provider; and,
- he extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

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

163. We will not mandate any one form for keeping records (i.e., we adopt a flexible approach to recordkeeping). While we establish uniform recordkeeping and enforcement procedures for entities subject to sections 255, 716, and 718, we believe that covered entities should not be required to maintain records in a specific format. Allowing covered entities the flexibility to implement individual recordkeeping procedures takes into account the variances in covered entities (e.g., size, experience with the Commission), recordkeeping methods, and products and services covered by the provisions. While we are not requiring that records and documents be kept in any specific format, we exercise our authority and discretion under sections 403, 4(i), 4(j), 208 and other provisions of the Act and Commission and court precedent to require production of records and documents in an informal and formal complaint process or in connection with investigations we initiate on our own motion in any form that is conducive to the dispatch of our obligation under the Act, including electronic form and formatted for specific documents review software products such as Summation, as well as paper copies. In addition, we require that all records filed with the Commission be in the English language. Where records are in a language other than English, we require the records to be filed in the native language format accompanied by a certified English translation. We adopt our proposal in the Accessibility NPRM that if a record that a covered entity must produce "is not readily available, the covered entity must provide it no later than the date of its response to the complaint."

164. While we are not requiring entities to adopt a standard approach to recordkeeping, we fully expect that entities will establish and sustain effective internal procedures for creating

and maintaining records that demonstrate compliance efforts and allow for prompt response to complaints and inquiries. As noted in the Section 255 Report and Order, if we determine that covered entities are not maintaining sufficient records to respond to Commission or consumer inquiries, we will revisit this decision.

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

documents would thus be relevant to a Commission-initiated investigation. For these reasons, we find that covered entities must retain records for two years after they cease offering (or in any way distributing) a covered product or service to the public.

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

167. The statute requires that an officer of a manufacturer or service provider annually submit to the Commission a certification that records required to be maintained are being kept in accordance with the statute. We adopt a rule requiring manufacturers and service providers to have an authorized officer sign and file with the Commission the annual certification required pursuant to section 717(a)(5)(B) and our rules. If the manufacturer or service provider is an individual, the individual must sign. In the case of a partnership, one of the partners must sign on behalf of the partnership and by a member with authority to sign in cases where the manufacturer or service provider is, for example, an unincorporated association or other legal entity that does not have an officer or partner, or its equivalent. The certification must state that

the manufacturer or service provider, as applicable, is keeping the records required in compliance with section 717(a)(5)(A) and § 14.31 of our new rules and be supported with an affidavit or declaration under penalty of perjury, signed and dated by the authorized officer of the company with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information therein. All such declarations must comply with § 1.16 of our rules and be substantially in the form set forth therein. We also require the certification to identify the name and contact details of the person or persons within the company that are authorized to resolve complaints alleging violations of our accessibility rules and sections 255, 716, and 718 of the Act, and the name and contact details of the person in the company for purposes of serving complaints under part 14, subpart D of our new rules. The contact details required for purposes of complaints and service must be the U.S. agent for service for the covered entity. This information will be posted on the FCC's website. Finally, the annual certification must be filed with the Commission on or before April 1st each year for records pertaining to the previous calendar year. CGB will issue a public notice to provide filing instructions prior to the first annual certification, which may be required on or before April 1, 2013. For the first certification filing, manufacturers and service providers must certify that, since the effective date of the rules, records have been kept in accordance with the Commission's rules. CGB will establish a system for online filing of annual certifications. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how annual certifications may be filed.

168. Section 717(a)(5)(C) requires the Commission to keep confidential only those records that are: (1) filed by a covered entity at the request of the Commission in response to a

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

169. While we recognize the limited scope of the confidentiality protection of section 717(a)(5)(C), we also recognize that some of the documents falling outside that protection may also qualify for confidentiality under our rules. For those documents submitted in response to a complaint or an investigation, covered entities should follow our existing rules and procedures for protecting confidentiality of records. Accordingly, when a covered entity responds to a complaint alleging a violation of section 255, 716, or 718 or responds to a Commission inquiry, the covered entity may request confidential treatment of the documentation, information, and records that it files with the Commission under § 0.459 of our rules. When covered entities file records that fall within the limited scope of section 717(a)(5)(C), they may assert the statutory exemption from disclosure under § 0.457(c) of the Commission's rules. In all other cases, covered entities must comply with § 0.459 when seeking protection of their records. We remind covered entities that our rules require such entities to file a redacted copy of their response to a complaint or investigation. We do not believe it serves the public interest of the parties in a complaint process for the Commission to try to determine in the first instance what documents

and records the filing party wishes be kept confidential. The party filing documents with the Commission is best suited to make that initial determination. We note that our informal complaint rules require the responding covered entity to serve a non-confidential summary of its complaint answer to the complainant.

170. Finally, as discussed earlier in this Report and Order, products or services offered in interstate commerce shall be accessible, unless not achievable, beginning on October 8, 2013. Pursuant to the statute, one year after the effective date of these regulations, covered entities' recordkeeping obligations become effective.

2. Enforcement

a. Overview

171. Section 717 of the Act requires the Commission to adopt rules that facilitate the filing of formal and informal complaints alleging non-compliance with section 255, 716, or 718 and to establish procedures for enforcement actions by the Commission with respect to such violations, within one year of enactment of the law. In crafting rules to implement the CVAA's enforcement requirements, our goal is to create an enforcement process that is accessible and fair and that allows for timely determinations, while allowing and encouraging parties to resolve matters informally to the extent possible.

b. General Requirements

172. Several commenters suggest that a type of pre-filing notice to potential defendants may facilitate the speedy settlement of consumer disputes, which, they say, would save consumers and industry time and money and preserve Commission resources that would otherwise be expended in the informal complaint process. These commenters urge the Commission to require potential complainants to notify covered entities of their intent to file an

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

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

of informal complaints only. It is not a prerequisite to the filing of a formal complaint, as the complainant and the respondent to a formal complaint proceeding are both required to certify in their pleadings that, prior to the filing of the formal complaint, both parties, "in good faith, discussed or attempted to discuss the possibility of settlement."

174. This Request should contain: (1) the name, address, e-mail address, and telephone number of the consumer and the manufacturer or service provider against whom the complaint will be made; (2) an explanation of why the consumer believes the manufacturer or provider is in violation of section 255, 716, or 718 of the Commission's implementing rules, including details regarding the service or equipment and the relief requested and any documentation that supports the complainant's contention; (3) the approximate date or dates on which the consumer either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service in question; (4) the consumer's preferred format or method of response to the complaint by the Commission and defendant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, or some other method that will best accommodate the consumer's disability); and (5) any other information that may be helpful to CGB and the defendant to understand the nature of the complaint.

175. CGB will forward a copy of the request to the named manufacturer or service provider in a timely manner. As discussed in the Recordkeeping section above, we require covered entities to include their contact information in their annual certifications filed with the Commission. If a covered entity has not filed a certification that includes its contact information (failure to file a certification is a violation of the Commission's rules), CGB shall forward the request to the covered entity based on publicly available information, and the covered entity may not argue that it did not have a sufficient opportunity to settle a potential complaint during the

dispute assistance process. If, in the course of the CGB dispute assistance process, CGB or the parties learn that the Requester has identified the wrong entity or there is more than one covered entity that should be included in the settlement process, then CGB will assist the parties in ascertaining and locating the correct covered entity or entities for the dispute at issue. In this case, the 30-day period will be extended for a reasonable time period, so that the correct covered entities have notice and an opportunity to remedy any failure to make a product or service achievable or to settle the dispute in another manner.

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

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

178. We believe that this dispute assistance process provides an appropriate amount of time to facilitate settlements and provide assistance to consumers to rapidly and efficiently resolve accessibility issues with covered entities. We also believe that this approach will lessen

the hesitation of some consumers to approach companies about their concerns or complaints by themselves. Commission involvement before a complaint is filed will benefit both consumers and industry by helping to clarify the accessibility needs of consumers for the manufacturers or service providers against which they may be contemplating a complaint, encouraging settlement discussions between the parties, and resolving accessibility issues without the expenditure of time and resources in the informal complaint process.

179. No parties opposed the Commission's proposal not to adopt a standing requirement or its proposal to continue taking sua sponte enforcement actions. The language of the statute supports no standing requirement, stating that "[a]ny person alleging a violation . . . may file a formal or informal complaint with the Commission." We believe that any person should be able to identify noncompliance by covered entities and anticipate that informal or formal complaints will be filed by a wide range of complainants, including those with and without disabilities and by individuals and consumer groups. As noted in the Accessibility NPRM, there is no standing requirement under sections 255, 716, and 718 or under section 208 of the Act and our existing rules. Therefore, we find no reason to establish a standing requirement and adopt the Accessibility NPRM's proposal on standing to file. We also find no reason to modify existing procedures for initiating, on our own motion, Commission and staff investigations, inquiries, and proceedings for violations of our rules and the Act. Irrespective of whether a consumer has sought dispute assistance or filed a complaint on a particular issue, we intend to continue using all our investigatory and enforcement tools whenever necessary to ensure compliance with the Act and our rules.

c. Informal Complaints

180. In crafting rules to govern informal accessibility complaints, we have first

examined the requirements of the CVAA, especially our obligation to undertake an investigation to determine whether a manufacturer or service provider has violated core accessibility requirements. While the investigation is pending, the CVAA also encourages private settlement of informal complaints, which may terminate the investigation. When a complaint is not resolved independently between the parties, however, the Commission must issue an order to set forth and fully explain the determination as to whether a violation has occurred. Further, if the Commission finds that a violation has occurred, a defendant manufacturer or service provider may be directed to institute broad remedial measures that have implications and effects far beyond an individual complainant's particular situation, as in an order by the Commission to make accessible the service or the next generation of equipment. Finally, the CVAA requires that the Commission hold as confidential certain materials generated by manufacturers and service providers who may be defendants in informal complaint cases. In addition to these statutory imperatives, we have also carefully considered the comments filed in this proceeding as well as our existing rules that apply to a variety of informal complaints.

181. Taking these factors into account, together with the complexity of issues and highly technical nature of the potential disputes that we are likely to encounter in resolving complaints, the rules we adopt here attempt to balance the interests of both industry and consumers. In this regard, we seek, as much as possible, to minimize the costs and burdens imposed on these parties while both encouraging the non-adversarial resolution of disputes and ensuring that the Commission is able to obtain the information necessary to resolve a complaint in a timely fashion. We discuss these priorities more fully below and set forth both our pleading requirements and the factors that we believe are crucial to our resolution of informal accessibility complaints.

182. We find the public interest would be served by adopting the minimum requirements identified by the Commission in the Accessibility NPRM for informal complaints. Specifically, the rules we adopt will require informal complaints to contain, at a minimum: (1) the name, address, e-mail address, and telephone number of the complainant, and the manufacturer or service provider defendant against whom the complaint is made; (2) a complete statement of facts explaining why the complainant contends that the defendant manufacturer or provider is in violation of section 255, 716, or 718, including details regarding the service or equipment and the relief requested and all documentation that supports the complainant's contention; (3) the date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service about which the complaint is being made; (4) a certification that the complainant submitted to the Commission a Request for Dispute Assistance no less than 30 days before the complaint is filed and the date that the Request was filed; (5) the complainant's preferred format or method of response to the complaint by the Commission and defendant (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, Braille, or some other method that will best accommodate the complainant's disability, if any); and (6) any other information that is required by the Commission's accessibility complaint form.

183. The minimum requirements we adopt for informal complaints are aligned with our existing informal complaint rules and the existing rules governing section 255 complaints and take into account our statutory obligations under the CVAA. They will allow us to identify the parties to be served, the specific issues forming the subject matter of the complaint, and the statutory provisions of the alleged violation, as well as to collect information to investigate the allegations and make a timely accessibility achievability determination. Further, we believe that

these requirements create a simple mechanism for parties to bring legitimate accessibility complaints before the Commission while deterring potential complainants from filing frivolous, incomplete, or inaccurate complaints. Accordingly, we decline to relax or expand the threshold requirements for informal accessibility complaints as advocated by some commenters.

184. As the Commission noted in the Accessibility NPRM, complaints that do not satisfy the pleading requirements will be dismissed without prejudice to re-file. We disagree with AFB that the Commission should work with a complainant to correct any errors before dismissing a defective complaint. Under the statute and the rules we adopt herein, the complainant in an informal complaint process is a party to the proceeding. The informal complaint proceeding is triggered by the filing of the informal complaint. Once the proceeding is initiated, the Commission's role is one of impartial adjudicator – not of an advocate for either the complainant or the manufacturer or service provider that is the subject of the complaint. While we will dismiss defective complaints once filed, we agree with commenters that consumers may need some assistance before filing their complaints. One commenter suggests that it may be difficult for consumers to obtain addresses for potential defendants as required by our rules. All manufacturers and service providers subject to sections 255, 716, and 718 are required to file with the Commission, and regularly update their business address and other contact information. Consumers, therefore, should have a simple means of obtaining this required information. Finally, the Commission may modify content requirements when necessary to accommodate a complainant whose disability may prevent him from providing information required under our rules. Toward that end, consumers may contact the Commission's Disability Rights Office by sending an e-mail to dro@fcc.gov; calling 202-418-2517 (voice) or 202-418-2922 (TTY), or visiting its website at http://transition.fcc.gov/cgb/dro

with any questions regarding where to find contact information for manufacturers and service providers, how to file an informal complaint, and what the complaint should contain.

185. By making the Commission's Disability Rights Office available to consumers with questions, and by carefully crafting the dispute assistance process, we believe that we have minimized any potential minimal burdens that an informal complaint's content requirements may impose on consumers. After a consumer has undertaken the dispute assistance process, CGB and the parties should have identified the correct manufacturer or service provider that the consumer will name in the informal complaint. Indeed, by the conclusion of the dispute assistance process, a consumer should have obtained all the information necessary to satisfy the minimal requirements of an informal complaint.

186. We decline to adopt a requirement suggested by some commenters that consumers be either encouraged or compelled to disclose the nature of their disability in an informal complaint. Nothing in the statute or the rules we adopt herein limits the filing of informal complaints to persons with disabilities or would prevent an advocacy organization, a person without disabilities, or other legal entity from filing a complaint. Thus, not every informal accessibility complaint will necessarily be filed by an individual with a disability. Further, imposing or even suggesting such a disclosure could have privacy implications and discourage some persons from filing otherwise legitimate complaints. To the extent that a particular disability is relevant to the alleged inaccessibility of a product or service, the complainant is free to choose whether to disclose his or her disability in the statement of facts explaining why the complainant believes the manufacturer or service provider is in violation of section 255, 716, or 718.

187. We also decline to permit consumers to assert anonymity when filing informal

accessibility complaints. One commenter suggests that such a procedure should be made available to complainants who may be concerned about retaliation. Anonymity would preclude the complainant from playing an active role in the adjudicatory process and prevent informal contacts and negotiated settlement between parties to resolve an informal complaint filed with the Commission – a possibility clearly favored by the CVAA. We recognize, however, that some consumers who wish to remain anonymous may have valuable information that could prompt the Commission to investigate, on its own motion, a particular entity's compliance with section 255, 716, or 718. We wish to encourage those consumers who do not want to file a complaint with the Commission, for fear of retaliation or other reasons, to provide the Commission with information about non-compliance with section 255, 716, or 718. To do so, consumers may anonymously apprise the Commission of possible unlawful conduct by manufacturers or service providers with respect to accessibility and compliance with section 255, 716, or 718. The Commission will issue a public notice that will provide a Commission e-mail address and voice and TTY number for the receipt of information from members of the public relating to possible section 255, 716, and 718 statutory and rule violations. Consumers may provide such information anonymously. The Commission may use this information to launch its own investigation on its own motion. This process should satisfy the IT and Telecom RERCs' concern that some consumer may wish to provide information but remain anonymous. This may trigger an investigation by the Commission on its own initiative, but supplying such information is not tantamount to filing an informal complaint subject to the procedures we adopt herein.

188. We also decline to establish deadlines for filing an informal accessibility complaint as requested by one party. Specifically, CTIA contends that complaints should be limited to a specified filing window that is tied to either the initial purchase of the equipment or

service or the first instance of perceived inaccessibility. As a preliminary matter, the statute does not impose a "filing window" or "statute of limitations" on the filing of complaints, and we see no reason to adopt such a limit at this time. Further, we have no information beyond conjecture to suggest that consumers would be likely to use the informal complaint process to bring stale accessibility issues before the Commission. The timeliness with which a complaint is brought may, however, have a bearing on its outcome. Complaints that are brought against products or services that are no longer being offered to the public, for example, may be less likely to bring about results that would be beneficial to complainants.

189. Finally, we do not believe that it is necessary to apply more stringent content requirements to informal complaints. We find unpersuasive the contention that complainants should be required to provide some evidentiary showing of a violation beyond the narrative required by new § 14.34(b) of our new rules. In fact, the primary evidence necessary to assess whether a violation has occurred resides with manufacturers and service providers, not with consumers who use their products and services. While a consumer should be prepared to fully explain the manner in which a product or service is inaccessible, inaccessibility alone does not establish a violation. Specifically, a violation exists only if the covered product or service is inaccessible and accessibility was, in fact, achievable. To require that a complaint include evidentiary documentation or analysis demonstrating a violation has occurred would place the complainant in the untenable position of being expected to conduct a complex achievability analysis without the benefit of the data necessary for such an analysis simply in order to initiate the informal complaint process. It is the covered entity that will have the information necessary to conduct such an analysis, not the complainant.

190. While no parties specifically commented on how the Commission should

establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of informal complaints, the Commission has established a process that allows consumers flexibility in the manner in which they choose to file an informal complaint. CGB will establish a system for online filing of informal complaints. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how requests for dispute assistance may be filed. Formal complaints must be filed in accordance with §§ 14.38-14.52 of our new rules. Informal complaints alleging a violation of section 255, 716, or 718 may be transmitted to the Commission via any reasonable means, including by the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or e-mail. The Commission will issue a public notice announcing the establishment of an Enforcement Bureau e-mail address that will accept informal complaints alleging violations of section 255, 716 or 718 or the Commission's rules. We encourage parties to use the Commission's online filing system, because of its ease of use. Informal complaints filed using a method other than the Commission's online system (the Commission will issue a public notice as soon as its online system is established for filing informal complaints alleging violations of the rules adopted in this Report and Order) should include a cover letter that references section 255, 716, or 718 and should be addressed to the Enforcement Bureau. Any party with a question about information that should be included in a complaint alleging a violation of section 255, 716, or 718 should contact the Commission's Disability Rights Office via e-mail at dro@fcc.gov or by calling 202-418-2517 (voice), 202-418-2922 (TTY).

191. Once we receive a complaint, we will forward those complaints meeting the filing requirements, discussed above, to the manufacturer or service provider named in the complaint.

To facilitate service of the complaints on the manufacturer or service provider named in the complaint, we adopt the Commission's proposal to require such entities to disclose points of contact for complaints and inquiries under section 255, 716, or 718 in annual certifications. As discussed in greater detail in General Requirements, supra, failure to file a certification is a violation of our rules. We expect that the parties or the Commission will discover that a covered entity has not filed contact information during the dispute assistance process, that the violation will be remedied during that process, and that the complainant will have the contact information prior to filing a complaint.

192. We believe that requiring such points of contact will facilitate consumers' ability to communicate directly with manufacturers and service providers about accessibility issues or concerns and ensure prompt and effective service of complaints on defendant manufacturers and service providers by the Commission. The contact information must, at a minimum, include the name of the person or office whose principal function will be to ensure the manufacturer or service provider's prompt receipt and handling of accessibility concerns, telephone number (voice and TTY), fax number, and both mailing and e-mail addresses. Covered entities must file their contact information with the Commission in accordance with our rules governing the filing of annual certifications. CGB will establish a system for online filing of contact information. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how contact information may be filed. We intend to make this information available on the Commission's website and also encourage, but do not require, covered entities to clearly and prominently identify the designated points of contact for accessibility matters in, among other places, their company websites, directories, manuals,

brochures, and other promotional materials. Providing such information on a company's website may assist consumers in contacting the companies directly and allow them to resolve their accessibility issues, eliminating any need to seek Commission assistance or file a complaint. Because the contact information is a crucial component of the informal complaint process (i.e., service of the complaint on defendants which, in turn, provides defendants with notice and opportunity to respond), we require that the contact information be kept current. It is critical that the Commission have correct information for service. If the complaint is not served to the correct address, it could delay or prevent the applicable manufacturer or service provider from timely responding. Failure to timely respond to a complaint or order of the Commission could subject a party to sanction or other penalties. In this regard, whenever the information is no longer correct in any material respect, manufacturers and service providers shall file and update the information within 30 days of any change to the information on file with the Commission. Further, failure to file contact information or to keep such information current will be a violation of our rules warranting an upward adjustment of the applicable base forfeiture under section 1.80 of our rules for "[e]gregious misconduct" and "[s]ubstantial harm." Likewise, the violation will be a "continuous violation" until cured.

193. The CVAA provides that the party that is the subject of the complaint be given a reasonable opportunity to respond to the allegations in the complaint before the Commission makes its determination regarding whether a violation occurred. It also allows the party to include in its answer any relevant information (e.g., factors demonstrating that the equipment or advanced communications services, as applicable, are accessible to and usable by individuals with disabilities or that accessibility is not achievable under the standards set out in the CVAA and rules adopted herein). These provisions not only protect the due process rights of defendant

manufacturers and service providers in informal complaint cases but also enable the Commission to compile a complete record to resolve a complaint and conduct the required investigation as to whether a violation of section 255, 716, or 718 has occurred.

194. To implement these provisions of the CVAA, we adopt the Commission's proposal in the Accessibility NPRM with one modification and require answers to informal complaints to: (1) be filed with the Commission and served on the complainant within twenty days of service of the complaint, unless the Commission or its staff specifies another time period; (2) respond specifically to each material allegation in the complaint; (3) set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable; (4) set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable; (5) set forth the manufacturer's or service provider's basis for determining that it was not achievable to make the product or service accessible and usable; (6) provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable; (7) include a declaration by an officer of the manufacturer or service provider attesting to the truth of the facts asserted in the answer; (8) set forth any claimed defenses; (9) set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised; (10) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and (11) be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown. We also adopt the Commission's proposal to allow the complainant ten days, unless otherwise directed by the Commission, to file and serve a reply that is responsive to the matters contained in the answer without the addition of

new matters. We do not anticipate accepting additional filings.

195. Defendants must file complete answers, including supporting records and documentation, with the Commission within the 20-day time period specified by the Commission. While we agree with those commenters that argue that a narrative answer or product design summary would be useful, we disagree that such a response, by itself, is sufficient to allow the Commission to fully investigate and make an accessibility or achievability determination as required by the Act. An answer must comply with all of the requirements listed in the paragraph above and include, where necessary, a discussion of how supporting documents, including confidential documents, support defenses asserted in the answer. We note that, because the CVAA requires that we keep certain of a defendant's documents confidential, we will not require a defendant to serve the complainant a confidential answer that incorporates, and argues the relevance of, confidential documents. Instead, we will require a defendant to file a non-confidential summary of its answer with the Commission and serve a copy on the complainant. The non-confidential summary must contain the essential elements of the answer, including any asserted defenses to the complaint, whether the defendant concedes that the product or service at issue was not accessible, and if so, the basis for its determination that accessibility was not achievable, and other material elements of its answer. The non-confidential summary should provide sufficient information to allow the complainant to file a reply, if he or she so chooses. Complainants may also request a copy of the public redacted version of a defendant's answer, as well as seek to obtain records filed by the defendant through a Freedom of Information Act ("FOIA") filing. The Commission may also use the summary to give context to help guide its review of the detailed records filed by the defendant in its answer.

196. We are also adopting the Commission's proposal in the Accessibility NPRM to

require that defendants include in their answers a declaration by an authorized officer of the manufacturer or service provider of the truth and accuracy of the defense. Such a declaration is not "irrelevant" to whether a manufacturer or service provider has properly concluded that accessibility was not achievable, as it establishes the good faith of the analysis and holds the company accountable for a conclusion that ultimately resulted in an inaccessible product or service. Consistent with requirements for declarations in other contexts, we specify that a declaration here must be made under penalty of perjury, signed and dated by the certifying officer.

197. We are not requiring answers to include the names, titles, and responsibilities of each decisionmaker involved in the process by which a manufacturer or service provider determined that accessibility of a particular offering was not achievable. We agree that such a requirement may be unduly burdensome, given the complexity of the product and service development process. We will, however, reserve our right under the Act to request such information on a case-by-case basis if we determine during the course of an investigation initiated in response to a complaint or our own motion that such information may help uncover facts to support our determination and finding of compliance or non-compliance with the Act.

198. We decline to adopt CTIA's proposal to incorporate the CVAA's limitation on liability, safe harbor, prospective guidelines, and rule of construction provisions into our rules as affirmative defenses. CTIA proposes that we adopt a bifurcated approach to our informal complaint process in which the Commission would determine whether certain affirmative defenses were applicable before requiring the defendant to respond to the complaint in full. We believe that the approach we adopt here is more likely to maximize the efficient resolution of informal complaints than the approach that CTIA recommends. Our rules will afford a

defendant ample opportunity to assert all defenses that the defendant deems germane to its case and assures that the Commission has a complete record to render its decision based on that record within the statutory 180-day timeframe. Because the Commission will be considering all applicable defenses as part of this process, we believe that singling out certain defenses to incorporate into our rules is unwarranted.

199. We also disagree with those commenters that express concern that the Accessibility NPRM did not appear to contemplate that some defendants may claim that their products or services are, in fact, accessible under section 255, 716, or 718. As noted above, the rules we adopt afford defendants ample opportunity to assert such a claim as an affirmative defense to a charge of non-compliance with our rules and to provide supporting documentation and evidence demonstrating that a particular product or service is accessible and usable either with or without third party applications, peripheral devices, software, hardware, or customer premises equipment. We recognize that different information and documentation will be required in an answer depending on the defense or defenses that are asserted. We expect defendants will file all necessary documents and information called for to respond to the complaint and any questions asked by the Commission when serving the complaint or in a letter of inquiry during the course of the investigation. Again, covered entities have the burden of proving that they have satisfied their legal obligations that a product or service is accessible and useable, or if it is not, that it was not achievable.

200. We also disagree with those commenters that contend that the answer requirements, particularly those related to achievability, are "broad and onerous and may subject covered entities to undue burdens."

201. According to these parties, defendants will be compelled to produce, within an

unreasonably short time frame, voluminous documents that may be of marginal value to complainants or the Commission in making determinations regarding accessibility and achievability of a particular product or service or in ensuring that an individual complainant obtains an accessible service or device as promptly as possible. We address these concerns below.

202. We disagree with commenters that the 20-day filing deadline for answers is too short and that we should liberally grant extensions of time within which to file. We believe that the 20-day filing window is reasonable given the 180-day mandatory schedule for resolving informal complaints. Furthermore, the dispute assistance process, described in General Requirements, supra, requires that consumers and manufacturers or service providers explore the possibilities for non-adversarial resolution of accessibility disputes before a consumer may file a complaint. Defendants will, therefore, have ample notice as to the issues in dispute even before an informal complaint is filed. In addition, all parties subject to sections 255, 716, and 718 should already have created documents for their defense due to our recordkeeping rules. As discussed above, this Report and Order places manufacturers and service providers on notice that they bear the burden of showing that they are in compliance with sections 255, 716, and 718 and our implementing rules by demonstrating that their products and services are accessible as required by the statutes and our rules or that they satisfy the defense that accessibility was not readily achievable under section 255 or achievable under the four factors specified in section 716. They should, therefore, routinely maintain any materials that they deem necessary to support their accessibility achievability conclusions and have them available to rebut a claim of non-compliance in an informal complaint or pursuant to an inquiry initiated by the Commission on its own motion.

203. Further, we do not believe additional time to file an answer or provide responsive material is warranted for all complaints based on the possibility that the documentation supporting a covered entity's claim may have been created in a language other than English. Our recordkeeping rules will require English translations of any records that are subject to our recordkeeping requirements to be produced in response to an informal complaint or a Commission inquiry. Parties may seek extensions of time to supplement their answers with translations of documents not subject to the mandatory recordkeeping requirements. We caution, however, that such requests will not be automatically granted, but will require a showing of good cause.

204. Only a covered entity will have control over documents that are necessary for us to comply with the Act's directive that we (1) "investigate the allegations in an informal complaint" and (2) "issue an order concluding the investigation" that "shall include a determination whether any violation [of section 255, 716, or 718 has] occurred." We disagree with CEA that this statute grants us authority to sua sponte close a complaint proceeding without issuing a final determination whether a violation occurs. However, where the complaint on its face shows that the subject matter of the complaint has been resolved, we may dismiss the complaint as defective for failure to satisfy the pleading requirements as discussed above. In addition, where the allegations in an informal complaint allege a violation related to a particular piece of equipment or service that was the subject of a prior order in an informal or formal complaint proceeding, then the Commission may issue an order determining that the allegations of the instant complaint have already been resolved based on the findings and conclusions of the prior order and such other documents and information that bear on the issues presented in the complaint. We reject commenters' concerns that the documentation requirements focus too

strongly on broad compliance investigations rather than on ensuring that an individual complainant is simply able to obtain an accessible product or service. Section 717(a)(1)(B)(i) specifically empowers us to go beyond the situation of the individual complainant and order that a service, or the next generation of equipment, be made accessible. Thus, our investigations with respect to informal complaints are directed to violations of the Act and our rules – not narrowly constrained to an individual complainant obtaining an accessible product or service, as commenters suggest. The dispute assistance process, on the other hand, is designed to assist consumers, manufacturers, or service providers in solving individual issues before a complaint is filed. Covered entities will have ample opportunity, therefore, to address the accessibility needs of potential complainants.

205. Finally, we reject the suggestion that if a defendant chooses to provide a possible replacement product to the complainant, the Commission should automatically stay the answer period while the complainant evaluates the new product. First, we expect that in virtually all cases, any replacement products will have been provided and evaluated during the pre-complaint dispute assistance process. Moreover, while suspending pleading deadlines may relieve the parties from preparing answers or replies that would be unnecessary if the manufacturer or service provider is able to satisfy the complainant's accessibility concerns, it would also substantially delay compilation of a complete record and thereby impede our ability to resolve the complaint within the mandatory 180-day timeframe, should private settlement efforts fail. Accordingly, we decline to adopt any procedure by which pleading deadlines would be automatically or otherwise stayed. We emphasize, nonetheless, that the parties are free to jointly request dismissal of a complaint without prejudice for the purpose of pursuing an informal resolution of an accessibility complaint. In such cases, if informal efforts were unsuccessful in

providing the complainant with an accessible product or service, the complainant could refile the informal complaint at any time and would not be required to use the dispute assistance process again for that particular complaint.

d. Formal Complaints

206. We require both complainants and defendants to: (1) certify in their respective complaints and answers that they attempted in good faith to settle the dispute before the complaint was filed with the Commission; and (2) submit detailed factual and legal support, accompanied by affidavits and documentation, for their respective positions in the initial complaint and answer. The rules also place strict limits on the availability of discovery and subsequent pleading opportunities to present and defend against claims of misconduct.

207. We decline to adopt a rule requiring an informal complaint to be filed prior to the filing of a formal complaint. As with the informal complaint process, we do not want to place any unnecessary barriers in the way of those who choose to use the formal complaint process. In this regard, we agree with commenters that to require a party to file an informal complaint as a prerequisite for filing a formal complaint would create an unnecessary obstacle to complainants. Such a prerequisite is not required in any other Commission complaint process and is inconsistent with the CVAA. For these reasons, we decline to require that an informal complaint be filed prior to the filing of a formal complaint.

208. We disagree with commenters that argue that the formal complaint rules will impose a burden on consumers. Our rules follow the CVAA in providing complainants with two options for filing complaints alleging accessibility violations. We believe the formal complaint process we adopt herein is no more burdensome than necessary given the complexities inherent in litigation generally and is in line with our other formal complaint processes. Like the

Commission's other formal complaint processes, the accessibility formal complaint rules allow parties an opportunity to establish their case through the filing of briefs, answers, replies, and supporting documentation; and allow access to useful information through discovery.

209. If a complainant feels that the formal complaint process is too burdensome or complex, the rules we adopt provide the option to file an informal complaint that is less complex, less costly, and is intended to be pursued without representation by counsel. For example, there is no filing fee associated with filing an informal complaint and the filing can be done by the average consumer. In contrast, there is a filing fee associated with the formal complaint process and, in general, parties are represented by counsel. While complainants may see advantages and disadvantages with either of the processes depending on the specifics of their circumstances, both options provide viable means for seeking redress for what a complainant believes is a violation of our rules. Moreover, we believe that potential complainants are in the best position to determine which complaint process and associated remedies (formal or informal) serve their particular needs.

210. We adopt the Commission's proposal in the Accessibility NPRM to no longer place formal accessibility complaints on the Accelerated Docket. Twelve years before the CVAA was enacted, in the Section 255 Report and Order, the Commission found that the Accelerated Docket rules were appropriate for handling expedited consideration of consumer section 255 formal complaints. In the CVAA, Congress mandated expedited consideration of informal complaints by requiring a Commission Order within 180 days after the date on which a complaint is filed. As discussed in Informal Complaints, supra, we have carefully designed an informal complaint process that will place a minimal burden on complainants, enable both parties to present their cases fully, and require a Commission order within 180 days. We believe

that this consumer-friendly, informal complaint process addresses our concerns that consumer complaints be resolved in a timely manner and provides an adequate substitute for formal Accelerated Docket complaints. In addition, given the "accelerated" or 180-day resolution time-frame for informal complaints, we believe that retaining an "Accelerated Docket" for formal complaints is no longer necessary and, in fact, may impose an unnecessary restriction on the formal complaint process where, as discussed above, the process involves, among other things, filing of briefs, responses, replies, and discovery. Therefore we decline to adopt the Accelerated Docket rules for section 255, 716, and 718 formal complaints.

e. Remedies and Sanctions

211. We intend to adjudicate each informal and formal complaint on its merits and will employ the full range of sanctions and remedies available to us under the Act in enforcing section 255, 716, or 718. Thus, we agree with commenters that the Commission should craft targeted remedies on a case-by-case basis, depending on the record of the Commission's own investigation or a complaint proceeding. For this same reason, while we agree with consumer groups that the Commission should act quickly and that time periods should be as short as practicable to ensure that consumers obtain accessible equipment or services in a timely manner, without the particular facts of a product or service in front of us, we cannot at this time decide what a "reasonable time" for compliance should be. Nevertheless, as the Commission gains more familiarity with services, equipment, and devices through its own investigations and resolution of complaints, our enforcement orders will begin to establish precedent of consistent injunctive relief, periods of compliance, and other sanctions authorized by the Act.

212. We disagree with AT&T's contention that the Accessibility NPRM's proposed formal complaint rules exceed the authority granted the Commission under the CVAA. We

further disagree with AT&T's specific argument that the Commission does not have authority to adopt proposed rule § 8.25, which provides that "a complaint against a common carrier may seek damages." As discussed above, we designed the formal complaint rules to address potential violations of section 255, 716, or 718. In the Section 255 Report and Order, the Commission decided that a complainant could obtain damages for a section 255 violation from a common carrier under section 207. We agree, however, with AT&T that CVAA services that constitute information services and are not offered on a common carrier basis would not be subject to the damages provision of section 207.

213. Neither the CVAA nor the Act addresses permitting prevailing parties to recover attorney's fees and costs in formal or informal complaint proceedings. The Commission cannot award attorney's fees or costs in a section 208 formal complaint proceeding or in any other proceeding absent express statutory authority. We hope that a majority of consumer issues can be resolved through the dispute assistance process and thereby alleviate the need for consumers to file a complaint at all. We also note that consumers need not incur any attorney's fees by providing the Commission with information that allows the Commission to, on its own motion, launch its own independent investigation, including but not limited to a Letter of Inquiry, into potential violations by a covered entity. Any party that would like to provide the Commission with information indicating that a covered entity's product or service is not in compliance with the Commission's rules may do so, without filing a complaint, by e-mailing or telephoning the Enforcement Bureau.

III. PROCEDURAL MATTERS

FINAL REGULATORY FLEXIBILITY ANALYSIS

214. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"), an Initial Regulatory Flexibility Analysis ("IRFA") was included in the Accessibility NPRM in CG Docket No. 10-

213, WT Docket No. 96-198, and CG Docket No. 10-145. The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

215. The Report and Order implements Congress' mandate that people with disabilities have access to advanced communications services ("ACS") and ACS equipment. Specifically, these rules implement sections 716 and 717 of the Communications Act of 1934, as amended, which were added by the "Twenty-First Century Communications and Video Accessibility Act of 2010" ("CVAA").

216. The Report and Order implements the requirements of section 716 of the Act, which requires providers of ACS and manufacturers of equipment used for ACS to make their products accessible to people with disabilities, unless accessibility is not achievable. The Commission also adopts rules to implement section 717 of the Act, which requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and providers subject to sections 255, 716 and 718.

217. The Report and Order applies to ACS, which includes interconnected VoIP, non-interconnected VoIP, electronic messaging service, and interoperable video conferencing service. The Report and Orders requires manufacturers and service providers subject to section 716 to comply with the requirements of section 716 either by building accessibility features into their equipment or service or by relying on third party applications or other accessibility solutions. If accessibility is not achievable by building in accessibility or relying on third party applications or other accessibility solutions, manufacturers and service providers must make their products compatible with existing peripheral devices or specialized customer premises equipment

commonly used by individuals with disabilities to achieve access, unless that is not achievable.

218. The Report and Order holds entities that make or produce end user equipment, including tablets, laptops, and smartphones, responsible for the accessibility of the hardware and manufacturer-installed software used for e-mail, SMS text messaging, and other ACS. The Report and Order also holds these entities responsible for software upgrades made available by such manufacturers for download by users. Additionally, the Report and Order concludes that, except for third party accessibility solutions, there is no liability for a manufacturer of end user equipment for the accessibility of software that is installed or downloaded by a user or made available for use in the cloud.

219. The Report and Order requires manufacturers and service providers to consider performance objectives at the design stage as early and consistently as possible and implement such evaluation to the extent that it is achievable. The Report and Order incorporates into the performance objectives the outcome-oriented definitions of "accessible," "compatibility," and "usable" contained in the rules regarding the accessibility of telecommunications services and equipment. The Report and Order adopts the four statutory factors to determine achievability. The Report and Order further expands on the fourth achievability factor – the extent to which an offering has varied functions, features, and prices – by allowing entities to not consider what is achievable with respect to every product, if such entity offers consumers with the full range of disabilities varied functions, features, and prices.

220. The Report and Order also establishes processes for providers of ACS and ACS equipment manufacturers to seek waivers of the section 716 obligations, both individual and class, for offerings which are designed for multiple purposes but are designed primarily for purposes other than using ACS. The Report and Order clarifies what constitutes "customized

equipment or services" for purposes of an exclusion of the section 716 requirements. Pointing to an insufficient record upon which to grant a permanent exemption for small entities, the Report and Order also temporarily exempts all manufacturers of ACS equipment and all providers of ACS from the obligations of section 716 if they qualify as small business concerns under the Small Business Administration's ("SBA") rules and size standards for the industry in which they are primarily engaged.

221. Specifically, the Report and Order adopted for this temporary exemption the SBA's maximum size standards that are used to determine whether a business concern qualifies as a small business concern in its primary industry. These size standards are based on the maximum number of employees or maximum annual receipts of a business concern. The SBA categorizes industries for its size standards using the North American Industry Classification System ("NAICS"), a "system for classifying establishments by type of economic activity." The Report and Order identified some NAICS codes for possible primary industry classifications of ACS equipment manufacturers and ACS providers and the relevant SBA size standards associated with the codes. This is not a comprehensive list of the primary industries and associated SBA size standards of every possible manufacturer of ACS equipment or provider of ACS. This list is merely representative of some primary industries in which entities that manufacture ACS equipment or provide ACS may be primarily engaged. It is ultimately up to an entity seeking the temporary exemption to make a determination regarding their primary industry, and justify such determination in any enforcement proceeding.

	NAICS Classification	**NAICS Code**	**SBA Size Standard**

Services	Wired Telecommunications Carriers	517110	1,500 or fewer employees
	Wireless Telecommunications Carriers (except satellites)	517210	1,500 or fewer employees
	Telecommunications Resellers	517911	1,500 or fewer employees
	All Other Telecommunications	517919	$25 million or less in annual receipts
	Software Publishers	511210	$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees
	Data Processing, Hosting, and Related Services	518210	$25 million or less in annual receipts
Equipment	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing	334220	750 or fewer employees
	Electronic Computer Manufacturing	334111	1,000 or fewer employees
	Telephone Apparatus Manufacturing	334210	1,000 or fewer employees
	Other Communications Equipment	334290	750 or fewer

	Manufacturing		employees
	Software Publishers	511210	$25 million or less in annual receipts
	Internet Publishing and Broadcasting and Web Search Portals	519130	500 or fewer employees

222. As stated above, the Report and Order indicated that this temporary exemption is self-executing. Under this approach, covered entities must determine whether they qualify for the exemption based upon their ability to meet the SBA's rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding. Entities claiming the exemption must be able to demonstrate that they met the exemption criteria during the estimated start of the design phase of the lifecycle of the product or service that is the subject of the complaint.

223. The Report and Order indicated that such an exemption was necessary to avoid the possibility of unreasonably burdening "small and entrepreneurial innovators and the significant value that they add to the economy. The Report and Order states that the temporary exemption enables us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption. The temporary exemption will begin on the effective date of the rules adopted in the Report and Order and will expire the earlier of the effective date of small entity exemption rules adopted

pursuant to the Further Notice of Proposed Rulemaking ("Accessibility FNPRM") or October 8, 2013.

224. The Report and Order reminds covered entities that, while the Commission does not require them to create and maintain any particular records to claim a defense that it is not achievable for them to make their products or services accessible, they bear the burden of proof on this defense.

B. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues

225. In response to the Accessibility NPRM, one commenter addressed the proposed rules and policies implicated in the IRFA. NTCA requests that the Commission adopt an exemption for small entities from the obligations of section 716 and the Commission's rules implementing section 716 for small telecommunications carriers as defined by the SBA. Alternatively, NTCA requests a waiver process for small entities to seek and qualify for a waiver. NTCA argues that small telecommunications companies "lack the size and resources to influence the design or features of equipment . . . . [and] the purchasing power to enable them to buy equipment in bulk for a reduced price, or to compel sufficient production to ensure that compliant equipment 'trickles down' to smaller purchasers within a specific timeframe."

226. As explained in the Report and Order, we lack a sufficient record upon which to base a permanent exemption for small entities. However, we believe that some relief is necessary for entities that may be unreasonably burdened by conducting an achievability analysis and complying with the recordkeeping and certification requirements as necessary under the Act and in accordance with the Report and Order. Therefore, we exercise our discretion under the

Act to temporarily exempt from the obligations of section 716 providers of ACS and manufacturers of ACS equipment that qualify as small business concerns under the applicable SBA rules and size standards, and seek further comment on whether to exercise our authority to grant a permanent small entity exemption in the Accessibility FNPRM, and if so, what criteria we should apply for defining which small entities should be subject to such permanent exemption. As such, the Report and Order extends temporary relief to all small business concerns that would otherwise have to comply with the Act.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

227. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that face possible significant economic impact by the adoption of proposed rules. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one that (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

228. The following entities have been identified as entities in which a majority of businesses in each category are estimated to be small. NAICS codes are provided where applicable.

- 24 GHz – Incumbent Licensees (517210)
- 24 GHz – Future Licensees (517210)

- 39 GHz Service (517210)
- 218-219 MHz Service (517210)
- 220 MHz Radio Service – Phase I Licensees (517210)
- 220 MHz Radio Service – Phase II Licensees (517210)
- 700 MHz Band Licenses (Upper) (517210)
- 700 MHz Band Licenses (Lower) (517210)
- 700 MHz Guard Band Licenses (517210)
- 800 and 800-Like Service Subscribers (517911)
- 800 MHz and 900 MHz Specialized Mobile Radio Licenses (517210)
- Air-Ground Radiotelephone Service (517210)
- All Other Information Services (519190)
- All Other Telecommunications (including provide interoperable video conferencing services) (517919)
- Aviation and Marine Radio Services (517210)
- AWS Services (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)) (517210)
- Broadband Personal Communications Service (517210)
- Cable and Other Program Distributors (517110)

- Cable Companies and Systems
- Cable System Operators
- Cellular Licensees (517210)
- Certain Equipment Manufacturers and Stores
- Common Carrier Paging (517210)
- Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers (517110)
- Data Processing, Hosting, and Related Services (518210)
- Electronic Computer Manufacturing (334111)
- Fixed Microwave Services (517210)
- Government Transfer Bands. (517210)
- Incumbent Local Exchange Carriers (Incumbent LECs) (517110)
- Interexchange Carriers (517110)
- Internet Publishing and Broadcasting and Web Search Portals (519130)
- Internet Service Providers, Web Portals and Other Information Services (519130)
- Local Resellers (517911)
- Narrowband Personal Communications Services (517210)

- Offshore Radiotelephone Service (517210)
- Open Video Services (517110)
- Operator Service Providers (OSPs) (517110)
- Other Communications Equipment Manufacturing (Manufacturers of Equipment Used to Provide Interoperable Video Conferencing Services) (334290)
- Part 15 Handset Manufacturers (334220)
- Payphone Service Providers (PSPs) (517110)
- Prepaid Calling Card Providers (517110)
- Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing (334220)
- Radio, Television, and Other Electronics Stores (443112)
- Rural Radiotelephone Service (517210)
- Satellite Telecommunications Providers (517410)
- Specialized Mobile Radio (517210)
- Telephone Apparatus Manufacturing (334210)
- Toll Resellers (517911)
- Wired Telecommunications Carriers (including providers of interconnected or non-interconnected VoIP) (517110)

- Wireless Cable Systems (Broadband Radio Service and Educational Broadband Service) (517210)
- Wireless Communications Services (517210)
- Wireless Telecommunications Carriers (except Satellite) (517210)
- Wireless Telephony (517210)

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

229. We summarize below the recordkeeping and certification obligations of the Report and Order. Additional information on each of these requirements can be found in the Report and Order. Again, the Report and Order temporarily exempts all providers of ACS and manufacturers of ACS equipment that qualify as small business concerns under the SBA's rules and size standards for the industry in which they are primarily engaged.

230. Recordkeeping. The Report and Order requires, beginning one year after the effective date of the Report and Order, that each manufacturer of equipment used to provide ACS and each provider of such services subject to sections 255, 716, and 718 not otherwise exempt under the Report and Order, maintain certain records. These records document the efforts taken by a manufacturer or service provider to implement sections 255, 716, and 718. The Report and Order adopts the recordkeeping requirements of the CVAA, which specifically include: (1) information about the manufacturer's or provider's efforts to consult with individuals

with disabilities; (2) descriptions of the accessibility features of its products and services; and (3) information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access. Additionally, while manufacturers and providers are not required to keep records of their consideration of the four achievability factors, they must be prepared to carry their burden of proof, which requires greater than conclusory or unsupported claims. Similarly, entities that rely on third party solutions to achieve accessibility must be prepared to produce relevant documentation.

231. These recordkeeping requirements are necessary to facilitate enforcement of the rules adopted in the Report and Order. The Report and Order builds flexibility into the recordkeeping obligations by allowing covered entities to keep records in any format, recognizing the unique recordkeeping methods of individual entities. Because complaints regarding accessibility of a product or service may not occur for years after the release of the product or service, the Report and Order requires covered entities to keep records for two years from the date the product ceases to be manufactured or a service is offered to the public.

232. Annual Certification Obligations. The CVAA and the Report and Order require an officer of providers of ACS and ACS equipment to submit to the Commission an annual certificate that records are kept in accordance with the above recordkeeping requirements, unless such manufacturer or provider is exempt from compliance with section 716 under applicable rules. The certification must be supported with an affidavit or declaration under penalty of perjury, signed and dated by an authorized officer of the entity with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information. The certification must be filed with the Consumer and Governmental Affairs

Bureau on or before April 1 each year for records pertaining to the previous calendar year.

233. Costs of Compliance. There is an upward limit on the cost of compliance for covered entities. Under the CVAA and Report and Order accessibility is required unless it is not achievable. Under two of the four achievability factors from the Act and adopted in the Report and Order, covered entities may demonstrate that accessibility is not achievable based on the nature and cost of steps needed or the technical and economic impact on the entity's operation. Entities that are not otherwise exempt or excluded under the Report and Order must nonetheless be able to demonstrate that they conducted an achievability analysis, which necessarily requires the retention of some records.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

234. The RFA requires an agency to describe any significant alternatives it considered in developing its approach, which may include the following four alternatives, among others: "(1) the establishment of differing compliance or certification requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and certification requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

235. For rules adopted that impose some burden on small entities, the Commission considered alternatives where possible, as directed by the RFA. Most significantly, the Commission considered and adopted a temporary exemption for all small entities that qualify as small business concerns under the SBA's rules and size standards. All entities may avoid compliance if accessibility is not achievable, may seek a waiver for products or services that are

not designed primarily for ACS, and may keep records in any format.

236. The rules require covered entities to ensure that products and services are accessible, unless not achievable. This is a statutory requirement, therefore no alternatives were considered. However, this requirement has built-in flexibility. All entities may demonstrate that accessibility is unachievable either through building accessibility features into the product or service or by utilizing third party solutions. Achievability is determined through a four factor analysis that examines: The nature and cost of the steps needed to meet the requirements of section 716(g) with respect to the specific equipment or service in question; the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies; the type of operations of the manufacturer or provider; the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

237. We note that two of the four factors look at factors that are particularly relevant to small entities: the nature and cost of the steps need to meet the section 716 requirements and the technical and economic impact on the entity's operations. Therefore, as explained further below, this achievability analysis provides a statutorily based means of minimizing the economic impact of the CVAA's requirements on small entities. Further, when accessibility is not achievable, covered entities must ensure that their products and services are compatible, unless not achievable. This again is a statutory requirement with built-in flexibility though the achievability analysis.

238. The rules require covered entities to consider performance objectives at the design stage as early and consistently as possible. This requirement is necessary to ensure that

accessibility is considered at the point where it is logically best to incorporate accessibility. The CVAA and the Report and Order are naturally performance-driven. The CVAA and Report and Order avoid mandating particular designs and instead focus on an entity's compliance with the accessibility requirements through whatever means the entity finds necessary to make its product or service accessible, unless not achievable. This provides flexibility by allowing all entities, including small entities, to meet their obligations through the best means for a given entity instead of the Commission explicitly mandating a rigid requirement.

239. With respect to recordkeeping and certification requirements, these requirements are necessary in order to demonstrate compliance with the requirements of the Report and Order and CVAA and to facilitate an effective and efficient complaint process. As described above, we adopt flexible requirements that allow covered entities to keep records in any format they wish. In the Report and Order, we found that this approach took into account the variances in covered entities (e.g., size, experience with the Commission), recordkeeping methods, and products and services covered by the CVAA. Moreover, we found that it also provided the greatest flexibility to small businesses and minimized the impact that the statutorily mandated requirements impose on small businesses. Correspondingly, we considered and rejected the alternative of imposing a specific format or one-size-fits-all system for recordkeeping that could potentially impose greater burdens on small businesses. Furthermore, the certification requirement is possibly less burdensome on small businesses than large, as it merely requires certification from an officer that the necessary records were kept over the previous year; this is presumably a less resource intensive certification for smaller entities.

240. While ensuring accessibility and keeping records may impose some burdens, as discussed, the Report and Order includes significant flexibility for small entities. First, the

achievability factors in the CVAA may mitigate adverse impacts and reduce burdens on small entities. Under the achievability factors as discussed above, an otherwise covered entity can demonstrate that accessibility is unachievable and therefore avoid compliance. The first and second factors are particularly relevant to small entities and the special circumstances they face. The first factor considers the nature and cost of the steps needed to meet the requirements with respect to the specific equipment or service in question, and the second considers the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question. If achievability is overly expensive or has some significant negative technical or economic impact on a covered entity, the entity can show that accessibility was not achievable as a defense to a complaint.

241. The Report and Order also includes significant relief for small and other entities including a temporary exemption from the obligations of section 716 and section 717 for qualifying small entities, waiver criteria under which all covered entities may seek a waiver of the obligations of section 716, and an exemption for customized equipment. Under the Report and Order, customized equipment offered to businesses and other enterprise customers is expressly exempt. Additionally, all providers and manufacturers, or classes of providers and manufacturers, are able to seek a waiver for equipment or services that are capable of accessing ACS. These two provisions allow any entity, including small entities, to avoid the burden of compliance with the accessibility and recordkeeping requirements if they meet the requirements for either provision.

242. Further, while we could have opted to not exercise our discretionary authority to exempt small entities, we found that even in the absence of meaningful comments regarding whether to grant a permanent small entity exemption, there was good cause to provide temporary

relief and avoid imposing an unreasonable burden upon small entities and negatively impacting the value they add to the economy. In the Report and Order, we therefore decided some exemption is necessary to provide relief to those entities for which even conducting an achievability analysis would consume an unreasonable amount of resources. Finding good cause for granting such relief, the Report and Order temporarily exempts ACS providers and ACS equipment manufacturers that qualify as small business concerns under the SBA's rules and size standards.

243. Specifically, the Report and Order temporarily exempts entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA's rules and size standards. A small business concern, as defined by the SBA, is an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." The Report and Order stated that if an entity no longer meets the exemption criteria, it must comply with section 716 and section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria. The temporary exemption will begin on the effective date of the rules adopted in the Report and Order and will expire the earlier of the effective date of small entity exemption rules adopted pursuant to the Accessibility FNPRM or October 8, 2013.

F. Federal Rules that May Duplicate, Overlap, or Conflict with Proposed Rules

Section 255(e) of the Act, as amended, directs the United States Access Board ("Access Board") to develop equipment accessibility guidelines "in conjunction with" the Commission, and

periodically to review and update those guidelines. We view the Access Board's current guidelines as well as its draft guidelines as starting points for our interpretation and implementation of sections 716 and 717 of the Act, as well as section 255, but because they do not currently cover ACS or equipment used to provide or access ACS, we must necessarily adapt these guidelines in our comprehensive implementation scheme. As such, our rules do not overlap, duplicate, or conflict with either Access Board Final Rules, or (if later adopted) the Access Board Draft Guidelines. Where obligations under section 255 and section 716 overlap, for instance for accessibility requirements for interconnected VoIP, we clarify in the Report and Order which rules govern the entities' obligations.

ORDERING CLAUSES

244. Accordingly, it is ordered that pursuant to sections 1-4, 255, 303(r), 403, 503, 716, 717, and 718 of the Communications Act of 1934, as amended, 47 U.S.C. 151-154, 255, 303(r), 403, 503, 617, 618, and 619, this Report and Order is hereby adopted.

245. It is further ordered that parts 1, 6 and 7 of the Commission's rules, 47 CFR parts 1, 6, and 7, are amended, and new part 14 of the Commission's rules, 47 CFR part 14 is added effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

246. It is further ordered that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of the Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

247. It is further ordered that the Commission shall send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Individuals with disabilities, Radio, Reporting and recordkeeping requirements, Satellites, Telecommunications.

47 CFR Parts 6 and 7

Communications equipment, Individuals with disabilities, Telecommunications.

47 CFR Part 14

Advanced communications services equipment, Manufacturers of equipment used for advanced communications services, Providers of advanced communications services, Individuals with disabilities, Recordkeeping and enforcement requirements.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 6 and 7 and adds new part 14 as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 et seq.; 47 U.S.C. 151, 154, 160, 201, 225, 303, 617 and 618.

2. Amend § 1.80 by redesignating paragraphs (b)(3), (b)(4), (b)(5), and (b)(6) as paragraphs (b)(4), (b)(5), (b)(6), and (b)(7) and by adding new paragraph (b)(3) and revising newly redesignated paragraph (b)(5) to read as follows:

§ 1.80 Forfeiture Proceedings.

* * * * *

(b) * * *

(3) If the violator is a manufacturer or service provider subject to the requirements of section 255, 716 or 718 of the Communications Act, and is determined by the Commission to have violated any such requirement, the manufacturer or service provider shall be liable to the United States for a forfeiture penalty of not more than $100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

*****

(5) In any case not covered in paragraphs (b)(1) through (b)(4) of this section, the amount of any forfeiture penalty determined under this section shall not exceed $16,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $112,500 for any single act or failure to act described in paragraph (a) of this section.

* * * * *

PART 6 – ACCESS TO TELECOMMUNICATIONS SERVICE, TELECOMMUNICATIONS EQUIPMENT AND CUSTOMER PREMISES EQUIPMENT BY PERSONS WITH DISABILITIES

3. The authority citation for part 6 continues to read as follows:

Authority: 47 U.S.C. 151-154, 251, 255, 303(r), 617, 618.

4. Revise § 6.15 to read as follows:

§ 6.15 Generally.

(a) All manufacturers of telecommunications equipment or customer premises equipment and all providers of telecommunications services, as defined under this subpart are subject to the enforcement provisions specified in the Act and the Commission's rules.

(b) For purposes of §§ 6.15 through 6.23, the term “manufacturers” shall denote manufacturers of telecommunications equipment or customer premises equipment and the term “providers” shall denote providers of telecommunications services.

5. Revise § 6.16 to read as follows:

§ 6.16 Informal or formal complaints.

Sections 6.17 through 6.23 of this subpart shall sunset on October 8, 2013. On October 8, 2013, any person may file either a formal or informal complaint against a manufacturer or provider alleging violations of section 255 or this part subject to the enforcement requirements set forth in §§ 14.30 through 14.52 of this chapter.

PART 7 – ACCESS TO VOICEMAIL AND INTERACTIVE MENU SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

6. The authority citation for part 7 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 208, 255, 617, 618.

7. Section 7.15 is amended by revising paragraph (b) to read as follows:

§ 7.15 Generally.

*****

(b) All manufacturers of telecommunications equipment or customer premises equipment and all providers of voicemail and interactive menu services, as defined under this subpart, are subject to the enforcement provisions specified in the Act and the Commission's rules.

*****

8. Revise § 7.16 to read as follows:

§ 7.16 Informal or formal complaints.

Sections 7.17 through 7.23 of this subpart shall sunset on October 8, 2013. On October 8, 2013, any person may file either a formal or informal complaint against a manufacturer or provider alleging violations of section 255 or this part subject to the enforcement requirements set forth in §§ 14.30 through 14.52 of this chapter.

9. Add part 14 to read as follows:

PART 14 - ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES

Subpart A – Scope

Sec.

Subpart B – Definitions

Subpart C – Implementation Requirements – What must Covered Entities Do?

Subpart D – Recordkeeping, Consumer Dispute Assistance, and Enforcement

Authority: 47 U.S.C. 151-154, 255, 303, 403, 503, 617, 618 unless otherwise noted.

Subpart A – Scope

§ 14.1 Applicability.

Except as provided in §§ 14.2, 14.3, 14.4 and 14.5 of this chapter, the rules in this part apply to:

(a) Any manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, that such manufacturer offers for sale or otherwise distributes in interstate commerce;

(b) Any provider of advanced communications services that such provider offers in or affecting interstate commerce.

§ 14.2 Limitations.

(a) Except as provided in paragraph (b) of this section no person shall be liable for a violation of the requirements of the rules in this part with respect to advanced communications services or equipment used to provide or access advanced communications services to the extent such person--

(1) Transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of advanced communications services by a third party; or

(2) Provides an information location tool, such as a directory, index, reference, pointer, menu, guide, user interface, or hypertext link, through which an end user obtains access to such advanced communications services or equipment used to provide or access advanced communications services.

(b) The limitation on liability under paragraph (a) of this section shall not apply to any person who relies on third party applications, services, software, hardware, or equipment to comply with the requirements of the rules in this part with respect to advanced communications services or equipment used to provide or access advanced communications services.

(c) The requirements of this part shall not apply to any equipment or services, including interconnected VoIP service, that were subject to the requirements of Section 255 of the Act on

October 7, 2010, which remain subject to Section 255 of the Act, as amended, and subject to the rules in parts 6 and 7 of this chapter, as amended.

§ 14.3 Exemption for Customized Equipment or Services.

(a) The rules in this part shall not apply to customized equipment or services that are not offered directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(b) A provider of advanced communications services or manufacturer of equipment used for advanced communications services may claim the exemption in paragraph (a) of this section as a defense in an enforcement proceeding pursuant to subpart D of this part, but is not otherwise required to seek such an affirmative determination from the Commission.

§ 14.4 Exemption for Small Entities.

(a) A provider of advanced communications services or a manufacturer of equipment used for advanced communications services to which this part applies is exempt from the obligations of this part if such provider or manufacturer, at the start of the design of a product or service:

(1) Qualifies as a business concern under 13 CFR 121.105; and

(2) Together with its affiliates, as determined by 13 CFR 121.103, meets the relevant small business size standard established in 13 CFR 121.201 for the primary industry in which it is engaged as determined by 13 CFR 121.107.

(b) A provider or manufacturer may claim this exemption as a defense in an enforcement proceeding pursuant to subpart D of this part, but is not otherwise required to seek such an affirmative determination from the Commission.

(c) This exemption will expire no later than October 8, 2013.

§ 14.5 Waivers – Multipurpose Services and Equipment.

(a) Waiver. (1) On its own motion or in response to a petition by a provider of advanced communications services, a manufacturer of equipment used for advanced communications services, or by any interested party, the Commission may waive the requirements of this part for any feature or function of equipment used to provide or access advanced communications services, or for any class of such equipment, for any provider of advanced communications services, or for any class of such services, that –

(i) Is capable of accessing an advanced communications service and;

(ii) Is designed for multiple purposes, but is designed primarily for purposes other than using advanced communications services.

(2) For any waiver petition under this section, the Commission will examine on a case-by-case basis –

(i) Whether the equipment or service is designed to be used for advanced communications purposes by the general public; and

(ii) Whether and how the advanced communications functions or features are advertised, announced, or marketed.

(b) Class Waiver. For any petition for a waiver of more than one advanced communications service or one piece of equipment used for advanced communications services where the service or equipment share common defining characteristics, in addition to the requirements of §§ 14.5(a)(1) and (2), the Commission will examine the similarity of the service or equipment subject to the petition and the similarity of the advanced communications features or functions of such services or equipment.

(c) Duration. (1) A petition for a waiver of an individual advanced communications service or equipment used for advanced communications services may be granted for the life of the service or equipment as supported by evidence on the record, or for such time as the Commission determines based on evidence on the record.

(2) A petition for a class waiver may be granted for a time to be determined by the Commission based on evidence on the record, including the lifecycle of the equipment or service in the class. Any class waiver granted under this section will waive the obligations of this part for all advanced communications services and equipment used for advanced communications services subject to a class waiver and made available to the public prior to the expiration of such waiver.

(d) Public notice. All petitions for waiver filed pursuant to this section shall be put on public notice, with a minimum of a 30-day period for comments and oppositions.

Subpart B – Definitions

§ 14.10 Definitions.

(a) The term accessible shall have the meaning provided in § 14.21(b).

(b) The term achievable shall mean with reasonable effort or expense, as determined by the Commission. In making such a determination, the Commission shall consider:

(1) The nature and cost of the steps needed to meet the requirements of section 716 of the Act and this part with respect to the specific equipment or service in question;

(2) The technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;

(3) The type of operations of the manufacturer or provider; and

(4) The extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.

(c) The term advanced communications services shall mean:

(1) Interconnected VoIP service, as that term is defined in this section;

(2) Non-interconnected VoIP service, as that term is defined in this section;

(3) Electronic messaging service, as that term is defined in this section; and

(4) Interoperable video conferencing service, as that term is defined in this section.

(d) The term application shall mean software designed to perform or to help the user perform a specific task or specific tasks, such as communicating by voice, electronic text messaging, or video conferencing.

(e) The term compatible shall have the meaning provided in § 14.21(d).

(f) The term customer premises equipment shall mean equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(g)The term customized equipment or services shall mean equipment and services that are produced or provided to meet unique specifications requested by a business or enterprise customer and not otherwise available to the general public, including public safety networks and devices.

(h) The term disability shall mean a physical or mental impairment that substantially limits one or more of the major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment.

(i) The term electronic messaging service means a service that provides real-time or near real-time non-voice messages in text form between individuals over communications networks.

(j) The term end user equipment shall mean equipment designed for consumer use. Such equipment may include both hardware and software components.

(k) The term hardware shall mean a tangible communications device, equipment, or physical component of communications technology, including peripheral devices, such as a smart phone, a laptop computer, a desktop computer, a screen, a keyboard, a speaker, or an amplifier.

(l) The term interconnected VoIP service shall have the same meaning as in § 9.3 of this chapter, as such section may be amended from time to time.

(m) An interoperable video conferencing service means a service that provides real-time video communications, including audio, to enable users to share information of the user's choosing.

(n) The term manufacturer shall mean an entity that makes or produces a product, including equipment used for advanced communications services, including end user equipment, network equipment, and software.

(o) The term network equipment shall mean equipment facilitating the use of a network, including, routers, network interface cards, networking cables, modems, and other related hardware. Such equipment may include both hardware and software components.

(p) The term nominal cost in regard to accessibility and usability solutions shall mean small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires**.**

(q) A non- interconnected VoIP service is a service that:

(1) Enables real-time voice communications that originate from or terminate to the user's location using Internet protocol or any successor protocol; and

(2) Requires Internet protocol compatible customer premises equipment; and

(3) Does not include any service that is an interconnected VoIP service.

(r) The term peripheral devices shall mean devices employed in connection with equipment, including software, covered by this part to translate, enhance, or otherwise transform advanced communications services into a form accessible to individuals with disabilities.

(s) The term service provider shall mean a provider of advanced communications services that are offered in or affecting interstate commerce, including a provider of applications and services that can be used for advanced communications services and that can be accessed (i.e., downloaded or run) by users over any service provider network.

(t) The term software shall mean programs, procedures, rules, and related data and documentation that direct the use and operation of a computer or related device and instruct it to perform a given task or function.

(u) The term specialized customer premises equipment shall mean customer premise equipment which is commonly used by individuals with disabilities to achieve access.

(v) The term usable shall have the meaning provided in § 14.21(c).

Subpart C – Implementation Requirements – What must Covered Entities Do?

§ 14.20 Obligations.

(a) General Obligations. (1) With respect to equipment manufactured after the effective date of this part, a manufacturer of equipment used for advanced communications services, including end user equipment, network equipment, and software, must ensure that the equipment and software that such manufacturer offers for sale or otherwise distributes in interstate commerce shall be accessible to and usable by individuals with disabilities, unless the requirements of this subsection are not achievable.

(2) With respect to services provided after the effective date of this part, a provider of advanced communications services must ensure that services offered by such provider in or affecting interstate commerce are accessible to and usable by individuals with disabilities, unless the requirements of this paragraph are not achievable.

(3) If accessibility is not achievable either by building it in or by using third party accessibility solutions available to the consumer at nominal cost and that individuals with disabilities can

access, then a manufacturer or service provider shall ensure that its equipment or service is compatible with existing peripheral devices or specialized customer premises equipment, unless the requirements of this subsection are not achievable.

(4) Providers of advanced communications services shall not install network features, functions, or capabilities that impede accessibility or usability.

(5) Providers of advanced communications services, manufacturers of equipment used with these services, and providers of networks used with these services may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through such services, equipment or networks.

(b) Product design, development, and evaluation. (1) Manufacturers and service providers must consider performance objectives set forth in § 14.21 at the design stage as early as possible and must implement such performance objectives, to the extent that they are achievable.

(2) Manufacturers and service providers must identify barriers to accessibility and usability as part of such evaluation.

(c) Information Pass Through. Equipment used for advanced communications services, including end user equipment, network equipment, and software must pass through cross-manufacturer, nonproprietary, industry-standard codes, translation protocols, formats or other information necessary to provide advanced communications services in an accessible format, if achievable. Signal compression technologies shall not remove information needed for access or shall restore it upon decompression.

(d) Information, documentation, and training. Manufacturers and service providers must ensure that the information and documentation that they provide to customers is accessible, if achievable. Such information and documentation includes, but is not limited to, user guides, bills, installation guides for end user devices, and product support communications. The requirement to ensure the information is accessible also includes ensuring that individuals with disabilities can access, at no extra cost, call centers and customer support regarding both the product generally and the accessibility features of the product.

§ 14.21 Performance Objectives.

(a) Generally. Manufacturers and service providers shall ensure that equipment and services covered by this part are accessible, usable, and compatible as those terms are defined in paragraphs (b) through (d) of this section.

(b) Accessible. The term accessible shall mean that:

(1) Input, control, and mechanical functions shall be locatable, identifiable, and operable in accordance with each of the following, assessed independently:

(i) Operable without vision. Provide at least one mode that does not require user vision.

(ii) Operable with low vision and limited or no hearing. Provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.

(iii) Operable with little or no color perception. Provide at least one mode that does not require user color perception.

(iv) Operable without hearing. Provide at least one mode that does not require user auditory perception.

(v) Operable with limited manual dexterity. Provide at least one mode that does not require user fine motor control or simultaneous actions.

(vi) Operable with limited reach and strength. Provide at least one mode that is operable with user limited reach and strength.

(vii) Operable with a Prosthetic Device. Controls shall be operable without requiring body contact or close body proximity.

(viii) Operable without time-dependent controls. Provide at least one mode that does not require a response time or allows response time to be by-passed or adjusted by the user over a wide range.

(ix) Operable without speech. Provide at least one mode that does not require user speech.

(x) Operable with limited cognitive skills. Provide at least one mode that minimizes the cognitive, memory, language, and learning skills required of the user.

(2) All information necessary to operate and use the product, including but not limited to, text, static or dynamic images, icons, labels, sounds, or incidental operating cues, [shall] comply with each of the following, assessed independently:

(i) Availability of visual information. Provide visual information through at least one mode in auditory form.

(ii) Availability of visual information for low vision users. Provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.

(iii) Access to moving text. Provide moving text in at least one static presentation mode at the option of the user.

(iv) Availability of auditory information. Provide auditory information through at least one mode in visual form and, where appropriate, in tactile form.

(v) Availability of auditory information for people who are hard of hearing. Provide audio or acoustic information, including any auditory feedback tones that are important for the use of the product, through at least one mode in enhanced auditory fashion (i.e., increased amplification, increased signal-to-noise ratio, or combination).

(vi) Prevention of visually-induced seizures. Visual displays and indicators shall minimize visual flicker that might induce seizures in people with photosensitive epilepsy.

(vii) Availability of audio cutoff. Where a product delivers audio output through an external speaker, provide an industry standard connector for headphones or personal listening devices (e.g., phone-like handset or earcup) which cuts off the speaker(s) when used.

(viii) Non-interference with hearing technologies. Reduce interference to hearing technologies (including hearing aids, cochlear implants, and assistive

listening devices) to the lowest possible level that allows a user to utilize the product.

(ix) Hearing aid coupling. Where a product delivers output by an audio transducer which is normally held up to the ear, provide a means for effective wireless coupling to hearing aids.

(c) Usable.The term usable shall mean that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation and technical support functionally equivalent to that provided to individuals without disabilities.

(d) Compatible. The term compatible shall mean compatible with peripheral devices and specialized customer premises equipment, and in compliance with the following provisions, as applicable:

(1) External electronic access to all information and control mechanisms. Information needed for the operation of products (including output, alerts, icons, on-line help, and documentation) shall be available in a standard electronic text format on a cross-industry standard port and all input to and control of a product shall allow for real time operation by electronic text input into a cross-industry standard external port and in cross-industry standard format. The cross-industry standard port shall not require manipulation of a connector by the user.

(2) Connection point for external audio processing devices. Products providing auditory output shall provide the auditory signal at a standard signal level through an industry standard connector.

(3) TTY connectability. Products that provide a function allowing voice communication and which do not themselves provide a TTY functionality shall provide a standard non-acoustic connection point for TTYs. It shall also be possible for the user to easily turn any microphone on and off to allow the user to intermix speech with TTY use.

(4) TTY signal compatibility. Products, including those providing voice communication functionality, shall support use of all cross-manufacturer non-proprietary standard signals used by TTYs.

Subpart D – Recordkeeping, Consumer Dispute Assistance, and Enforcement

§ 14.30 Generally.

(a) The rules in this subpart regarding recordkeeping and enforcement are applicable to all manufacturers and service providers that are subject to the requirements of sections 255, 716, and 718 of the Act and parts 6, 7 and 14 of this chapter.

(b) The requirements set forth in § 14.31 of this subpart shall be effective **January 30, 2013.**

(c) The requirements set forth in §§ 14.32 through 14.37 of this subpart shall be effective on October 8, 2013.

§ 14.31 Recordkeeping.

(a) Each manufacturer and service provider subject to section 255, 716, or 718 of the Act, must create and maintain, in the ordinary course of business and for a two year period from the date a

product ceases to be manufactured or a service ceases to be offered, records of the efforts taken by such manufacturer or provider to implement sections 255, 716, and 718 with regard to this product or service, as applicable, including:

(1) Information about the manufacturer's or service provider's efforts to consult with individuals with disabilities;

(2) Descriptions of the accessibility features of its products and services; and

(3) Information about the compatibility of its products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.

(b) An officer of each manufacturer and service provider subject to section 255, 716, or 718 of the Act, must sign and file an annual compliance certificate with the Commission.

(1) The certificate must state that the manufacturer or service provider, as applicable, has established operating procedures that are adequate to ensure compliance with the recordkeeping rules in this subpart and that records are being kept in accordance with this section and be supported with an affidavit or declaration under penalty of perjury, signed and dated by the authorized officer of the company with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information therein.

(2) The certificate shall identify the name and contact details of the person or persons within the company that are authorized to resolve complaints alleging violations of our accessibility rules and sections 255, 716, and 718 of the Act, and the agent designated for service pursuant to § 14.35(b) of this subpart and provide contact information for this agent. Contact information shall include, for the manufacturer or the service provider, a name or department designation, business address, telephone number, and, if available TTY number, facsimile number, and e-mail address.

(3) The annual certification must be filed with the Commission on April 1, 2013 and annually thereafter for records pertaining to the previous calendar year. The certificate must be updated when necessary to keep the contact information current.

(c) Upon the service of a complaint, formal or informal, on a manufacturer or service provider under this subpart, a manufacturer or service provider must produce to the Commission, upon request, records covered by this section and may assert a statutory request for confidentiality for these records under 47 U.S.C. 618(a)(5)(C) and § 0.457(c) of this chapter. All other information submitted to the Commission pursuant to this subpart or pursuant to any other request by the Commission may be submitted pursuant to a request for confidentiality in accordance with § 0.459 of this chapter.

§ 14.32 Consumer Dispute Assistance.

(a) A consumer or any other party may transmit a Request for Dispute Assistance to the Consumer and Governmental Affairs Bureau by any reasonable means, including by the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or e-mail to dro@fcc.gov. Any Requests filed using a method other than the Commission's online system should include a cover letter that references section 255, 716, or 718 or the rules of parts 6, 7, or 14 of this chapter and should be addressed to the Consumer and Governmental Affairs Bureau. Any party with a question about information that should be included in a Request for Dispute Assistance should e-mail the Commission's Disability Rights Office at dro@fcc.gov or call 202-418-2517 (voice), 202-418-2922 (TTY).

(b) A Request for Dispute Assistance shall include:

(1) The name, address, e-mail address, and telephone number of the party making the Request (Requester);

(2) The name of the manufacturer or service provider that the requester believes is in violation of section 255, 716, or 718 or the rules in this part, and the name, address, and telephone number of the manufacturer or service provider, if known;

(3) An explanation of why the requester believes the manufacturer or service provider is in violation of section 255, 716, or 718 or the rules in this part, including details regarding the service or equipment and the relief requested, and all documentation that supports the requester's contention;

(4) The date or dates on which the requester either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service in question;

(5) The Requester's preferred format or method of response to its Request for Dispute Assistance by CGB or the manufacturer or service provider (e.g., letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, Braille, or some other method that will best accommodate the Requester's disability, if any);

(6) Any other information that may be helpful to CGB and the manufacturer or service provider to understand the nature of the dispute;

(7) Description of any contacts with the manufacturer or service provider to resolve the dispute, including, but not limited to, dates or approximate dates, any offers to settle, etc.; and

(8) What the Requester is seeking to resolve the dispute.

(c) CGB shall forward the Request for Dispute Assistance to the manufacturer or service provider named in the Request. CGB shall serve the manufacturer or service provider using the contact details of the certification to be filed pursuant to § 14.31(b). Service using contact details provided pursuant to § 14.31(b) is deemed served. Failure by a manufacturer or service provider to file or keep the contact information current will not be a defense of lack of service.

(d) CGB will assist the Requester and the manufacturer or service provider in reaching a settlement of the dispute.

(e) Thirty days after the Request for Dispute Assistance was filed, if a settlement has not been reached between the Requester and the manufacturer or service provider, the Requester may file an informal complaint with the Commission,;

(f) When a Requester files an informal complaint with the Enforcement Bureau, as provided in § 14.34, the Commission will deem the CGB dispute assistance process closed and the requester and manufacturer or service provider shall be barred from further use of the Commission's dispute assistance process so long as a complaint is pending.

§ 14.33 Informal or formal complaints.

Complaints against manufacturers or service providers, as defined under this subpart, for alleged violations of this subpart may be either informal or formal.

§ 14.34 Informal complaints; form, filing, content, and consumer assistance.

(a) An informal complaint alleging a violation of section 255, 716 or 718 of the Act or parts 6, 7, or 14 of this chapter this part may be transmitted to the Enforcement Bureau by any reasonable means, including the Commission’s online informal complaint filing

system, U.S. Mail, overnight delivery, or e-mail. Any Requests filed using a method other than the Commission's online system should include a cover letter that references section 255, 716, or 718 or the rules of parts 6, 7, or 14 of this chapter and should be addressed to the Enforcement Bureau.

(b) An informal complaint shall include:

(1) The name, address, e-mail address, and telephone number of the complainant;

(2) The name, address, and telephone number of the manufacturer or service provider defendant against whom the complaint is made;

(3) The date or dates on which the complainant or person(s) on whose behalf the complaint is being filed either purchased, acquired, or used or attempted to purchase, acquire, or use the equipment or service about which the complaint is being made;

(4) A complete statement of fact explaining why the complainant contends that the defendant manufacturer or provider is in violation of section 255, 716 or 718 of the Act or the Commission's rules, including details regarding the service or equipment and the relief requested, and all documentation that supports the complainant's contention;

(5) A certification that the complainant submitted to the Commission a Request for Dispute Assistance, pursuant to § 14.32, no less than 30 days before the complaint is filed;

(6) The complainant's preferred format or method of response to the complaint by the Commission and defendant (e.g., letter, facsimile transmissions, telephone

(voice/TRS/TTY), e-mail, audio-cassette recording, Braille, or some other method that will best accommodate the complainant's disability, if any); and

(7) Any other information that is required by the Commission's accessibility complaint form.

(c) Any party with a question about information that should be included in an Informal Complaint should e-mail the Commission's Disability Rights Office at dro@fcc.gov or call 202-418-2517 (voice), 202-418-2922 (TTY).

§ 14.35 Procedure; designation of agents for service.

(a) The Commission shall forward any informal complaint meeting the requirements of § 14.34 of this subpart to each manufacturer and service provider named in or determined by the staff to be implicated by the complaint.

(b) To ensure prompt and effective service of informal and formal complaints filed under this subpart, every manufacturer and service provider subject to the requirements of section 255, 716, or 718 of the Act and parts 6, 7, or 14 of this chapter shall designate an agent, and may designate additional agents if it so chooses, upon whom service may be made of all notices, inquiries, orders, decisions, and other pronouncements of the Commission in any matter before the Commission. The agent shall be designated in the manufacturer or service provider's annual certification pursuant to § 14.31.

§ 14.36 Answers and replies to informal complaints.

(a) After a complainant makes a prima facie case by asserting that a product or service is not accessible, the manufacturer or service provider to whom the informal complaint is directed bears the burden of proving that the product or service is accessible or, if not accessible, that accessibility is not achievable under this part or readily achievable under parts 6 and 7. To carry

its burden of proof, a manufacturer or service provider must produce documents demonstrating its due diligence in exploring accessibility and achievability, as required by parts 6, 7, or 14 of this chapter throughout the design, development, testing, and deployment stages of a product or service. Conclusory and unsupported claims are insufficient to carry this burden of proof.

(b) Any manufacturer or service provider to whom an informal complaint is served by the Commission under this subpart shall file and serve an answer responsive to the complaint and any inquires set forth by the Commission.

(1) The answer shall:

(i) Be filed with the Commission within twenty days of service of the complaint, unless the Commission or its staff specifies another time period;

(ii) Respond specifically to each material allegation in the complaint and assert any defenses that the manufacturer or service provider claim;

(iii) Include a declaration by an officer of the manufacturer or service provider attesting to the truth of the facts asserted in the answer;

(iv) Set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised;

(v) Provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and

(vi) Be prepared or formatted, including in electronic readable format compatible with the Commission's Summation or other software in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.

(2) If the manufacturer's or service provider's answer includes the defense that it was not achievable for the manufacturer or service provider to make its product or service accessible, the manufacturer or service provider shall carry the burden of proof on the defense and the answer shall:

(i) Set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable;

(ii) Set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable in cases where the manufacturer or service provider alleges it was not achievable to do so;

(iii) Set forth the manufacturer's basis for determining that it was not achievable to make the product or service accessible and usable in cases where the manufacturer or service provider so alleges; and

(iv) Provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable in cases where the manufacturer or service provider so alleges.

(c) Any manufacturer or service provider to whom an informal complaint is served by the Commission under this subpart shall serve the complainant and the Commission with a non-confidential summary of the answer filed with the Commission within twenty days of service of the complaint. The non-confidential summary must contain the essential elements of the answer, including, but not limited to, any asserted defenses to the complaint, must address the material elements of its answer, and include sufficient information to allow the complainant to file a reply, if the complainant chooses to do so.

(d) The complainant may file and serve a reply. The reply shall:

(1) Be served on the Commission and the manufacturer or service provider that is subject of the complaint within ten days after service of answer, unless otherwise directed by the Commission;

(2) Be responsive to matters contained in the answer and shall not contain new matters.

§ 14.37 Review and disposition of informal complaints.

(a) The Commission will investigate the allegations in any informal complaint filed that satisfies the requirements of § 14.34(b) of this subpart, and, within 180 days after the date on which such complaint was filed with the Commission, issue an order finding whether the manufacturer or service provider that is the subject of the complaint violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, and provide a basis therefore, unless such complaint is resolved before that time.

(b) If the Commission determines in an order issued pursuant to paragraph (a) of this section that the manufacturer or service provider violated section 255, 716, or 718 of the Act, or the Commission's implementing rules, the Commission may, in such order, or in a subsequent order:

(1) Direct the manufacturer or service provider to bring the service, or in the case of a manufacturer, the next generation of the equipment or device, into compliance with the requirements of section 255, 716, or 718 of the Act, and the Commission's rules, within a reasonable period of time; and

(2) Take such other enforcement action as the Commission is authorized and as it deems appropriate.

(c) Any manufacturer or service provider that is the subject of an order issued pursuant to paragraph (b)(1) of this section shall have a reasonable opportunity, as established by the Commission, to comment on the Commission's proposed remedial action before the Commission issues a final order with respect to that action.

§ 14.38 Formal Complaints; General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings.

(a) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

(b) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(c) Facts must be supported by relevant documentation or affidavit.

(d) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(e) Opposing authorities must be distinguished.

(f) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as

well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(h) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

(i) Pleadings shall identify the name, address, telephone number, and facsimile transmission number for either the filing party's attorney or, where a party is not represented by an attorney, the filing party.

§ 14.39 Format and content of formal complaints.

(a) Subject to paragraph (d) of this section governing supplemental complaints filed pursuant to § 14.39 of this subpart, a formal complaint shall contain:

(1) The name of each complainant and defendant;

(2) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;

(3) The name, address, and telephone number of complainant's attorney, if represented by counsel;

(4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.

(5) A complete statement of facts which, if proven true, would constitute such a violation. All material facts must be supported, pursuant to the requirements of § 14.38(c) of this subpart and paragraph (a)(11) of this section, by relevant affidavits and documentation, including copies of relevant written agreements, offers, counter-offers, denials, or other related correspondence. The statement of facts shall include a detailed explanation of the manner and time period in which a defendant has allegedly violated the Act, Commission order, or

Commission rule in question, including a full identification or description of the communications, transmissions, services, or other carrier conduct complained of and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the plaintiff's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(6) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint;

(7) The relief sought, including recovery of damages and the amount of damages claimed, if known;

(8) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter outlining the allegations that form the basis of the complaint it anticipated filing with the Commission to the defendant carrier or one of the defendant's registered agents for service of process that invited a response within a reasonable period of time and a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint. If no additional steps were taken, such certificate shall state the reason(s) why the complainant believed such steps would be fruitless;

(9) Whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part,

or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission;

(10) An information designation containing:

(i) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the complaint, along with a description of the facts within any such individual's knowledge;

(ii) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control, that are relevant to the facts alleged with particularity in the complaint. Such description shall include for each document:

(A) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(B) The author, preparer, or other source;

(C) The recipient(s) or intended recipient(s);

(D) Its physical location; and

(E) A description of its relevance to the matters contained in the complaint; and

(iii) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(11) Copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the complaint;

(12) A completed Formal Complaint Intake Form;

(13) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and the complainant's 10-digit FCC Registration Number, if any;

(14) A certificate of service; and

(15) A FCC Registration Number is required under part 1, subpart W. Submission of a complaint without the FCC Registration Number as required by part 1, subpart W will result in dismissal of the complaint.

(b) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

Before the Federal Communications Commission, Washington, DC 20554

In the matter of

Complainant,

v.

Defendant.

File No. (To be inserted by the Enforcement Bureau)

Complaint

To: The Commission.

The complainant (here insert full name of each complainant and, if a corporation, the corporate title of such complainant) shows that:

(1) (Here state post office address, and telephone number of each complainant).

(2) (Here insert the name, and, to the extent known, address and telephone number of defendants).

(3) (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give a full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired).

(Date)

(Name of each complainant)

(Name, address, and telephone number of attorney, if any)

(c) The complainant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

(d) Supplemental complaints.

(1) Supplemental complaints filed pursuant to § 14.39 shall conform to the requirements set out in this section and § 14.38 of this subpart, except that the requirements in §§ 14.38(b), 14.39 (a)(4), (a)(5), (a)(8), (a)(9), (a)(12), and (a)(13) of this subpart shall not apply to such supplemental complaints;

(2) In addition, supplemental complaints filed pursuant to § 14.39 of this subpart shall contain a complete statement of facts which, if proven true, would support complainant's calculation of damages for each category of damages for which recovery is sought. All material facts must be supported, pursuant to the requirements of § 14.38(c) of this subpart and paragraph (a)(11) of this section, by relevant affidavits and other documentation. The statement of facts shall include a detailed explanation of the matters relied upon, including a full identification or description of the communications, transmissions, services, or other matters relevant to the calculation of damages and the nature of any injury allegedly sustained by the complainant. Assertions based on information and belief are expressly

prohibited unless made in good faith and accompanied by an affidavit explaining the basis for the complainant's belief and why the complainant could not reasonably ascertain the facts from the defendant or any other source;

(3) Supplemental complaints filed pursuant to § 14.39 of this subpart shall contain a certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with respect to damages for which recovery is sought with each defendant prior to the filing of the supplemental complaint. Such certification shall include a statement that, no later than 30 days after the release of the liability order, the complainant mailed a certified letter to the primary individual who represented the defendant carrier during the initial complaint proceeding outlining the allegations that form the basis of the supplemental complaint it anticipates filing with the Commission and inviting a response from the carrier within a reasonable period of time. The certification shall also contain a brief summary of all additional steps taken to resolve the dispute prior to the filing of the supplemental complaint. If no additional steps were taken, such certification shall state the reason(s) why the complainant believed such steps would be fruitless.

§ 14.40 Damages.

(a) A complaint against a common carrier may seek damages. If a complainant wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.

(b) If a complainant wishes a determination of damages to be made in the same proceeding as the determinations of liability and prospective relief, the complaint must contain the allegations and information required by paragraph (h) of this section.

(c) Notwithstanding paragraph (b) of this section, in any proceeding to which no statutory deadline applies, if the Commission decides that a determination of damages would best be

made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(d) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

(1) Comply with paragraph (a) of this section, and

(2) State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.

(e) If a complainant proceeds pursuant to paragraph (d) of this section, or if the Commission invokes its authority under paragraph (c) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint that complies with § 14.39(d) of this subpart and paragraph (h) of this section within sixty days after public notice (as defined in § 1.4(b) of this chapter) of a decision that contains a finding of liability on the merits of the original complaint.

(f) If a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(g) Where a complainant chooses to seek the recovery of damages upon a supplemental complaint in accordance with the requirements of paragraph (e) of this section, the

Commission will resolve the separate, preceding liability complaint within any applicable complaint resolution deadlines contained in the Act.

(h) In all cases in which recovery of damages is sought, it shall be the responsibility of the complainant to include, within either the complaint or supplemental complaint for damages filed in accordance with paragraph (e) of this section, either:

(1) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(2) An explanation of:

(i) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(ii) Why such information is unavailable to the complaining party;

(iii) The factual basis the complainant has for believing that such evidence of damages exists;

(iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.

(i) Where a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the following procedures may apply:

(1) Issues concerning the amount, if any, of damages may be either designated by the Enforcement Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the following manner:

(i) By agreement of the parties and the Chief Administrative Law Judge; or

(ii) In the absence of such agreement, the Chief Administrative Law Judge shall designate the Administrative Law Judge.

(2) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

(i) The complainant's potential irreparable injury in the absence of such deposit;

(ii) The extent to which damages can be accurately calculated;

(iii) The balance of the hardships between the complainant and the defendant; and

(iv) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(3) The Commission may, in its discretion, suspend ongoing damages proceedings for fourteen days, to provide the parties with a time within which to pursue settlement negotiations and/or alternative dispute resolution procedures.

(4) The Commission may, in its discretion, end adjudication of damages with a determination of the sufficiency of a damages computation method or formula. No such method or formula shall contain a provision to offset any claim of the defendant against the complainant. The parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within thirty days of the release date of the damages order, parties shall submit jointly to the Commission either:

(i) A statement detailing the parties' agreement as to the amount of damages;

(ii) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(iii) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(j) Except where otherwise indicated, the rules governing initial formal complaint proceedings govern supplemental formal complaint proceedings, as well.

§ 14.41 Joinder of complainants and causes of action.

(a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act.

(b) Two or more grounds of complaint involving the same principle, subject, or statement of facts may be included in one complaint, but should be separately stated and numbered.

§ 14.42 Answers.

(a) Any defendant upon whom copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within twenty days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are expressly prohibited unless made in good faith and accompanied by an affidavit explaining the basis for

the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

(c) The answer shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the answer.

(d) Averments in a complaint or supplemental complaint filed pursuant to §§ 14.38 and 14.39 of this subpart are deemed to be admitted when not denied in the answer.

(e) Affirmative defenses to allegations contained in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (c) of this section.

(f) The answer shall include an information designation containing:

(1) The name, address, and position of each individual believed to have firsthand knowledge of the facts alleged with particularity in the answer, along with a description of the facts within any such individual's knowledge;

(2) A description of all documents, data compilations and tangible things in the defendant's possession, custody, or control, that are relevant to the facts alleged with particularity in the answer. Such description shall include for each document:

(i) The date it was prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the defendant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information.

(g) The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.

(h) The answer shall contain certification that the defendant has, in good faith, discussed or attempted to discuss, the possibility of settlement with the complainant prior to the filing of the formal complaint. Such certification shall include a brief summary of all steps taken to resolve the dispute prior to the filing of the formal complaint. If no such steps were taken, such certificate shall state the reason(s) why the defendant believed such steps would be fruitless;

(i) The defendant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

§ 14.43 Cross-complaints and counterclaims.

Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate

complaint in accordance with §§ 14.38 through 14.40 of this subpart. For purposes of this subpart, the term “cross-complaint” shall include counterclaims.

§ 14.44 Replies.

(a) Within three days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 14.42(e) of this subpart, a complainant may file and serve a reply containing statements of relevant, material facts and legal arguments that shall be responsive to only those specific factual allegations and legal arguments made by the defendant in support of its affirmative defenses. Replies which contain other allegations or arguments will not be accepted or considered by the Commission.

(b) Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the reply.

(d) The reply shall include an information designation containing:

(1) The name, address and position of each individual believed to have firsthand knowledge about the facts alleged with particularity in the reply, along with a description of the facts within any such individual's knowledge.

(2) A description of all documents, data compilations and tangible things in the complainant's possession, custody, or control that are relevant to the facts alleged with particularity in the reply. Such description shall include for each document:

(i) The date prepared, mailed, transmitted, or otherwise disseminated;

(ii) The author, preparer, or other source;

(iii) The recipient(s) or intended recipient(s);

(iv) Its physical location; and

(v) A description of its relevance to the matters in dispute.

(3) A complete description of the manner in which the complainant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute, including, but not limited to, identifying the individual(s) that conducted the information search and the criteria used to identify such persons, documents, data compilations, tangible things, and information;

(e) The reply shall attach copies of all affidavits, documents, data compilations and tangible things in the complainant's possession, custody, or control upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the reply.

(f) The complainant may petition the staff, pursuant to § 1.3 of this chapter, for a waiver of any of the requirements of this section. Such waiver may be granted for good cause shown.

§ 14.45 Motions.

(a) A request to the Commission for an order shall be by written motion, stating with particularity the grounds and authority therefor, and setting forth the relief or order sought.

(b) All dispositive motions shall contain proposed findings of fact and conclusions of law, with supporting legal analysis, relevant to the contents of the pleading. Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion. All facts relied upon in motions must be supported by documentation or affidavits pursuant to the requirements of § 14.38(c) of this subpart, except for those facts of which official notice may be taken.

(c) The moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly marked as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 14.51(d) of this subpart. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(d) Oppositions to any motion shall be accompanied by a proposed order for adoption, which appropriately incorporates the basis therefor, including proposed findings of fact and conclusions of law relevant to the pleading. The proposed order shall be clearly captioned as a "Proposed Order." The proposed order shall be submitted both as a hard copy and on computer disk in accordance with the requirements of § 14.51(d) of this subpart. Where appropriate, the proposed order format should conform to that of a reported FCC order.

(e) Oppositions to motions may be filed and served within five business days after the motion is filed and served and not after. Oppositions shall be limited to the specific issues and allegations contained in such motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting of the motion.

(f) No reply may be filed to an opposition to a motion.

(g) Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.

(h) Amendments or supplements to complaints to add new claims or requests for relief are prohibited. Parties are responsible, however, for the continuing accuracy and completeness of

all information and supporting authority furnished in a pending complaint proceeding as required under § 14.38(g) of this subpart.

§ 14.46 Formal complaints not stating a cause of action; defective pleadings.

(a) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act or a Commission rule or order will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within the statutory periods of limitations of actions contained in section 415 of the Communications Act.

(b) Any other pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

§ 14.47 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Requests for interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to

the material facts in dispute in the pending proceeding, provided, however, that requests for interrogatories filed and served by a complainant after service of the defendant's answer shall be limited in scope to specific factual allegations made by the defendant in support of its affirmative defenses. This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.

(b) Requests for interrogatories filed and served pursuant to paragraph (a) of this section shall contain a listing of the interrogatories requested and an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

(c) A responding party shall file with the Commission and serve on the propounding party any opposition and objections to the requests for interrogatories as follows:

(1) By the defendant, within ten calendar days of service of the requests for interrogatories served simultaneously with the complaint and within five calendar days of the requests for interrogatories served following service of the answer;

(2) By the complainant, within five calendar days of service of the requests for interrogatories; and

(3) In no event less than three calendar days prior to the initial status conference as provided for in § 14.50(a) of this subpart.

(d) Commission staff will consider the requests for interrogatories, properly filed and served pursuant to paragraph (a) of this section, along with any objections or oppositions thereto, properly filed and served pursuant to paragraph (b) of this section, at the initial status

conference, as provided for in § 14.50(a)(5) of this subpart, and at that time determine the interrogatories, if any, to which parties shall respond, and set the schedule of such response.

(e) The interrogatories ordered to be answered pursuant to paragraph (d) of this section are to be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them. The answers shall be filed with the Commission and served on the propounding party.

(f) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a Commission-ordered discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of § 14.45 of this subpart.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that provides:

(1) Indexing by useful identifying information about the documents; and

(2) Technology that allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. In its discretion, the Commission may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

§ 14.48 Confidentiality of information produced or exchanged by the parties.

(a) Any materials generated in the course of a formal complaint proceeding may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(b) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff; and

(5) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information shall sign a

notarized statement affirmatively stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(e) Upon termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

§ 14.49 Other required written submissions.

(a) The Commission may, in its discretion, or upon a party's motion showing good cause, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence.

(b) Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned. The Commission may, in its discretion, limit the scope of any briefs to certain subjects or issues. A party shall attach to its brief copies of all documents, data compilations, tangible things, and affidavits upon which such party relies or intends to rely to support the facts alleged and legal arguments made in its brief and such brief shall contain a full explanation of how each attachment is relevant to the issues and matters in

dispute. All such attachments to a brief shall be documents, data compilations or tangible things, or affidavits made by persons, that were identified by any party in its information designations filed pursuant to §§ 14.39(a)(10)(i), (a)(10)(ii), 14.27(f)(1), (f)(2), and 14.44(d)(1), (d)(2) of this subpart. Any other supporting documentation or affidavits that are attached to a brief must be accompanied by a full explanation of the relevance of such materials and why such materials were not identified in the information designations. These briefs shall contain the proposed findings of fact and conclusions of law which the filing party is urging the Commission to adopt, with specific citation to the record, and supporting relevant authority and analysis.

(c) In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs. If the Commission does authorize the filing of briefs in cases in which discovery is not conducted, briefs shall be filed concurrently by both the complainant and defendant at such time as designated by the Commission staff and in accordance with the provisions of this section.

(d) In cases in which discovery is conducted, briefs shall be filed concurrently by both the complainant and defendant at such time designated by the Commission staff.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 14.48 of this subpart shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked “Not for Public Inspection.” An edited version removing all proprietary data shall also be filed with the Commission for inclusion in the public file. Edited versions shall be filed within five days from the date the unedited brief is submitted, and served on opposing parties.

(f) Initial briefs shall be no longer than twenty-five pages. Reply briefs shall be no longer than ten pages. Either on its own motion or upon proper motion by a party, the Commission staff may establish other page limits for briefs.

(g) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

(h) The parties shall submit a joint statement of stipulated facts, disputed facts, and key legal issues no later than two business days prior to the initial status conference, scheduled in accordance with the provisions of § 14.50(a) of this subpart.

§ 14.50 Status conference.

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. Unless otherwise ordered by the Commission, an initial status conference shall take place, at the time and place designated by the Commission staff, ten business days after the date the answer is due to be filed. A status conference may include discussion of:

(1) Simplification or narrowing of the issues;

(2) The necessity for or desirability of additional pleadings or evidentiary submissions;

(3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(4) Settlement of all or some of the matters in controversy by agreement of the parties;

(5) Whether discovery is necessary and, if so, the scope, type and schedule for such discovery;

(6) The schedule for the remainder of the case and the dates for any further status conferences; and

(7) Such other matters that may aid in the disposition of the complaint.

(b)(1) Parties shall meet and confer prior to the initial status conference to discuss:

(i) Settlement prospects;

(ii) Discovery;

(iii) Issues in dispute;

(iv) Schedules for pleadings;

(v) Joint statement of stipulated facts, disputed facts, and key legal issues; and

(2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff at least two business days prior to the scheduled initial status conference.

(c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.

(d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Parties may make, upon written notice to the Commission and all attending parties at least three business days prior to the status conference, an audio recording of the Commission staff's summary of its oral rulings. Alternatively, upon agreement among all attending parties and written notice to the Commission at least three business days prior to the status conference, the parties may make an audio recording of, or use a stenographer to transcribe, the oral

presentations and exchanges between and among the participating parties, insofar as such communications are “on-the-record” as determined by the Commission staff, as well as the Commission staff's summary of its oral rulings. A complete transcript of any audio recording or stenographic transcription shall be filed with the Commission as part of the record, pursuant to the provisions of paragraph (f)(2) of this section. The parties shall make all necessary arrangements for the use of a stenographer and the cost of transcription, absent agreement to the contrary, will be shared equally by all parties that agree to make the record of the status conference.

(f) The parties in attendance, unless otherwise directed, shall either:

(1) Submit a joint proposed order memorializing the oral rulings made during the conference to the Commission by 5:30 pm, Eastern Time, on the business day following the date of the status conference, or as otherwise directed by Commission staff. In the event the parties in attendance cannot reach agreement as to the rulings that were made, the joint proposed order shall include the rulings on which the parties agree, and each party's alternative proposed rulings for those rulings on which they cannot agree. Commission staff will review and make revisions, if necessary, prior to signing and filing the submission as part of the record. The proposed order shall be submitted both as hard copy and on computer disk in accordance with the requirements of § 14.51(d) of this subpart; or

(2) Pursuant to the requirements of paragraph (e) of this section, submit to the Commission by 5:30 pm., Eastern Time, on the third business day following the status conference or as otherwise directed by Commission staff either:

(i) A transcript of the audio recording of the Commission staff's summary of its oral rulings;

(ii) A transcript of the audio recording of the oral presentations and exchanges between and among the participating parties, insofar as such communications are “on-the-record” as determined by the Commission staff, and the Commission staff's summary of its oral rulings; or

(iii) A stenographic transcript of the oral presentations and exchanges between and among the participating parties, insofar as such communications are “on-the-record” as determined by the Commission staff, and the Commission staff's summary of its oral rulings.

(g) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(h) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties and/or counsel present.

§ 14.51 Specifications as to pleadings, briefs, and other documents; subscription.

(a) All papers filed in any formal complaint proceeding must be drawn in conformity with the requirements of §§ 1.49 and 1.50 of this chapter.

(b) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(c) The original of all pleadings and other submissions filed by any party shall be signed by the party, or by the party's attorney. The signing party shall include in the document his or her address, telephone number, facsimile number and the date on which the document was signed.

Copies should be conformed to the original. Unless specifically required by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certificate that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed solely for purposes of delay or for any other improper purpose.

(d) All proposed orders shall be submitted both as hard copies and on computer disk formatted to be compatible with the Commission's computer system and using the Commission's current word processing software. Each disk should be submitted in “read only” mode. Each disk should be clearly labeled with the party's name, proceeding, type of pleading, and date of submission. Each disk should be accompanied by a cover letter. Parties who have submitted copies of tariffs or reports with their hard copies need not include such tariffs or reports on the disk. Upon showing of good cause, the Commission may waive the requirements of this paragraph.

§ 14.52 Copies; service; separate filings against multiple defendants.

(a) Complaints may generally be brought against only one named defendant; such actions may not be brought against multiple defendants unless the defendants are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall file an original copy of the complaint and, on the same day:

(1) File three copies of the complaint with the Office of the Commission Secretary;

(2) Serve two copies on the Enforcement Bureau;

and

(3) If a complaint is addressed against multiple defendants, file three copies of the complaint with the Office of the Commission Secretary for each additional defendant.

(c) Generally, a separate file is set up for each defendant. An original plus two copies shall be filed of all pleadings and documents, other than the complaint, for each file number assigned.

(d) The complainant shall serve the complaint by hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(e) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by facsimile transmission to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall send, by regular U.S. mail delivery, to each defendant named in the complaint, a copy of the complaint. The Commission shall additionally send, by regular U.S. mail to all parties, a schedule detailing the date the answer will be due and the date, time and location of the initial status conference.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or by facsimile transmission followed by regular U.S. mail delivery, together with a proof of such service in accordance with the requirements of § 1.47(g) of this chapter. Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service such as, or comparable to, the US Postal Service Express Mail, United Parcel Service or Federal Express; or

(3) Service by facsimile transmission that is fully transmitted to the office of the recipient by 5:30 pm, local time of the recipient, on a business day will be deemed served that day. Service by facsimile transmission that is fully transmitted to the office of the recipient after 5:30 pm, local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaint proceedings. Supplemental complaints filed pursuant to § 14.39 of this subpart shall conform to the requirements set out in this section, except that the complainant need not submit a filing fee, and the complainant may effect service pursuant to paragraph (f) of this section rather than paragraph (d) of this section.

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