Voice on the Net Coalition
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September 6, 2011

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex parte meeting on CG No. 10-213, WT No. 96-198, CG No. 10-145

Dear Ms. Dortch:

On September 1, 2011, the Voice on the Net Coalition (VON), represented by VON Executive Director Glenn Richards, Brian Scarpelli and Mark Uncapher of the Telecommunications Industry Association, Paula Boyd of Microsoft, Gerard Waldron of Covington & Burling LLP, Laura Peed of Yahoo!, and Vince Jesaitis of the Information Technology Industry Council met with Austin Schlick, Diane Griffin Holland, David E. Horowiz, and Julie Veach of the Office of General Counsel, Jane E. Jackson of the Wireless Telecommunications Bureau, and Karen Peltz Strauss of the Consumer and Government Affairs Bureau to discuss the Commission's implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"). The parties discussed the scope of the FCC's authority pursuant to Section 716 and addressed other issues raised in VON's filings in the above-referenced proceedings.

I. Scope of Section 716

A. Service as Threshold Issue

First, VON explained that defining "service" is a threshold issue to determining the scope of Section 716, which applies to "manufacturer[s] of equipment used for advanced communications services" and "provider[s] of advanced communications services." The phrase "advanced communications service" (ACS), in turn, is defined in Section 101 of the CVAA as, among other things, electronic messaging *service* and non-interconnected VoIP *service*. Those terms are further defined as, respectively, "a *service* that provides real-time or near real-time non-voice messages" and "a *service* that . . . enables real-time voice communications[.]" Through its recursive use of the term, Congress made clear that a predicate to the statute's application is that it must involve a "service."

Although "service" is not defined in the statute, VON explained that it is generally understood to mean the offering of facilities to users on an ongoing basis that enables the user to make use of some capacity or functionality.[1] Accordingly, the key elements of a service in the electronic communications context therefore include the following: an entity that (i) uses facilities to (ii) make available to users on an ongoing basis (iii) the ability to engage in some activity.

[1] For instance, the *Merriam-Webster Dictionary* defines "service" as, *inter alia*, "a facility supplying some public demand <telephone service> <bus service>." *See also* The Free Dictionary (defining "service" to mean "[a] facility providing the public with the use of something, such as water or transportation").

VON emphasized that companies that make available software for purchase on disc are not engaged in providing a "service" but rather are selling a good and that the Uniform Commercial Code defines "goods" as all things that are movable at the time of identification to a contract for sale. It is clear that a simple disc of software purchased by a consumer is "movable at the time of sale" and therefore is a good and not a service. In contrast to an ongoing service relationship, the commercial exchange described above involves a one-time transaction in which the end user has little or no more dealings with the selling entity, and the selling entity has no facilities that it makes available to the end user on an ongoing basis.[2]

VON urged the Commission to make the services/goods distinction clear, as outlined above. Otherwise the Commission risks inadvertently sweeping into its regulations a large number of companies that do not make facilities available on an ongoing basis with customers when it is clear that Congress did not intend to cover such companies when it carefully wrote the definitions contained in the CVAA.

B. Scope of Section 716(a)

1. Proper Interpretation

VON next discussed the scope of Section 716(a), which imposes accessibility obligations on "manufacturer[s] of equipment used for advanced communications services, including end user equipment, network equipment, and software[.]" VON explained that inherent in the statutory language are limits on the scope of the Commission's authority: (1) the Commission may only regulate "manufacturer[s] of equipment," and (2) the equipment in question must be "used for" an ACS. Congress did not give the Commission authority to regulate any entity that is remotely involved with advanced services but only those that fall within the statutory framework. Careful attention to the proper limitations flowing from these terms is necessary to ensure that the Commission complies with the statutory limits set forth by Congress.

Manufacturers of equipment. First, VON highlighted that the Commission may only regulate "manufacturers of equipment." That the Commission's authority reaches only to manufacturers of equipment is confirmed by the sub-section title "Manufacturing" and by repeated references to the obligations of manufacturers. *See* 47 U.S.C. § 716(a)(1) ("[The Commission] shall ensure that the equipment and software that *such manufacturer* offers for sale . . . shall be accessible[.]");47 U.S.C. § 716(a)(2) (specifying the means by which a "manufacturer of equipment" may satisfy the requirements of paragraph (a)(1)).

[2] When applying the concept of making facilities available on an ongoing basis, activities such as providing software updates should not be considered since the product can clearly be used without the update.

It is clear that software is not "equipment" within the meaning of Section 716(a)(1). The statute gives the Commission authority over "a manufacturer of equipment used for [ACS], including end user equipment, network equipment, and software." Insofar as the manufacturer includes a software component in its physical equipment used for ACS, the manufacturer would be responsible for ensuring that such software complies with the CVAA. *See* 47 U.S.C. § 716(a)(1) (stating that "the equipment *and* software that such manufacturer offers for sale" must be made accessible) (emphasis added). However, Section 716(a) provides no authority to regulate directly software makers.

Thus, VON explained that Congress intended to give the Commission authority that will allow it to pursue manufacturers of ACS equipment to ensure the ACS equipment including all necessary hardware and software component parts deliver accessibility solutions. For instance, even though the Commission cannot regulate an operating system programmer, it may ensure the accessibility of the operating system by pursuing the manufacturer that includes the operating system on its devices used for ACS. The Commission, however, cannot reach each manufacturer of hardware or software components in a device used for ACS.

Meaning of "used for." Second, VON highlighted that the Commission must give meaning to the phrase "used for" in Section 716(a)(1), since an overly broad interpretation would lead to plainly unacceptable results. In some sense, when a user is employing an ACS service on a computer, every component of the computer necessary to the function of the service is being "used for" that service. Yet such an interpretation would lead to an untenable expansion of Commission authority and regulatory burdens since the computer's power cord, its CPU, and its RAM all would be subject to Section 716(a)(1). Such a result does not comport with the careful balance Congress intended to strike, nor is it clear how such devices could be rendered accessible.

VON explained that to prevent such a result, the phrase "used for" must be seen as limiting the possible scope of regulation. VON asked the Commission to clarify that "used for" limits the scope of regulation to **equipment that *by itself* can be used for access to an ACS without substantial additional technology or add-ons**. Such a definition avoids the problem of regulating equipment that is clearly attenuated from the ACS and gives practical meaning to the phrase "used for." This interpretation provides the Commission with sufficient authority to ensure proper accessibility of devices users will purchase for the purpose of employing as an ACS while avoiding unnecessary breadth, thus maintaining the balance between accessibility and innovation that Congress intended to create pursuant to the statute.

2. Scope of Section 716(b)

VON reiterated the importance of giving meaning to the term "service" so that the scope of Section 716(b) is properly limited to those who provide advanced communications *services* and not merely those who sell goods. Thus, VON asked the Commission to make clear that Section 716(b) applies only insofar as someone is offering an ACS to the public. VON also asked the Commission to clarify that Section 716(b) does not reach developers of products that may facilitate ACS, but do not actually provide ACS, such as operating systems and programs that merely organize one's emails. While these products facilitate the provision of ACS, they are not themselves an ACS, because they lack the indicia of services — they are sold at once rather than provided on an ongoing basis and do not require the use of facilities. Thus, the Commission can

ensure that software designed for use by an ACS provider is properly accessible. However, pursuant to the statute, the duty of compliance of an ACS offering properly falls on the ACS provider rather than on a software or hardware component provider or on a developer of software whose product may facilitate ACS but does not actually provide an ACS.

3. VON's Interpretation Is Consistent With the Statutory Structure

VON explained that the interpretation described above is consistent with the statutory structure of the CVAA:

Overly broad interpretation of Section 716(a) renders 716(b) superfluous. First, VON contended that interpreting Section 716(a) to regulate all developers of software used for ACS, regardless of whether included in physical equipment, would render Section 716(b) superfluous, contrary to the statutory design. Such an expansive reading would mean that section 716(a) would capture all ACS providers since advanced communications services of necessity include software. Thus, if software fits within the ambit of Section 716(a), the regulation of an ACS provider via 716(b) is unnecessary and duplicative.[3] Therefore, it is clear that Section 716(a) is not so broad as to reach a provider of software. VON explained that its interpretation avoids this problem in a manner entirely consistent with the language of the statute and the intent of Congress.

Role of Section 716(e)(1)(C). Second, the parties discussed that the interpretation of Section 716(a)(1) described above is consistent with the mandates to the Commission set forth in Section 716(e), and in particular 716(e)(1)(C), which provides that the Commission must "determine the obligations under this section of manufacturers, service providers, and providers of applications or services accessed over service provider networks[.]" With respect to the third clause, the phrase "providers of applications or services" is a recognition that a provider of applications or services may be able to deliver an ACS service through software without providing equipment or significant infrastructure, but instead by relying on the equipment of others. Given this possibility, the Commission as previously discussed above, must distinguish between software that provides a "service" versus software that is simply a "good". Thus, it remains important that the Commission makes clear that the CVAA does not capture those who provide locally-stored software, including locally-stored operating systems, word processing, email clients, and browsers and whose products do not directly provide an ACS.

It bears emphasis that the phrase "providers of applications or services accessed over service provider networks" in Section 716(e)(1)(C) refers to applications or services offered by an ACS provider. That conclusion holds because the "applications or services" phrase must be grounded in either Section 716(a) or 716(b), since it is clear that that 716(e)(1)(C) is *not* an independent grant of authority. The reference to "services" and "service providers" in Section 716(e) clarifies that the phrase should be understood to refer to the authority granted to the Commission by Section 716(b), as it mirrors the

[3] It is a basic tenet of statutory interpretation that no statutory provision should be rendered superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]").

providers/service terminology of that subsection. Consequently, applications and services provided by an ACS provider may be regulated pursuant to Section 716(b) only insofar as they comprise a "service."

Section 2 limitation on liability. Third, VON explained that its interpretation of Section 716(a) is consistent with the limitation on liability found in Section 2 of the CVAA. As VON highlighted, Congress intended to strike an appropriate balance between accessibility and innovation. By focusing liability under Section 716(a) on manufacturers of physical devices, Congress achieved that balance. Further, the software provided by an ACS provider or a manufacturer of equipment used for ACS to users will typically be more robust than that protected by the narrow limitation on software liability included in Section 2, which is limited to information location tools such as a hyperlink or menu, rather than a full-fledged program.

II. OTHER ISSUES

In addition to its discussion of the scope of Section 716, VON briefly discussed a number of other issues more briefly:

Products in beta. VON reiterated its view that the FCC should make clear that manufacturers of devices used for ACS or providers of ACS are not subject to the CVAA with respect to products they are testing. Companies need the beta process to test, explore, and improve features, and requiring companies to meet legal accessibility standards at that time would hinder product development, to the detriment of all users.

Functional requirements. VON noted that Section 716(e)(1)(A) requires the Commission to include "performance objectives" in its regulations, but Section 716(e)(1)(D) allows the Commission to adopt technical standards as a safe harbor. VON also asked (a) how the Commission is planning to issue its performance objectives, and (b) whether the Commission would be guided by the Section 255 guidelines or the Section 508 functional performance standards.

Interoperable video conferencing services. VON reiterated that video conferencing services today are not interoperable and technological barriers at present prevent interoperability. The definition of "interoperable video conferencing service" provided by Section 101 of the CVAA should therefore be understood as a placeholder, allowing the Commission to pursue providers of interoperable video conferencing services whenever they come into existence through private action. VON also emphasized that "interoperable" cannot be understood to simply mean that one user of a particular video conferencing system can talk to another user of that same system. First, the parties explained that such an interpretation would render the use of the term 'interoperable" superfluous, as Congress simply could have used the term "video conferencing service." (A video conferencing service in which one user could not talk to another user of the

same system would not be a video conferencing service at all.) Additionally, the parties emphasized such an interpretation would be contrary to the understanding of interoperability as that term is used elsewhere in the Communications Act[4] and used in existing Commission regulations.[5]

The VON Coalition looks forward to continuing to work with you and other stakeholders on these important issues as the Commission implements the CVAA.

Please contact me directly if you have any questions.

Sincerely,

/s/

Glenn S. Richards
Executive Director

cc: Mr. Austin Schlick
Ms. Diane Griffin Holland
Mr. David E. Horowitz
Ms. Julie Veach
Ms. Jane E. Jackson
Ms. Karen Peltz Strauss

[4] *See* 47 U.S.C. 230(f)(1) ("The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.") (emphasis added); 47 U.S.C. 251(c)(5) ("[E]ach incumbent local exchange carrier has the . . . duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.") (emphasis added). In both of those contexts the term, refers to the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.

[5] *See, e.g.*, 47 C.F.R. § 51.325(b) ("[I]nteroperability means the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged."); 47 C.F.R. § 90.179(j) ("On the Interoperability Channels in the 700 MHz Public Safety Band . . . , hand-held and vehicular units operated by any licensee . . . may communicate with or through land stations without further authorization and without a sharing agreement.").