Voice on the Net Coalition
c/o Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122
www.von.org
TEL: 202.663.8215 | FAX: 202.513.8006
Email: glenn.richards@pillsburylaw.com

August 12, 2011

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

***Re: Ex Parte Letter in CG Docket No. 11-47; CG Docket No. 10-213***

Dear Ms. Dortch:

On August 10, 2011, the Voice on the Net Coalition, represented by Glenn Richards, VON Executive Director, and Paula Boyd of Microsoft, met with Rick Kaplan, Jane Jackson and Elizabeth Lyle of the Wireless Telecommunications Bureau to discuss the Commission's implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"). The conversation focused largely on the scope of the FCC's authority and touched on other issues raised in VON's filings in the above-referenced proceedings.

## A. VON Positions noted in the Meeting

During the meeting, VON made the following requests:

- Scope. VON asked that the FCC (1) appropriately tailor the scope of its regulations to the contours of the CVAA and (2) distinguish between advanced communications goods versus services.

  VON noted that the authority conferred by Congress in the CVAA allows the FCC to reach a manufacturer of a device used for advanced communications service (ACS) or a provider of ACS. It does not extend the FCC's reach to every manufacturer or developer of components involved in these devices or services. Thus, the CVAA does not allow the FCC to reach chip makers or software developers whose products are components of an ACS or devices used for ACS since a consumer cannot use these individual components on their own for ACS. To interpret the CVAA otherwise would constitute a massive and unsupported expansion of the FCC's authority.

During the meeting VON also asked the FCC to recognize the difference between a good and a service in defining what constitutes an ACS. Unlike a service provider, a provider of goods does not have an ongoing relationship with the consumer. In implementing its communications authority, the FCC has distinguished services from non-services such as in the case of distinguishing telecommunications from telecommunications service. In Section B, we provide additional information on this distinction and touch on other issues.

- Compliance Timeframe. The FCC should adopt a compliance timeframe of two or more years. Given the variety of products impacted it will be important for the FCC to provide industry with sufficient time to come into compliance with its rules. Industry will need at least two years after the FCC adopts its rules to incorporate accessibility solutions in their products and services.

- Electronic Messaging. The CVAA defines electronic messaging service as a service that enables "individuals" to exchange messages in text form in "real-time or near real-time." The Commission's rules should clarify that this definition does not include blogs, online publishing, messages posted on websites and similar messaging since these communications are not real-time or near real-time or between actual human beings. VON reiterated that the rules should make clear that machine-to-machine or machine-to-person communications are not covered, because they are not "between individuals."

- Waiver Process. VON highlighted the importance of providing waivers that are not time limited. This will provide certainty for industry in indentifying what products will be subject to the FCC's rules. A waiver will not preclude a consumer from bringing a complaint or the FCC from finding that a product is subject to the FCC's rules since in doing so, the FCC would have to find that the advanced communications service is a primary purpose of the device or product. In addition, as it builds products industry often will work in conjunction with the FCC to anticipate whether it will need to comply with the FCC's rules. This presents another mechanism for ensuring that accessibility solutions will be made available.

- Section 718 and not Section 716 defines the FCC's authority with respect to browsers. VON stated that Section 718 defines the FCC's authority with respect to browsers that work with smart phones and Section 718 does not confer authority upon the FCC to regulate developers of browsers in smart phones. This is a classic case of Congress adopting a specific provision (on browsers in Section 718) that trumped the general requirement (found in Section 716) and that the Commission should rely solely on Section 718. *See generally Morales v. Trans*

*World Airlines, Inc.*, 504 U.S. 374 (1992) ("It is a commonplace of statutory construction that the specific governs the general.").

**B. Additional VON Arguments for the Record**

In addition to the points made during the meetings, VON offers additional information on scope, interoperable video conferencing services and beta products:

- **Section 718 limits the FCC's authority to manufacturers of devices used for ACS and service providers of ACS**. This means that the FCC is without authority to regulate devices that do not provide an ACS or a software provider that is not providing an ACS. It also remains important that the FCC gives meaning to the concept of "service" and not attempt to reach the many providers of products and developers of software that may facilitate advanced communications, but who do not actually provide a service. This framework remains consistent with Congress' previous grants of authority to the FCC which have focused on specific communications service, service providers, and device manufacturers.

  Section 716(a) focuses on manufacturers of devices used for ACS including devices that involve "end user equipment, network equipment, and software." Sec 716(a) is not an independent grant of authority to the FCC to reach all makers of components involved in the ACS devices or services. The subsection is entitled "Manufacturing" and any reference to software must be read as software that is included in a device that is used for ACS. Congress makes this clear by stating that the "equipment ***and*** software that such ***manufacturers*** offer for sale or otherwise distributes in interstate commerce shall be accessible." This provision is meant to make clear that the FCC's authority reaches manufacturers of devices that include software and not each component maker. If Congress intended that section 716(a) capture developers of software it would have more clearly delineated the responsibilities of software developers from that of manufacturers of equipment as it did by delineating the responsibilities of manufacturers and service providers.

  Section 716(b) confers on the FCC authority to ensure that services providers of ACS ensure that their services are accessible. This limits the FCC's authority only to those parties that provide a non-interconnected VoIP service, an electronic messaging service, or an interoperable video service as defined in Section 101 of the CVAA. Here, too, this provision does not give the FCC authority to regulate a software developer who is not an actual provider of ACS.

- **The FCC must give meaning to the term "service" as it defines the scope of its authority under CVAA and Section 716.** Section 716 applies to a

"manufacturer of equipment used to access advanced communications services" and a "provider of advanced communications service." As a result, the Commission must define the reach of "advanced communications services" and then consider whether the equipment is used to access these services or the provider offers these services. The term "advanced communications services" is defined in Section 101 of the CVAA as, among other things, electronic messaging service and non-interconnected VoIP service. Those terms in turn are defined in Section 101 of the CVAA as "a *service* that provides real-time or near real-time non-voice messages" and "a *service* that . . . enables real-time voice communications . . . ." Thus, a necessary feature of the statutory definition of the scope of the CVAA is that it must involve a "service."

The CVAA does not define the term "service," but the term in this context is generally understood to refer to an entity making equipment or facilities available to users on an ongoing basis that enables the user to make use of some capability or functionality. The *Merriam-Webster Dictionary* thus defines "service," *inter alia*, as "a facility supplying some public demand <telephone *service*>." (Emphasis in original.) *See also* The Free Dictionary ("A facility providing the public with the use of something, such as water or transportation."). The key elements of service in this context therefore include the following: an entity (i) uses facilities to (ii) make available to users on an ongoing basis the ability to engage in some activity.

Companies that sell consumers a suite of software tools found in a box at many consumer electronic retailers are not engaged in manufacturing a device used for ACS nor are they providing a "service." Instead, they are simply selling a good or product. For example, a developer of an operating system is not providing a device used for ACS or providing an ACS service. An operating system cannot be used to provide advanced communications services without substantial addition of devices and applications. Consequently, the FCC has no authority under the CVAA to regulate providers of operating systems and other similarly situated software. The Uniform Commercial Code, which provides model legislation for regulating the sale of goods, defines "goods" as all things that are movable at the time of identification to a contract for sale. U.C.C. § 2-103 (1)(k).[1] It is clear that a simple box of software bought at a retail store by a consumer is "movable at the time of sale" and therefore is a good and not a service. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (affirming the district court's decision stating that the mass market software

[1] The Uniform Computer Information Transaction Act was drafted more than a decade ago as a model act to regulate sales of software and other computer programming, but the proposal has been controversial and to date has been adopted by only two states, so the UCC remains relevant.

transaction at issue was a transaction in goods because purchasers do not make periodic payments, the software company does not retain title for the purpose of a security interest, and no set expiration date for the licensed right exists); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3rd Cir. 1991); *ePresence, Inc. v. Evolve Software, Inc.*, 190 F. Supp.2d 159 (D. Mass. 2002); *Olcott International & Co. v. Micro Data Base Systems, Inc.*, 793 N.E.2d 1063 (Ind. App. 2003). That conclusion makes sense since the commercial exchange involved in purchasing software is the opposite of what a consumer gets from a service provider. The commercial exchange described above involves a one-time transaction, the end user has little or no more dealings with the software maker after the purchase is completed, and the software maker has no facilities that it makes available to the end user on an ongoing basis. Therefore, the Commission should make clear that the definition of advanced communications services and its constituent parts under the CVAA apply only to service providers and not to entities that sell products such as software to consumers.

The next inquiry in determining the scope of Section 716 is whether the equipment is "used to access advanced communications services." The Commission needs to carefully construe this language or else it could sweep in any device or widget that touches the Internet. For example, some high-end automobiles sold today in theory could be "used for" advanced communications services since they have built-in capability to access the Internet, but we do not think it was the intent of Congress to bring auto manufacturers and cars into the scope of Section 716. An expansive interpretation of that phrase would result in two bad outcomes: the Commission would be regulating potentially thousands of entities that Congress never intended the Commission to regulate, or else it would face a swarm of waiver requests and until they were resolved all those companies would have the overhang of regulatory uncertainty and compliance costs. To avoid that outcome, we urge the Commission to interpret the provision to read that providers of equipment or software that is used for ACS, but cannot *on their own and without need for additional devices or software provide ACS* are not covered by the CVAA. Without that formulation, the Commission's scope of authority would be unbounded and would significantly extend beyond the framework of the Act. The reality of the Internet ecosystem is that equipment and software component providers will feel the regulatory pressure to make the devices accessible and they will be called upon by the regulated equipment manufacturer or the ACS provider to problem solve, and that is how it should be. But that outcome is far different than the FCC suddenly regulating thousands of companies that do not provide equipment or software that can be directly used for advanced communications services.

VON emphasized that on both of these scope issues, the Commission needs to establish a clear distinction about what is and is not covered. Otherwise, the Commission risks sweeping into its regulations a large number of companies that have no facilities, no ongoing relationships with customers, and do not provide equipment used directly for advanced communications services.

- Interoperable video conferencing services. Video conferencing services today are not interoperable, and therefore, the FCC cannot regulate these offerings. As the Consumer Electronics Association noted in its July 18, 2011 ex parte filing, IEEE defines interoperable as "the ability of a system or product to work with other products without special effort on the part of the consumer." Today, video conferencing services do not meet this requirement.

- Products in Beta. The FCC should make clear that manufacturers of devices used for ACS or providers of ACS are not captured by the CVAA based on products they are testing. The beta process enables companies to test, explore, and improve features and companies should not be held responsible for meeting legal requirements for products in the test phase.

The VON Coalition looks forward to working with you and other stakeholders on this important issue as the Commission implements the CVAA.

Please contact me directly if you have any questions.

Sincerely,

Glenn S. Richards
Executive Director

Cc: Rick Kaplan
Jane Jackson
Elizabeth Lyle