

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

In the Matter of )
Implementation of Sections 716 and 717 of the ) CG Docket No. 10-213
Communications Act of 1934, as Enacted by the )
Twenty-First Century Communications and Video )
Accessibility Act of 2010 )
CONSUMER ELECTRONICS ASSOCIATION )
NATIONAL CABLE & )
TELECOMMUNICATIONS ASSOCIATION )
ENTERTAINMENT SOFTWARE )
ASSOCIATION )
Petitions for Class Waivers of Sections 716 and 717 )
of the Communications Act and Part 14 of the )
Commission's Rules Requiring Access to )
Advanced Communications Services (ACS) and )
Equipment by People with Disabilities )

ORDER

Adopted: October 15, 2012

Released: October 15, 2012

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, the Consumer and Governmental Affairs Bureau (CGB) of the Federal Communications Commission (Commission), pursuant to its delegated authority, addresses petitions (Petitions) filed by the Consumer Electronics Association (CEA), the National Cable &

1 Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010; Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1966; Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14566, 14640-14641, ¶¶ 19, 197 (2011) (ACS Report and Order) (delegating to CGB the authority to act upon all waiver requests).

2 CEA Petition for Waiver, CG Docket No. 10-213, filed March 22, 2012 (CEA Petition). CEA is a U.S. trade association for the consumer electronics and information technologies industries. CEA states that it has more than 2,000 member companies that are involved in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold through consumer channels. CEA Petition at 1 n.1. On May 15, 2012, the Consumer and Governmental Affairs Bureau (Bureau) placed the CEA Petition on public notice. Request for Comment Petition for Class Waiver of Commission's Rules for Access to Advanced Communications Services and Equipment by People with Disabilities, Public Notice, 27 FCC Rcd 5202 (May 15, 2012) (CEA Public Notice). Comments were filed by (continued....)

Telecommunications Association (NCTA),<sup>3</sup> and the Entertainment Software Association (ESA)<sup>4</sup> for class waivers of sections 716 and 717 of the Communications Act of 1934, as amended (Act),<sup>5</sup> and Part 14 of the Commission's rules,<sup>6</sup> which require access to advanced communications services (ACS) and equipment by people with disabilities. CEA requests a waiver until July 1, 2016 for Internet protocol-enabled television sets (IP-TVs) and Internet protocol-enabled digital video players (IP-DVPs) manufactured before July 1, 2016. NCTA requests a waiver until July 1, 2016 for set-top boxes leased by cable operators to their customers and manufactured before July 1, 2016. ESA requests an eight-year waiver until October 8, 2021 for three classes of gaming devices and services. For the reasons set forth below, we grant each waiver in part with a common expiration date of October 8, 2015.

## II. BACKGROUND

2. On October 8, 2010, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) into law.<sup>7</sup> One year later, on October 7, 2011, the Commission adopted a Report and Order implementing section 716 of the Act,<sup>8</sup> which was added by the CVAA and requires ACS and equipment used for ACS<sup>9</sup> to be accessible to and usable by individuals with

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Consumer Groups (jointly filed by the National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., and the RERC on Telecommunications Access); Missouri Council of the Blind; NCTA; Panasonic Corporation of North America (Panasonic); and individual consumers. Reply Comments were filed by American Council of the Blind (ACB); CEA; and Telecommunications Industry Association (TIA).

<sup>3</sup> NCTA Petition for Waiver, CG Docket No. 10-213, filed June 1, 2012 (NCTA Petition). NCTA states that it is a trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service, and also provides competitive voice service to more than 23 million customers. NCTA Petition at 1 n.1. On June 21, 2012, the Bureau placed the NCTA Petition on public notice. *Request for Comment Petition for Class Waiver of Commission's Rules for Access to Advanced Communications Services and Equipment by People with Disabilities*, Public Notice, 27 FCC Rcd 7101 (June 21, 2012) (NCTA Public Notice). Comments were filed by American Council of the Blind of Maryland; CEA; Consumer Groups; TIA; and individual consumers. Reply Comments were filed by NCTA.

<sup>4</sup> Petition of the Entertainment Software Association, CG Docket No. 10-213, filed March 21, 2012 (ESA Petition). ESA states that it is a U.S. trade association dedicated to serving companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA Comments at 1 n.1, Docket 10-213, April 25, 2011. On May 15, 2012, the Bureau placed the ESA Petition on public notice. *Request for Comment Petition for Class Waiver of Commission's Rules for Access to Advanced Communications Services and Equipment by People with Disabilities*, Public Notice, 27 FCC Rcd 5204 (May 15, 2012) (ESA Public Notice). ESA supplemented its petition on June 11, 2012 with textual descriptions of the visual material included in the original ESA Petition (ESA Supplement). Comments were filed by Consumer Groups; the Voice on the Net Coalition (VON Coalition); and individual consumers. Reply Comments were filed by ACB; ESA; and TIA.

<sup>5</sup> 47 U.S.C. §§ 617 and 618.

<sup>6</sup> 47 C.F.R. §§ 14.1 *et seq.*

<sup>7</sup> Pub. L. No. 111-260, 124 Stat. 2751 (2010), *amended* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections).

<sup>8</sup> 47 U.S.C. § 617.

<sup>9</sup> ACS is defined as interconnected voice over Internet protocol (VoIP) service; non-interconnected VoIP; electronic messaging service, such as e-mail, instant messaging, and SMS text messaging; and interoperable video conferencing service. 47 U.S.C. § 153(1); 47 C.F.R. § 14.10(c).

disabilities, if achievable, beginning October 8, 2013.<sup>10</sup> The Commission also adopted rules to implement section 717 of the Act,<sup>11</sup> which creates recordkeeping and enforcement provisions for sections 255, 716 and 718 of the Act.<sup>12</sup>

3. Pursuant to section 716(h)(1) of the Act,<sup>13</sup> the ACS rules allow the Commission to grant waivers of the ACS requirements for multipurpose equipment or services or classes of multipurpose equipment or services that have features or functions that are capable of accessing ACS but are nonetheless designed primarily for purposes other than using ACS.<sup>14</sup> In instances where equipment and services may have multiple primary or co-primary purposes, waivers may not be warranted.<sup>15</sup> In conducting a waiver analysis, the rules provide for a case-by-case examination of whether the equipment is marketed for its ACS features or functions.<sup>16</sup> In order to make this determination, the *ACS Report and Order* directs the Commission to consider “whether the ACS functionality or feature is suggested to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service.”<sup>17</sup> The Commission may also consider the manufacturer’s market research and the usage trends of similar equipment or services in order to determine whether a manufacturer or provider designed the equipment or service primarily for purposes other than ACS.<sup>18</sup> The *ACS Report and Order* further notes that the following factors may be relevant to a primary purpose waiver determination: whether the ACS functionality is designed to be operable outside of other functions or aids other functions; the impact that the removal of the ACS feature has on the primary purpose for which the equipment or services is claimed to be designed, and an examination of waivers for similar products or services.<sup>19</sup> In addition to considering these various factors, the *ACS Report and Order* calls for the Commission, when examining a waiver request, to utilize its general waiver standard, which requires good cause to waive the rules, and a showing that the particular facts of the petitioner make compliance with the relevant requirements

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<sup>10</sup> *ACS Report and Order*, 26 FCC Rcd 14557. See also 47 C.F.R. § 14.20. Specifically, the ACS rules apply to models or versions of products and services that are introduced or upgraded after the October 8, 2013 date. *ACS Report and Order*, 26 FCC Rcd at 14609, ¶¶ 124-125.

<sup>11</sup> 47 U.S.C. § 618.

<sup>12</sup> 47 U.S.C. §§ 255, 617 and 619. See *ACS Report and Order*, 26 FCC Rcd at 14650-14577, ¶¶ 219-278.

<sup>13</sup> 47 U.S.C. § 617(h).

<sup>14</sup> *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181. See also 47 C.F.R. § 14.5.

<sup>15</sup> *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 184 (offering as an example of equipment or services that have multiple primary or co-primary purposes, smartphones that are designed for voice communications, text messaging, e-mail, web browsing, video chat, digital video recording, mobile hotspot connectivity, and several other purposes). In other words, multipurpose equipment or services that are capable of accessing ACS and are designed primarily or co-primarily for ACS, do not qualify for a waiver under this provision. 47 U.S.C. § 617(h)(1); 47 C.F.R. § 14.5(a)(1). A product or service may have co-primary purposes when it contains multiple features and functions. Conversely, as noted in the *ACS Report and Order*, the House and Senate Reports explain that “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.” *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 182, citing House Report at 26; Senate Report at 8.

<sup>16</sup> *ACS Report and Order*, 26 FCC Rcd at 14634, 14640, ¶¶ 182, 196. See also 47 C.F.R. § 14.5(a)(2)(ii).

<sup>17</sup> *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 185 (footnote omitted).

<sup>18</sup> *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 183.

<sup>19</sup> *ACS Report and Order*, 26 FCC Rcd at 14636, ¶ 186.

inconsistent with the public interest.<sup>20</sup>

4. The ACS rules allow the Commission to entertain a waiver for equipment and services individually or as a class, and to limit the time of its coverage, with or without a provision for renewal.<sup>21</sup> The Commission will exercise its authority to grant class waivers, which apply to more than one piece of equipment or more than one service, in instances in which classes are carefully defined and the equipment or services share common defining characteristics.<sup>22</sup> In addition, the Commission will examine the extent to which the petitioner has explained in detail the expected lifecycle of the equipment or services that are part of the class.<sup>23</sup> Substantial upgrades are considered new products or services for the purpose of this waiver analysis.<sup>24</sup> For products and services already under development *after* a class waiver expires, the achievability analysis 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.<sup>25</sup> To the extent a petitioner seeks a class waiver for multiple generations of similar equipment and services, the Commission will examine the justification for the waiver extending through the lifecycle of each discrete generation.<sup>26</sup> We will take a careful look at industry developments to determine whether any extensions are justified.

5. 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 or services—*i.e.*, for as long as those particular products or services are sold.<sup>27</sup> For example, if a particular model covered by a class waiver were introduced to the public on the day before the expiration of the waiver period, then all products of that particular model that are sold from that point forward would be covered by the waiver.<sup>28</sup> Consequently, it is the period of time that it takes to get a product or service from the drawing board to introduction in the marketplace that is relevant to determining the appropriate waiver period.

### III. THE CEA PETITION

6. *Background.* CEA requests a waiver until July 1, 2016 for two classes of equipment manufactured before July 1, 2016: (1) Internet protocol-enabled television sets (IP-TVs) and (2) Internet protocol-enabled digital video players (IP-DVPs).<sup>29</sup> CEA's petition states that although both types of

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<sup>20</sup> *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188, citing 47 C.F.R. § 1.3; *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

<sup>21</sup> *ACS Report and Order*, 26 FCC Rcd at 14638, ¶ 192. *See also* 47 C.F.R. § 14.5(c).

<sup>22</sup> *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193. *See also* 47 C.F.R. § 14.5(b).

<sup>23</sup> *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

<sup>24</sup> *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192. *See also id.* at 14609, ¶ 124 (“Natural opportunities to assess or reassess the achievability of accessibility may include, for example, the redesign of a product model or service, new versions of software, upgrades to existing features or functionalities, significant rebundling or unbundling of product and service packages, or any other significant modification that may require redesign.”).

<sup>25</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

<sup>26</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 195.

<sup>27</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

<sup>28</sup> As noted above, if there were a substantial upgrade to the product model, a new waiver would be required. *See ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192.

<sup>29</sup> CEA Petition at 1-2.

equipment allow consumers to access and use ACS, they are designed primarily to display video content rather than to provide access to ACS, and therefore qualify for a waiver from the Commission's ACS rules.<sup>30</sup> CEA argues that because ACS features and functions are just beginning to make their way into these devices, allowing manufacturers of IP-TVs and IP-DVPs additional time to provide accessibility will afford them the opportunity to develop ACS features and functions and design accessibility features in a more cost-effective way.<sup>31</sup> CEA argues for a waiver until July 1, 2016 by claiming a product lifecycle for IP-TVs and IP-DVPs of three years, comprised of a two-year development phase plus one year, which according to CEA, is the typical period in which new models are offered and marketed by the manufacturer.<sup>32</sup> CEA also argues that it has demonstrated good cause to waive the rules because the public interest would be served by providing for the cost-effective development of accessibility for these products.<sup>33</sup> Finally, it also claims that the benefits of including ACS functionality in IP-TVs and IP-DVPs may be small because people with disabilities can use "alternative ACS-capable devices."<sup>34</sup>

7. CEA defines IP-TVs as televisions that "(1) allow consumers to access and use ACS via IP and (2) are designed primarily to receive and display video content, principally full-length, professional-quality video programming, not ACS."<sup>35</sup> CEA defines IP-DVPs as digital video players that "(1) allow consumers to access and use ACS via IP and (2) are designed primarily for the playback and rendering of video content, principally full-length, professional-quality video programming, not ACS."<sup>36</sup> In both cases, CEA claims that although the classes of these products allow consumers to access and use ACS via IP, such function is not a primary purpose of the products.<sup>37</sup> Rather, CEA insists that the Internet-connectivity of these devices "is primarily focused on enabling and improving the playback and rendering of video content . . . or the delivery of video-on-demand content from a pay television service."<sup>38</sup>

8. The Consumer Groups argue that the ACS features of IP-TVs and IP-DVPs provide a co-primary purpose, that IP-TVs and IP-DVPs are designed and marketed as multipurpose devices, and that it is contrary to the fundamental purpose of the CVAA for consumers to have to wait to receive the benefits of the ACS features and functions that are already included in these devices.<sup>39</sup> They claim, for

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<sup>30</sup> CEA Petition at 8-10, 15-16; CEA *Ex Parte* Submission (September 7, 2012) at 2-6 (CEA September 7, 2012 *Ex Parte*).

<sup>31</sup> CEA Petition at 4-5; CEA *Ex Parte* (July 13, 2012) and accompanying letter from Gregory L. Rosston (July 13, 2012) (Rosston Letter).

<sup>32</sup> CEA Petition at 7-8, 13-14.

<sup>33</sup> CEA Petition at 10-12, 16-18; Rosston Letter.

<sup>34</sup> See also CEA Reply Comments at 6; Rosston Letter at 3, 8. See also Panasonic Comments at 11 (claiming that ACS on IP-TVs and IP-DVPs need not be accessible because ACS is available on "second screens," that is, devices other than IP-TVs and IP-DVPs.)

<sup>35</sup> CEA Petition at 5-6 (footnote omitted).

<sup>36</sup> CEA Petition at 12-13 (footnote omitted).

<sup>37</sup> See CEA Petition at 5-6, 12-13; CEA Reply Comments at 12; CEA September 7, 2012 *Ex Parte* at 4-6.

<sup>38</sup> CEA September 7, 2012 *Ex Parte* at 6, offering Netflix, YouTube and Hulu Plus as examples of video content obtained via the Internet over IP-TVs and DIRECTV as an example of video-on-demand content delivered from a pay television service and made available on an IP-DVP.

<sup>39</sup> See Consumer Groups Opposition to Petition for Waiver by Consumer Electronics Association (Consumer Groups Opposition to CEA Petition) at 2-5. See also Patricia Albee Comments; Todd Morrison Comments; Don Cullen Comments; Sommer Willis Comments; Brian Coppola Comments (on CEA Petition); Missouri Council of the Blind (continued....)

example, that many IP-TVs and IP-DVPs already pre-install or allow installation of ACS applications that have web conferencing capabilities that need to be made accessible to users who are deaf and hard of hearing.<sup>40</sup> If the Commission does decide to grant a waiver, Consumer Groups urge that it be limited to one year.<sup>41</sup> In support, they cite to industry reports suggesting that approximately 70 percent of all in-home video devices will be able to connect to the Internet by 2016.<sup>42</sup> Similarly, the American Council for the Blind (ACB) expresses concern that market conditions are rapidly evolving, and new models of these products are released every year with increasing ACS capabilities.<sup>43</sup>

9. *Discussion.* We grant CEA class waivers of the ACS rules for IP-TVs and IP-DVPs until October 8, 2015, which is two years past the implementation date for compliance with these rules.<sup>44</sup> First, we agree that, as required by the *ACS Report and Order*, the two classes of equipment for which CEA seeks a waiver are defined with specificity and that the equipment in each class share enough common defining characteristics to be granted class waivers.<sup>45</sup> Specifically, following CEA's descriptions, for purposes of these class waivers, we define IP-TVs as televisions designed primarily to receive and display video content, principally full-length, professional-quality video programming,<sup>46</sup> and IP-DVPs as digital video players designed primarily for the playback and rendering of video content, principally full-length, professional-quality video programming.<sup>47</sup>

10. Next, we find that CEA has demonstrated that, although consumers can use both types of equipment for ACS, presently IP-TVs and IP-DVPs are designed primarily to display video content rather than for ACS, as is required to receive a waiver under section 716(h)(1)(A) and (B) of the Act<sup>48</sup> and section 14.5(a) of the rules.<sup>49</sup> With respect to IP-TVs, CEA points to manufacturer marketing materials that emphasize the primary purpose of these devices to provide video content.<sup>50</sup> Likewise, CEA provides

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Comments; Walter Newsome Comments; Rosemarie A. Facilla Late-Filed Comments (July 5, 2012); ACB Reply Comments at 2. Each of these commenters opposed the grant of the CEA Petition.

<sup>40</sup> Consumer Groups Opposition to CEA Petition at 2 (offering Facebook and Skype as examples of applications that can be installed or are pre-installed on these devices).

<sup>41</sup> Consumer Groups Opposition to CEA Petition at 6.

<sup>42</sup> Consumer Groups Opposition to CEA Petition at 3.

<sup>43</sup> ACB Reply Comments at 7.

<sup>44</sup> *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 107-112.

<sup>45</sup> See 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

<sup>46</sup> See CEA Petition at 5-6.

<sup>47</sup> See CEA Petition at 12-13. As noted by CEA, not every IP-enabled TV will fall into this class. As an example, CEA notes that “any device not designed and marketed primarily to display video content (principally full-length, professional-quality video programming)” will be excluded from the class waiver granted herein for IP-TVs. CEA Petition at 6 n.19. We note that Consumer Groups ask the Commission to provide “an effective, expeditious process for the public to file complaints about any improper application of a waiver to equipment not expressly covered.” Consumer Groups Opposition to CEA Petition at 11. In the *ACS Report and Order*, the Commission adopted procedures to expeditiously conduct a 30-day dispute assistance procedure, and if such process does not satisfy the consumer's concerns, the consumer may then file an informal complaint that will be resolved within 180 days. *ACS Report and Order*, 26 FCC Rcd at 14656-14672, ¶¶ 232-268.

<sup>48</sup> 47 U.S.C. § 617(h)(1)(A) and (B).

<sup>49</sup> 47 C.F.R. § 14.5(a).

<sup>50</sup> CEA points to the marketing materials and statements of Samsung, LG, Sony, Panasonic and Mitsubishi to make the point that “the vast majority of apps relate to video-content, gaming, or news and general information, which generally do not include ACS features or functions.” CEA Petition at 8-10. In its September 7, 2012 *Ex Parte*, CEA (continued....)

examples of marketing materials that highlight the purpose of IP-DVPs to be the playback and rendering of video content through Internet-based services or the delivery of video-on-demand content from pay television services.<sup>51</sup> We agree with CEA that ACS features and functions are just beginning to make their way into these devices,<sup>52</sup> and find that CEA has demonstrated that ACS is not designed to be a co-primary feature of IP-TVs and IP-DVPs at this time.<sup>53</sup> Although the Consumer Groups and ACB argue that IP-TVs and IP-DVPs are multipurpose devices, and that ACS features and functions are included in the marketing materials for these devices, which according to these commenters, establishes ACS as a primary or co-primary purpose,<sup>54</sup> we believe that presently the marketing and advertising of such products focus primarily on use of these devices for video programming, rather than ACS use, and that consequently, there is insufficient evidence to establish ACS as a primary or co-primary purpose for these devices at this time. For example, as noted by CEA, at present, the vast majority of apps available for download or installation on IP-TVs are marketed for the purpose of obtaining video content, not ACS.<sup>55</sup> Likewise, we agree with CEA that presently, the marketing materials distributed for IP-DVPs emphasize the playback and rendering of video content via video streaming apps, pay television services or locally stored video content.<sup>56</sup>

11. Finally, we agree that CEA has demonstrated in its petition good cause to waive the rules, because the public interest will be served by allowing these new video innovations, which are breaking new ground by beginning to combine the viewing of traditional and Internet forms of video on a single device, to enter the marketplace.<sup>57</sup> During the period of this waiver, CEA claims, and we agree, that manufacturers will be able to apply the experience gained from designing accessibility in other products – that do have ACS as a primary or co-primary function – to the development and implementation of

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offers an extensive list of apps for IP-TVs and IP-DVPs that focus on video content. CEA September 7, 2012 *Ex Parte* at 4-6. *See also* ¶ 7, n.38, *supra*.

<sup>51</sup> *See* CEA Comments at 15-16, citing to various video Blu-ray and streaming players by LG, Panasonic, Samsung and Sony.

<sup>52</sup> *See* CEA Petition at 4-5.

<sup>53</sup> *See* CEA Petition at 8-10, 15-16; CEA Reply Comments at 7-10. *See also* Panasonic Comments at 4-8; NCTA Comments at 2; TIA Reply Comments (to CEA Petition) at 2. Nevertheless, as discussed below, we agree with the Consumer Groups and ACB that the market is rapidly changing, *see* Consumer Groups Opposition to CEA Petition at 6, ACB Reply Comments at 7, and anticipate that ACS may become a co-primary purpose of IP-TVs and IP-DVPs in the near term.

<sup>54</sup> *See* Consumer Groups Opposition to CEA Petition at 4-5; Consumer Groups Supplement to Opposition (August 28, 2012) at 7-12 (Consumer Groups Supplement to Opposition); ACB Reply Comments at 7.

<sup>55</sup> *See* CEA Petition at 8-10 (noting, for example, that Samsung's roster of apps focus on video content, including AOL, HD, CNBC Real-Time, Comcast Xfinity, Verizon Flex View and others; that LG emphasizes video content provided by Netflix, Hulu Plus and other video providers; that Sony's marketing materials focus on its "Video Unlimited" streaming service; that Panasonic highlights popular IP-TV apps that are "overwhelmingly video related, including Netflix, YouTube; and Amazon Video," and that Mitsubishi emphasized high-definition and 3D movies through its "StreamTV.>").

<sup>56</sup> *See* CEA Petition at 15, n.62 (noting, for example, that LG's advertisements for its LG Limitless Content emphasize streaming video from Netflix, Hulu Plus, Vudu and more; Panasonic's marketing for its DMP-BD77 Blu-ray Player highlights access to Netflix, Cinema Now and Vudu; Samsung's ads for its Smart Blu-ray Player notes the ease with which viewers can search for movies and TV shows, and Sony's Smart Streaming Player emphasizes the ability to enjoy "instant access to thousands of hit movies, TV shows, music choices and online videos.")

<sup>57</sup> *See* CEA Petition at 11.

accessibility features in the video devices subject to the class waiver.<sup>58</sup> Therefore, during the period of the waiver, we will not require the equipment and services covered by the waiver to comply with the obligations of section 14.20, the performance objectives of section 14.21 and the recordkeeping obligations of section 14.31 of our rules.<sup>59</sup>

12. *Duration of the Waiver.* With respect to the duration of the waiver granted, CEA claims to need a waiver until July 1, 2016 based on a product cycle of three years – a two-year development cycle followed by a one-year period when the products are sold.<sup>60</sup> However, as discussed above, because “[a]ll products and services covered by a class waiver will ordinarily be subject to the waiver for the duration of the life of those particular products and services[,]”<sup>61</sup> the waiver extends to particular models of equipment for as long as the covered models are sold without significant upgrades. Consequently, in defining the waiver period for these purposes, we only consider the time used to get a product developed and initially introduced in the market, and not the period of time during which it is sold. We thus exclude the one-year period CEA identified as the time during which the products are sold, and grant a waiver period of two years for IP-TVs and IP-DVPs. Since the waiver period will begin on October 8, 2013 (the date by which covered equipment must comply),<sup>62</sup> the waiver period will run until October 8, 2015.

13. Limiting the waiver period to two years for IP-TVs and IP-DVPs is also justified by the rapid pace by which changes in communications and video technologies are resulting in the convergence of multiple functions in single devices.<sup>63</sup> We share the concerns expressed by consumers that IP-TVs and IP-DVPs may quickly develop ACS as a co-primary purpose.<sup>64</sup> Given that the public interest is a key

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<sup>58</sup> See Rosston Letter at 5-6. Notwithstanding this finding in the public interest at this time, we reject CEA’s argument that there is good cause to grant such waiver because people with disabilities are able to acquire second screens, such as tablets, laptops or smartphones, to use ACS with their IP-TVs or IP-DVPs. See Rosston Letter at 3, 8. We believe that requiring the purchase of a second screen – and thereby denying people with disabilities the opportunity to have access to Internet connectivity built into a single device that performs multiple functions (that is available to the general public) – is contrary to the very purpose of the CVAA. See Senate Report at 1 (noting that modern technology allows us to “streamlin[e] tasks and allow[] mobile access to the Internet and a diverse menu of applications and services,” and that the CVAA is intended to “update the communications laws to help ensure that individuals with visual, auditory, or speech disabilities are able to fully utilize communications services and equipment . . . .” *Id.* at 2.

<sup>59</sup> 47 C.F.R. §§ 14.20, 14.21 and 14.31. The waiver of these rules also includes a waiver of the obligation to conduct an achievability analysis during the period of the waiver. See *ACS Report and Order*, 27 FCC Rcd at 14607-14619, ¶¶ 119-148.

<sup>60</sup> See CEA Petition at 7-8, 13-14; CEA Reply Comments at 10-11.

<sup>61</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. See also 47 C.F.R. § 14.5(c)(2).

<sup>62</sup> See *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 107-112.

<sup>63</sup> See Consumer Groups *Ex Parte* Submission (August 13, 2012) at 3 (Consumer Groups August 13, 2102 *Ex Parte*) (discussing the speed in which smartphones changed how we communicate within a very short period of time and predicting that the same will happen for IP-TVs and IP-DVPs). See also video entitled “XFINITY, The Future of Awesome,” [http://www.youtube.com/watch?v=VINJ-uR\\_tgY&feature=player\\_embedded](http://www.youtube.com/watch?v=VINJ-uR_tgY&feature=player_embedded) (last visited, October 4, 2012), which shows various devices, including laptops, tablets, mobile phones, televisions and cable set top boxes, serving interchangeable functions. *Contra*, TIA Reply Comments (on CEA Petition) at 3-4 (disagrees with assertions that projected use of ACS is rapidly-evolving). We find TIA’s unsupported assertions to be contrary to the record evidence cited herein and below.

<sup>64</sup> See Consumer Groups Opposition to CEA Petition at 3; ACB Reply Comments at 7; Consumer Groups August 13, 2012 *Ex Parte* at 3 (citing to a video entitled “A Day Made of Glass . . . Made Possible by Corning,” [http://www.youtube.com/watch?v=6Cf7IL\\_eZ38](http://www.youtube.com/watch?v=6Cf7IL_eZ38) (last visited, October 4, 2012), which demonstrates a multitude of uses in the same glass surface devices).

consideration in our waiver determination,<sup>65</sup> we must consider the harm to consumers with disabilities that might result were we to allow the waiver period to last for too long a duration. In this regard, we are concerned that devices that are now designed primarily for viewing or recording video programming could swiftly evolve to include ACS as a co-primary purpose; thus, a waiver period of the accessibility requirements for too a long a duration could, if this occurs, result in consumers being denied access to ACS. Restricting the waiver period to two years will serve the public interest by providing an appropriate balance between promoting disability access to ACS when these devices are more likely to be re-purposed to include ACS as a co-primary function, and meeting the needs of CEA's members to release their devices over the next two years, before such convergence of technologies is likely to take place.<sup>66</sup>

14. The action we take herein is without prejudice to CEA requesting an extension of the waiver period at a later time. However, as noted above, CEA asserts that grant of a class waiver will provide for the cost-effective development of accessibility by, among other things, permitting manufacturers to take advantage of the experience they gain from designing accessibility for products that have ACS as a primary or co-primary function.<sup>67</sup> In this vein, we expect manufacturers of IP-TVs and IP-DVPs to plan for accessibility now so they are ready to implement accessible features and functions when the class waiver period expires on October 8, 2015.<sup>68</sup> As the Commission has previously noted, "in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle."<sup>69</sup>

#### IV. THE NCTA PETITION

15. *Background.* NCTA requests a waiver until July 1, 2016 for set-top boxes that are leased by cable operators to their customers and manufactured before July 1, 2016.<sup>70</sup> According to NCTA, although some set-top boxes being deployed and manufactured today are capable of accessing a limited number of services that may qualify as ACS, the primary purpose of set-top boxes provided by cable operators is to access video programming services, not ACS.<sup>71</sup> NCTA claims a deployment cycle of six years, arguing that there is a two to three year development cycle, followed by three years of manufacturing and deployment.<sup>72</sup> In addition, NCTA asserts that good cause to waive the rules has been demonstrated because the public interest will be served by the promotion of innovation, competition and investment in new technologies during the waiver period, granting a waiver will provide greater certainty and predictability to eventually achieve a better experience for all stakeholders, including people with disabilities, and a class waiver will encourage efficient use of Commission resources by avoiding large

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<sup>65</sup> *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

<sup>66</sup> See Consumer Groups Opposition to CEA Petition at 6.

<sup>67</sup> See Rosston Letter at 5-6.

<sup>68</sup> We acknowledge, as noted in section II, *supra*, that the achievability analysis conducted for products and services already under development at the time when the class waiver expires may take into consideration the effort and expense needed to achieve accessibility during the developmental stage of the product or service. *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. See also 47 C.F.R. § 14.5(c)(2). However, manufacturers of IP-TVs and IP-DVPs that attempt to demonstrate, in response to an enforcement action, that accessibility is not achievable for models introduced after October 8, 2015 will be expected to demonstrate that they have conducted accessibility planning throughout the time period of the class waiver, as early as possible during the design process for equipment and services. *ACS Report and Order*, 26 FCC Rcd at 14602, ¶ 108.

<sup>69</sup> *ACS Report and Order*, 26 FCC Rcd at 14609, ¶ 124.

<sup>70</sup> NCTA Petition at 1-2.

<sup>71</sup> NCTA Petition at 5-7.

<sup>72</sup> NCTA Petition at 4.

numbers of individual waiver requests.<sup>73</sup>

16. The Consumer Groups oppose a class waiver, and argue that the ACS features of cable set-top boxes, such as electronic messaging and non-interconnected VoIP, provide a co-primary purpose, that the set-top boxes are designed and marketed as multipurpose devices that include voice and video communications features, and that it is contrary to the fundamental purpose of the CVAA for consumers to have to wait to receive the benefits of the ACS features and functions that are already included in these devices.<sup>74</sup> Consumer Groups further argue that cable operators routinely bundle telecommunications packages as part of their offerings, and that set top boxes come with pre-installed support for applications that use ACS functionality, such as email and social networking.<sup>75</sup> The Consumer Groups add that if the Commission does decide to grant a waiver, it should be limited to a period of one year.<sup>76</sup> They point to the swift pace at which video products are changing<sup>77</sup> and “the trend for TV, Internet and telecommunications to converge,” in urging the Commission to take steps now to ensure access to ACS features and functions on cable operator-provided set top boxes, “particularly as the competition between traditional cable TV operators and Internet video distributors continues to heat up and ACS features are used to distinguish offerings from the competition.”<sup>78</sup>

17. *Discussion.* We grant NCTA a class waiver of the ACS rules until October 8, 2015 for one class of equipment: set-top boxes leased by cable operators to their customers. First, we find that the class of equipment for which NCTA seeks a waiver is defined with specificity and that the equipment within the class share enough common defining characteristics to be granted a class waiver.<sup>79</sup> Specifically, for purposes of this waiver, we define the class of cable operator-supplied set-top boxes, following NCTA’s description, as “standalone devices that are primarily designed to convert the video signals delivered by cable systems to consumers’ homes and transmit the converted signal to television sets or other display devices for viewing.”<sup>80</sup> This definition is consistent with the Commission’s rules, which define set-top boxes as a form of navigation device “used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.”<sup>81</sup>

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<sup>73</sup> NCTA Petition at 7-10.

<sup>74</sup> See Consumer Groups Opposition to Petition for Waiver by the National Cable & Telecommunications Association (Consumer Groups Opposition to NCTA Petition) at 2-7. See also American Council of the Blind of Maryland Comments; Diane Bomar Comments; Charis Austin Comments; Frank Brown Comments; Gina Allen Comments; Joe Morgan Comments; Mark A. Webb Comments; Marlaina Lieberg Comments; Reginald George Comments; Russell Schermer Comments; Tracey H. Gonzalez Comments; Yvonne T. Miller Comments; Philip G. Rich Comments; Catherine Golding Comments; Karyn Campbell Comments; Pamela Scott Comments; Edwin Rumsey Comments; Norma A. Boge Comments; Parras Shah Comments; Cheryl Roshka Comments; Gaylen Floy Comments; Glenn McCully Comments; Heather Macdonald Comments; Louis J. Schwarz Late-Filed Comments (August 21, 2012).

<sup>75</sup> Consumer Groups Opposition to NCTA Petition at 3. The Consumer Groups point to Facebook integration into Comcast Xfinity set top boxes and the intent of Comcast to partner with Skype as examples. *Id.* at 7.

<sup>76</sup> See Consumer Groups Opposition to NCTA Petition at 9-10.

<sup>77</sup> See Consumer Groups Opposition to NCTA Petition at 8-9 (suggesting that the changing landscape in video programming, which is increasingly reliant on Internet-based participants, make it unreasonable to assume that NCTA’s alleged six year lifecycle of cable operator-leased set-top boxes will be sustainable).

<sup>78</sup> Consumer Groups Opposition to NCTA Petition at 4.

<sup>79</sup> See 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

<sup>80</sup> NCTA Comments at 3.

<sup>81</sup> NCTA Petition at 4, quoting 47 C.F.R. § 76.1200(c).

18. Next, we find that NCTA has demonstrated that a class waiver for set top boxes satisfies the waiver standard of multipurpose equipment that has a feature or function that is capable of accessing ACS but is nonetheless designed primarily for purposes other than using ACS.<sup>82</sup> Although consumers may be able to use some cable set-top boxes for ACS to a limited extent, presently such devices are designed primarily for the purpose of receiving video signals and delivering those signals to consumer display and recording devices, and therefore meet the criteria of section 716(h)(1)(A) and (B) of the Act<sup>83</sup> and section 14.5(a) of the rules.<sup>84</sup> Additionally, as noted by NCTA, the advertising and marketing materials distributed by the manufacturers who make these devices support a finding that these devices are marketed primarily for the reception and delivery of video programming.<sup>85</sup> Accordingly, we find that ACS is not presently a co-primary feature of cable operator-supplied set-top boxes,<sup>86</sup> and that for those newer models that do incorporate ACS, the ACS features and functions that have been added are ancillary to the reception and delivery of video programming.<sup>87</sup>

19. Finally, we agree that NCTA has demonstrated good cause to waive the rules and that the particular facts presented in its Petition suggest that compliance with the ACS rules for set top boxes at the present time would be inconsistent with the public interest.<sup>88</sup> NCTA acknowledges that cable operators are beginning to leverage new Internet technologies to incorporate ACS applications.<sup>89</sup> However, because, at this early stage of development, it remains an open question whether “the set-top box will succeed as a platform for delivering additional features or enhancements,”<sup>90</sup> we find that it would not serve the public interest to delay the deployment of these features. Allowing these enhanced set top boxes to enter the marketplace at this time will provide the time needed to ensure that accessibility features are incorporated into newer generations of set-top boxes when ACS becomes a primary or co-primary function in these devices. During the period of the waiver, we will not require the equipment and services covered by the waiver to comply with the obligations of section 14.20, the performance objectives of section 14.21 and the recordkeeping obligations of section 14.31 of our rules.<sup>91</sup>

20. *Duration of the Waiver.* NCTA seeks a waiver until July 1, 2016, claiming a product cycle of six years. NCTA explains that this is based on a two to three year development cycle followed

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<sup>82</sup> See 47 C.F.R. § 14.5(a); *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181.

<sup>83</sup> 47 U.S.C. § 617(h)(1)(A) and (B).

<sup>84</sup> 47 C.F.R. § 14.5(a).

<sup>85</sup> See NCTA Petition at 6 (listing advertising materials distributed by Motorola, Cisco, and Pace, all of which focus on the video programming functions of these devices).

<sup>86</sup> See NCTA Petition at 5-7; NCTA Reply Comments at 3-4; CEA Comments (on NCTA Petition) at 2-3; TIA Comments (on NCTA Petition) at 2-3.

<sup>87</sup> See NCTA Petition at 7.

<sup>88</sup> See 47 C.F.R. § 1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

<sup>89</sup> NCTA Petition at 8 (noting that potential applications include caller ID features and instant messaging).

<sup>90</sup> NCTA Petition at 9. NCTA also raises concerns about the extent to which the ACS rules would apply to the features being considered for set-top boxes – which it says includes interactive advertising to customizable sports scores and news, traffic, and weather information, as well as the extent to which making these features accessible will be achievable. *Id.* at 8. To the extent new features are incorporated into set-top boxes that are not ACS, they would not be subject to the ACS rules and would not need to be subjected to an achievability analysis.

<sup>91</sup> 47 C.F.R. §§ 14.20, 14.21 and 14.31. The waiver of these rules also includes a waiver of the obligation to conduct an achievability analysis during the period of the waiver. See *ACS Report and Order*, 27 FCC Rcd at 14607-14619, ¶¶ 119-148.

by three years of manufacturing and deployment of the devices.<sup>92</sup> However, as discussed above, product models and services that are covered by a class waiver are entitled to regulatory relief for as long as they are sold without significant upgrades.<sup>93</sup> Consequently, in defining the waiver period for these purposes, we only consider the time it takes to get a product developed and initially introduced in the market, and not the period of time it is deployed. We thus exclude the three-year period NCTA identified as the time during which the products are manufactured and deployed, and grant a waiver period of two years for cable set-top boxes. We further find, in the interest of not adopting a waiver period of overbroad duration and absent more definitive evidence that a full three year period is needed for the development of products in the covered class, that it is in the public interest to limit the initial waiver period to the low end of the range of two to three years identified by NCTA for the development cycle of these products. The two-year waiver period will commence on October 8, 2013 (the date by which covered equipment must comply)<sup>94</sup> and end two years later on October 8, 2015.

21. Limiting the waiver period to two years for cable set-top boxes is also justified in light of the rapid changes in technology and industry trends towards convergence of functions. We thus share the concerns expressed by consumers that cable set-top boxes may swiftly incorporate ACS as a co-primary purpose.<sup>95</sup> Given that the public interest is a key consideration in our waiver determination,<sup>96</sup> we must consider the harm to consumers with disabilities that might result if we were to grant the waiver for too long a duration. Specifically, it is difficult to determine the pace at which single purpose devices that are now designed primarily for the purpose of receiving video signals and delivering those signals to consumer display and recording devices will transition to include ACS as a co-primary purpose. If, however, the incorporation of ACS features into set-top boxes proves to be a success in the marketplace and this transition occurs as swiftly as other technological developments have occurred in recent years,<sup>97</sup> waiver of the ACS accessibility requirements for the full period of time sought by NCTA could result in consumers being denied access to ACS.<sup>98</sup> We believe that limiting the waiver period to two years will serve the public interest by balancing the interest of NCTA's members to begin rolling out recently

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<sup>92</sup> See NCTA Petition at 4.

<sup>93</sup> See ¶ 12, *supra*. We thus reject NCTA's arguments concerning the burdens associated with the potential need to retrofit millions of devices. See NCTA Petition at 9; NCTA Reply Comments at 6. Manufacturers and service providers are not required to recall or retrofit equipment already in inventories or in the field. See *ACS Report and Order*, 26 FCC Rcd at 14609, ¶ 126.

<sup>94</sup> See *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 107-112.

<sup>95</sup> See Consumer Groups Opposition to NCTA at 6-7 (referencing the intent of Comcast to partner with Skype as well as cable industry promotions of access to social media, which now include ACS functions such as instant messaging and e-mail); Gina Allen Comments; Marlaina Lieberg Comments; Reginald George Comments; Karyn Campbell Comments; Edwin Rumsey Comments; Cheryl Roshka Comments; Heather Macdonald Comments; Consumer Groups August 13, 2012 *Ex Parte* at 3 (discussing the multiple functions of consumer devices, including set-top boxes, and citing to a video entitled "A Day Made of Glass . . . Made Possible by Corning," [http://www.youtube.com/watch?v=6Cf7IL\\_eZ38](http://www.youtube.com/watch?v=6Cf7IL_eZ38) (last visited, October 4, 2012), which shows the multitude of uses from various glass surface devices).

<sup>96</sup> *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

<sup>97</sup> See Consumer Groups August 13, 2012 *Ex Parte* Letter at 3 (discussing the extraordinary speed at which smartphones transitioned the way that Americans communicate and noting that the same could happen for cable-supplied set-top boxes). See also video entitled "XFINITY, The Future of Awesome," [http://www.youtube.com/watch?v=VINJ-uR\\_tgY&feature=player\\_embedded](http://www.youtube.com/watch?v=VINJ-uR_tgY&feature=player_embedded) (last visited, October 4, 2012), which shows various devices including laptops, tablets, mobile phones, televisions and cable set top boxes serving interchangeable functions.

<sup>98</sup> See Consumer Groups Opposition to NCTA Petition at 9-10.

developed devices with limited ACS features, with the interests of consumers in having access to these devices when ACS becomes a co-primary purpose with their video programming functions.

22. The action we take herein is without prejudice to NCTA exercising its right to come back to the Commission at a later time to request an extension of the waiver period. However, we expect cable service providers and manufacturers of cable set-top boxes to plan for accessibility now so they are ready to implement accessible features and functions when the class waiver expires on October 8, 2015.<sup>99</sup>

## V. THE ESA PETITION

23. *Background.* ESA requests an eight-year waiver period – until October 8, 2021<sup>100</sup> – for new models or upgrades of the following three classes of equipment and services: Class I – game consoles, both home and handheld, and their peripherals and integrated online networks; Class II – game distribution and online game play services that distribute game software or enable online game play across a network, regardless of the device from which it is accessed; and Class III – game software used for game play.<sup>101</sup> According to ESA, ACS-type features, where they presently exist in game industry products and services, are subordinate to, and typically used to enhance and support the primary purpose of game play rather than ACS, and therefore qualify for a waiver from the Commission’s ACS rules.<sup>102</sup>

24. ESA claims that each of these classes of equipment and services (1) are specifically defined and demonstrate the similarity of the equipment and services within each class;<sup>103</sup> (2) satisfy the waiver standard of multipurpose equipment that has a feature or function that is capable of accessing ACS but is nonetheless designed primarily for purposes other than using ACS;<sup>104</sup> and (3) satisfy the Commission’s general waiver standard, which requires a demonstration of good cause to waive the rules, and a showing that particular facts of the petitioner make compliance inconsistent with the public interest.<sup>105</sup>

25. ESA defines Class I equipment as game consoles and handheld game devices, along with their integrated online networks and peripherals that utilize ACS.<sup>106</sup> ESA explains that Class I devices share many similar characteristics including: “custom hardware and operating systems designed for game

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<sup>99</sup> As the Commission has previously noted, “in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle.” *ACS Report and Order*, 26 FCC Rcd at 14609, ¶ 124. We acknowledge, as noted in Section II, *supra*, that the achievability analysis conducted for products and services already under development at the time when the class waiver expires may take into consideration the effort and expense needed to achieve accessibility during the developmental stage of the product or service. *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. See also 47 C.F.R. § 14.5(c)(2). However, if a cable service provider or manufacturer of cable set-top boxes attempts to demonstrate, in response to an enforcement action, that accessibility is not achievable for models introduced after October 8, 2015, the manufacturer or service provider would also need to demonstrate that it has conducted accessibility planning throughout the time period of the waiver, as early as possible during the design process for equipment and services. *ACS Report and Order*, 26 FCC Rcd at 14602, ¶ 108.

<sup>100</sup> See ESA Petition at 21-22, 27 and 34. Eight years is measured from the *ACS Report and Order* implementation date of October 8, 2013. See *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 107-112.

<sup>101</sup> See ESA Petition at 4.

<sup>102</sup> ESA Petition at 9-10.

<sup>103</sup> See 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

<sup>104</sup> See 47 C.F.R. § 14.5(a); *ACS Report and Order*, 26 FCC Rcd at 14634, ¶ 181.

<sup>105</sup> See 47 C.F.R. § 1.3; *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

<sup>106</sup> ESA Petition at 18-19.

play; an integrated online network and marketplace unique to that platform and that emphasizes game play functions while also providing ancillary functions; and parental control systems.”<sup>107</sup> According to ESA, game consoles “are first and foremost meant for playing games”<sup>108</sup> and any ACS functionality “is limited and is offered as a discrete, add-on feature designed to supplement and enhance the device’s primary game play purpose.”<sup>109</sup> ESA supports its assertions with examples of marketing materials that emphasize the game play functions of the devices,<sup>110</sup> the design of game consoles, which focuses on technological advances directed to game play,<sup>111</sup> the location of game consoles in the “Video Games” section of physical and online retail establishments,<sup>112</sup> and market research that has categorized game console systems as a distinct category separate from telecommunications products and services.<sup>113</sup> ESA excludes from Class I general purpose devices with ACS features and functions, such as PCs and mobile phones, even if those devices include game play.<sup>114</sup>

26. ESA defines Class II as game distribution and online game play services that share a common purpose of distributing games and enabling game play, but that are not games themselves.<sup>115</sup> ESA explains that these services include “game download services, game streaming services, web sites directed to hosting games or game-related support services, and online game networks (including those associated with game consoles, when accessed through devices *other* than a game console).”<sup>116</sup> ESA excludes from Class II general communications services, including social networking services such as Facebook, that may offer the ability to play games, as well as generalized distribution platforms such as iTunes that originate outside of the game industry.<sup>117</sup>

27. ESA contends that the primary purpose of online game services is game distribution and enabling game play and not ACS as evidenced by various websites of game networks.<sup>118</sup> While ESA acknowledges that these services offer some ACS chat functions, it says these functions are to

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<sup>107</sup> ESA Petition at 18.

<sup>108</sup> ESA Petition at 11.

<sup>109</sup> ESA Petition at 12.

<sup>110</sup> ESA Petition at 12-17 and Exhibit A (listing, as examples, marketing materials by Microsoft, Nintendo and Sony).

<sup>111</sup> ESA Petition at 11 (listing, as examples, state-of-the-art Central Processing Units and Graphic Processing Units, increased memory and storage capacity, advanced controllers, enhanced capabilities for multiplayer game play and online marketplaces, all of which, according to ESA, “enable games of increased complexity and depth, while simultaneously providing consumers fresh new ways to acquire games and enjoy them with their friends.”)

<sup>112</sup> ESA Petition at 17-18 (listing, as examples, Best Buy, Target, and Amazon.com).

<sup>113</sup> ESA Petition at 19 (providing, as an example, market research conducted by the NDP Group); ESA *Ex Parte* Letter, October 11, 2012 at 1-3.

<sup>114</sup> ESA Petition at 19.

<sup>115</sup> ESA Petition at 22.

<sup>116</sup> ESA Petition at 22 (footnote omitted, emphasis and parentheses in original). ESA adds that online game services offer leaderboards, the ability to find other users for game competition, tournaments, chat, and game downloading. *Id.* at 22-23.

<sup>117</sup> ESA Petition at 26.

<sup>118</sup> ESA Petition at 23-25 and Exhibit B (citing as examples, EA Origin’s, Microsoft’s Games for Windows LIVE, and Valve Corp’s websites, all of which ESA says emphasize the functionality of ACS only in the context of game play or the game distribution function). *See also* VON Coalition Comments at 1-2; TIA Reply Comments (on ESA Petition) at 2.

enhance or support game play, and that their primary focus is on delivering game content to the consumer.<sup>119</sup> Consequently, ESA concludes that even if ACS capabilities were absent, it “would not impair these services’ primary purpose as a distribution platform.”<sup>120</sup>

28. ESA defines Class III as game software, which covers game software in all of its forms, including online games, but according to ESA is distinguishable from other software and entertainment media.<sup>121</sup> ESA asserts that the primary purpose of video game software is “self-evident”<sup>122</sup> and adds that it would be cumbersome to use in-game chat as a generalized communications platform, and that in-game chat terminates when the game session ends.<sup>123</sup> ESA further argues that game software is marketed and designed primarily for game play and not ACS, and provides examples of such promotional materials that support its assertions.<sup>124</sup>

29. Finally, ESA argues that the ACS that occurs through its gaming systems and services should be waived because this is not the sort of “general communications” that Congress intended to be covered by section 716,<sup>125</sup> *i.e.*, it does “not constitute ACS in the sense meant by the CVAA, which was intended to address real-time voice communications or text messaging between individuals.”<sup>126</sup> Along these lines, ESA concludes that accessibility of other forms of ACS “are far more likely to have meaningful real-world implications than the limited and focused ACS functions of video games, which means that the waivers will not adversely affect the fundamental Congressional concerns that propelled the Act.”<sup>127</sup>

30. ESA states that it has demonstrated good cause to waive the rules because the public interest would be served by advancing innovation and fostering competition, class waivers would promote efficiency by avoiding large numbers of individual waiver requests, and waivers would facilitate voluntary efforts to increase accessibility to the many elements of games not covered by the CVAA.<sup>128</sup> ESA further claims that its requested waivers will reduce uncertainty among manufacturers who might

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<sup>119</sup> ESA Petition at 25.

<sup>120</sup> ESA Petition at 25.

<sup>121</sup> ESA Petition at 31.

<sup>122</sup> ESA Petition at 27.

<sup>123</sup> ESA Petition at 28-29.

<sup>124</sup> ESA Petition at 29-31 and Exhibit C. As examples, ESA notes that a 2012 Nielsen study found that the most popular way to play the existing generation of console games remains offline, that only a small percentage of Scrabble players use chat “to any significant degree,” *id.* at 29, and that the marketing for DC Universe Online and the Madden NFL series confirms that their primary purpose is for game play. *Id.* at 30-31. ESA also points to the websites of Microsoft Xbox Games for Windows and EA Origin to support its assertion that the marketing of game networks identify game delivery and/or support as their primary purpose. *Id.* at 24.

<sup>125</sup> ESA Petition at 12-13. ESA notes, for example, that voice communication when using the Xbox Live multiplayer enables interaction with teammates and opponents, *id.* at 12 n.27, and that Sony’s marketing for the PlayStation 3 “emphasizes the connection between chat and game play.” *Id.* at 13.

<sup>126</sup> ESA Petition at 12 (footnote omitted). *See also id.* at 28 (noting that games are “about game play and are not a generalized communications platform”); *id.* at 36, n.85. Although ESA acknowledges that some chat features available through Class I consoles may be operated independently of a live game session, *id.* at 15, 25 n.63, and that in this context chat “may not directly support game play,” it insists that it is still “focused on connecting with other gamers and supporting other entertainment experiences on the console.” ESA Petition at 25 n.63.

<sup>127</sup> ESA Petition at 36.

<sup>128</sup> ESA Petition at 34-36.

otherwise decline to experiment with new ACS features “for fear that such experimentation may trigger unclear regulatory obligations disproportionate to the value of the feature to the overall product or service.”<sup>129</sup>

31. The Consumer Groups argue that the ACS features of game consoles, services and software provide a co-primary purpose, that ACS is an essential function of games,<sup>130</sup> and that the CVAA requires that consumers with disabilities be able to attain and maintain access that is functionally equivalent to that accorded other users in the gaming community.<sup>131</sup> Specifically, Consumer Groups offer several examples of how online communication and interaction with team players occur during game play, in strategy sessions before and after play, and via third party software that is available on some gaming systems.<sup>132</sup> At the same time that the consumers claim reliance on online communications during gaming sessions is growing and online communication is becoming essential to participation, they insist that the failure to incorporate accessibility in the ACS features and functions is resulting in the exclusion of users with disabilities.<sup>133</sup>

32. The Consumer Groups add that the gaming community uses ACS to chat with friends and teammates not only about games and avatars, but also about other matters, such as catching up with friendships, making plans to meet, and swapping information on subjects other than the game, both inside and outside of game play.<sup>134</sup> For support, the Consumer Groups point to marketing materials and Internet advertisements for games that they say emphasize the social networking aspect of ACS on game consoles.<sup>135</sup> Various other commenters report use of ACS in gaming systems to talk to people around the

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<sup>129</sup> ESA Petition at 35.

<sup>130</sup> Consumer Groups Opposition to ESA Petition at 7-10. *See also id.* at 4 (because ACS has become critical to receive and relay imperative information, particularly for multiplayer games with teams, games that do not have ACS capabilities have become nearly extinct in the online community); Consumer Groups *Ex Parte* Letter, October 9, 2012 at 2-3.

<sup>131</sup> Consumer Groups Opposition to ESA Petition at 2-3.

<sup>132</sup> Consumer Groups Opposition to ESA Petition at 4.

<sup>133</sup> See Consumer Groups Opposition to ESA Petition at 5 (individuals who have disabilities are already being excluded “full membership to the gaming community”). ACB adds that the lack of accessible ACS features in gaming consoles and services requires people who are blind, visually impaired or deaf-blind to pay for additional devices and services to be able to utilize the entertainment content of these games. ACB Reply Comments at 5. *See also* Frank M. Hernandez *Ex Parte* Comments (August 29, 2012) (“People who are blind or visually impaired should be able to fully use the most popular gaming technologies on the market today including any communications features, such as text chat and other forms of electronic messaging.”); Tony B. Swartz *Ex Parte* Comments (August 29, 2012) (“[O]ther communication components such as text chat and other forms of electronic messaging should be made accessible.”).

<sup>134</sup> Consumer Groups Opposition to ESA Petition at 4; Consumer Groups Supplement to Opposition at 2-6. The Consumer Groups cite to game communications that resulted in marriage and other long term relationships. Consumer Groups Supplement to Opposition at 2-3, *citing* A “World of Warcraft” Wedding (February 19, 2007), available at: <http://voices.yahoo.com/a-world-warcraft-wedding-206654.html?cat=19> (last visited, October 4, 2012) (Noting that the reason that “[s]ome people may have a harder time understanding how and why people can meet in a virtual game and then form a romantic relationship . . . is that people who have never played these types of game have a hard time understanding how highly social they actually are.”). *See also* ACB Reply Comments at 2-4 (games are multimedia entertainment platforms with multiple primary purposes, including ACS).

<sup>135</sup> *See e.g.*, Consumer Groups *Ex Parte* Submission (August 20, 2012) at 2 (Consumer Groups August 20, 2012 *Ex Parte*), referencing an advertisement for Xbox, which states “Whether you’re on your computer, your phone or your console, Xbox Social is your connection to the Xbox LIVE community.”

globe,<sup>136</sup> to promote socialization and interaction,<sup>137</sup> and to foster learning in educational contexts.<sup>138</sup> While the Consumer Groups seek a denial of the requested waivers,<sup>139</sup> they add that if the waivers are granted, they should be limited to a term of one year.<sup>140</sup>

33. *Discussion.* We grant waivers for all three defined classes of products and services set out in ESA's petition. However, for the reasons enumerated below, we limit the term of these waivers to a period of two years, rather than the eight years requested by ESA, so that the waivers will expire on October 8, 2015, which is two years past the implementation date for compliance with these rules.<sup>141</sup> While we are convinced that these class waivers are appropriate at this time, we believe that, given the current trajectory of integration and use of ACS in gaming systems, granting waivers beyond October 8, 2015 at this point is outweighed by the public interest and congressional intent to ensure that Americans with disabilities have access to advanced communications technologies.

34. First, we agree that, as required by the *ACS Report and Order*, the classes of equipment and services for which ESA seeks a waiver are defined with sufficient specificity and that the equipment and services in each class share enough common defining characteristics to be granted class waivers.<sup>142</sup> Specifically, per the definitions provided by ESA,<sup>143</sup> for purposes of these class waivers, we define Class I to include game consoles, both home and handheld, and their peripherals and integrated online networks,

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<sup>136</sup> See e.g., Evan Spytak Late-Filed Comments (August 17, 2012) ("One of my favorite parts of the Xbox360 is being able to talk with people that live in different places. . . . Communicating with people is the awesome part about the Xbox360 and one of the main reasons I like it."); Darrell Borchardt *Ex Parte* Comments (September 7, 2012) ("We have relied on video game technology as a means to communicate with other people not just around our community or country but from across the globe . . . there is also the bond that we are able to experience through meeting other people via our video games. . . ."); DeAnna Noriega *Ex Parte* Comments (August 28, 2012) ("Several times a day, friends and acquaintances send me requests to participate in an inaccessible online game. When I interact with my children and grandchildren, I am told of the friends they have made in England or halfway across the world through a game they share.").

<sup>137</sup> Gretchen Maune *Ex Parte* Comments (August 28, 2012) ("These games provide an extremely popular way for people to socialize, play, and interact together and people with visual impairments should not be left out of this. It's hard enough to fit in when you're so different, and the more ways in which we can relate to our sighted peers, the better."); Phyllis Slater *Ex Parte* Comments (September 2, 2012) ("For many of us across the world, this is a way to have fun together.").

<sup>138</sup> Rene Latorre *Ex Parte* Comments (August 31, 2012) ("Gaming systems offer advanced communications functionality such as text chat and other electronic messaging capabilities. . . . The growing popularity of gaming technologies in K-12 education to foster learning and the overall impact of gaming technologies to bring people together means that the accessibility of these gaming technologies must not be forgotten . . . gaming technologies . . . serve as a communication device, promote social interaction, and enable the blind or visually impaired parent to use it as an educational tool."); Frank Welte *Ex Parte* Comments (September 11, 2012) ("Online game technologies are being deployed for educational purposes, so it is important that such educational applications of gaming technology be accessible to students who are blind or visually impaired.").

<sup>139</sup> Consumer Groups Opposition to ESA Petition at 2-3. See also Patricia Albee Comments; Todd Morrison Comments; Don Cullen Comments; Sommer Willis Comments; Brian Coppola Comments (on ESA Petition); Walter Newsome Comments; ACB Reply Comments at 2. Each of these commenters opposed the grant of the ESA petition for waiver.

<sup>140</sup> Consumer Groups Opposition to ESA Petition at 14.

<sup>141</sup> See *ACS Report and Order*, 26 FCC Rcd at 14601-14605, ¶¶ 107-112.

<sup>142</sup> See 47 C.F.R. § 14.5(b); *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 193.

<sup>143</sup> See ESA Petition at 4, 18.

which are designed for multiple entertainment purposes but with a primary purpose of playing games. We define Class II to include game distribution and online game play services designed for the primary purpose of distributing online game software or enabling online game play across a network. Class II does not include general communications services, including general online social networking services that offer the ability to play games or generalized digital distribution platforms originating outside of the game industry.<sup>144</sup> Class III includes game software that is designed for the primary purpose of game play.<sup>145</sup>

35. Next, we find that the equipment and services defined by these three classes are capable of accessing ACS and are designed for multiple purposes, but, at present, are designed primarily for the purpose of game play, which meets the waiver criteria of section 716(h)(1)(A) and (B) of the Act and section 14.5(a) of the Commission's rules.<sup>146</sup> As explained by ESA, at this time, game consoles are designed primarily for playing games,<sup>147</sup> online game services are designed primarily for game distribution and enabling game play,<sup>148</sup> and video game software is designed primarily for game play.<sup>149</sup> Among the factors used to determine whether ACS is a primary or co-primary use in gaming is the extent to which the ACS functionality is advertised, announced, or marketed to consumers as a reason for purchasing, installing, downloading, or accessing the equipment or service.<sup>150</sup> Even though there is a clear trend towards marketing the ACS features and functions of gaming equipment and services,<sup>151</sup> currently, most of the marketing for these products and services emphasizes game playing.<sup>152</sup>

36. Finally, we must determine the extent to which granting the requested gaming waivers is in the public interest.<sup>153</sup> A review of the record suggests that the competing public interests at stake – *i.e.*, the ability of consumers with disabilities to use ACS to communicate with others via online gaming

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<sup>144</sup> See ESA Petition at 4, 26.

<sup>145</sup> See ESA Petition at 4, 31.

<sup>146</sup> 47 U.S.C. § 617(h)(1)(A) and (B); 47 C.F.R. § 14.5(a).

<sup>147</sup> See ESA Petition at 11-16 and Exhibit A.

<sup>148</sup> See ESA Petition at 22-24 and Exhibit B.

<sup>149</sup> See ESA Petition at 27-29 and Exhibit C. We disagree, however, with ESA's suggestion that for a purpose to be co-primary, it must be equal to other co-primary purposes. For support, ESA refers to the Commission's statement in the *ACS Report and Order* that where multipurpose equipment and services are "equally designed for multiple primary purposes, none of which are the exclusive primary use or design purpose," the denial of a waiver may be appropriate. See ESA Reply Comments at 3-4, citing *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 184. However, the *ACS Report and Order* goes on to provide as an example the smartphone, which is "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." *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 184. There is no evidence that manufacturers designed each of these smartphone functions to be used equally by all consumers. As is apparent from the smartphone example, the amount of intended usage, as designed by the manufacturer, or the amount of actual usage by the customer of each function does not need to be considered "equal" in order for multiple purposes within a device to be considered co-primary.

<sup>150</sup> *ACS Report and Order*, 26 FCC Rcd at 14635, ¶ 185.

<sup>151</sup> See, e.g., Consumer Groups August 20, 2012 *Ex Parte* at 2 (referencing an advertisement for Xbox that emphasizes social connections); Consumer Groups Supplement to Opposition at 2-6 (referencing a number of marketing materials where ACS features and functions are touted).

<sup>152</sup> See ESA Petition at 17-18, 24-25, 30-31, and Exhibits A, B and C.

<sup>153</sup> See *ACS Report and Order*, 26 FCC Rcd at 14637, ¶ 188.

systems and services, versus the gaming industry's interest in rolling out innovative games that are currently or are about to go into development – make consideration of ESA's waivers a closer call than the waivers granted to CEA or NCTA, where the inclusion of ACS in the covered classes is not yet as prevalent. We agree with ESA that granting waivers at this time will allow manufacturers of new online gaming systems and services that have ACS to compete with other video game products and services that are already in the market.<sup>154</sup> We also agree that if granted waivers, gaming equipment manufacturers and service providers will be able to benefit from and utilize the experience gained in making ACS accessible in other contexts, to develop and implement ACS accessibility in the equipment and services that are subject to the class waiver in a more efficient and cost-effective manner. However, we note the increasing role that ACS is beginning to play in online gaming systems and services – both with respect to the ability to compete effectively,<sup>155</sup> and with respect to engaging in communications that are unrelated to game play.<sup>156</sup> We disagree with ESA that online communication that occurs through gaming systems and services should be excluded from the coverage of section 716 because this is not the sort of “general communications” that Congress intended to be covered by this section.<sup>157</sup> Neither the CVAA nor its legislative history restricts the Act's coverage to ACS used for a particular purpose.<sup>158</sup> The denial of communications access during gaming – even if it is communication designed to better one's participation in the task created by the game, by conferring and strategizing with others – is included within the kinds of barriers that Congress intended to address in the CVAA.<sup>159</sup> Accordingly, given evidence in the record of the expanding role of ACS in online gaming systems, we believe that good cause exists to waive the Commission's rules for the three gaming classes at this time, but to do so for a more limited period than the eight years requested by ESA. During the period of the waiver, we will not require the equipment and services covered by the waiver to comply with the obligations of section 14.20, the performance

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<sup>154</sup> See ESA Petition at 35.

<sup>155</sup> See Consumer Groups Opposition to ESA Petition at 4 (noting that the ability to compete effectively during an online game frequently turns on the ability to share information with other players.)

<sup>156</sup> See ¶ 32, *supra*.

<sup>157</sup> See ESA Petition at 12-13.

<sup>158</sup> Senate and House legislative reports accompanying the CVAA speak of the “innovative and exciting ways to communicate and share information” provided by Internet-based technologies, Senate Report at 1; House Report at 19, and the need “to ensure that individuals with visual, auditory or speech disabilities are able to fully utilize [such] communications services and equipment. . . .” Senate Report at 2. According to Congress, section 716's mandate for accessible ACS, “is intended to ensure that individuals with disabilities are able to utilize fully the essential advanced technologies that have developed since the passing of the Americans with Disabilities Act and subsequent statutes addressing communications accessibility.” Senate Report at 3.

<sup>159</sup> See Senate Report at 1-2; House Report at 19-20. In the same way that using ACS in the context of employment, education, and civic affairs may be necessary for full participation in society, so too could having the ability to communicate online in a recreational context. Just as the inability of an employee with a disability to send an e-mail to a colleague might impede his ability to fulfill the essential functions of a job, and obstacles preventing a student from conferring with a teacher online might cause her grades to suffer, so too, could an accessibility barrier preventing a person with a disability from communicating during gaming create the type of exclusion and isolation that the CVAA sought to eliminate. See generally, John Boone *Ex Parte* Comments (August 28, 2012) (“[I]f the communications features of such technologies are allowed to continue to be inaccessible, kids, adults and seniors with vision loss will continue to be shut out of full participation in school and community and will not be able to enjoy the full benefits afforded by such technologies.”); Sandy Finkel *Ex Parte* Comments (August 29, 2012); Robin Williams *Ex Parte* Comments (September 2, 2012); Fred Olver *Ex Parte* Comments (August 28, 2012).

objectives of section 14.21 and the recordkeeping obligations of section 14.31 of our rules.<sup>160</sup> As discussed below, by limiting the waiver period to two years, we find that the public interest benefits of the waivers outweigh the countervailing public interest concerns for covering gaming systems and services under the ACS accessibility requirements of section 716.

37. *Duration of the Waiver.* The eight-year waiver period that ESA seeks for all three proposed waiver classes would end on October 8, 2021.<sup>161</sup> For Class I video game consoles, ESA claims that new systems typically are released every five to seven years, but that the lifecycle of such systems are five to ten years because this includes the full period during which a typical consumer is likely to purchase or continue to use the product.<sup>162</sup> ESA states that Class II game distribution and online game play services do not have a specific lifecycle,<sup>163</sup> because “an online gaming service is upgraded and refined, incrementally, over the duration the gamer uses the service.”<sup>164</sup> In addition, ESA argues that because Class II gaming services rely on underlying hardware, the timing of the waiver for Class II should track the timing of the waivers granted for game consoles in Classes I and game software in Class III.<sup>165</sup> In describing the product cycle for Class III gaming software, ESA explains that although popular games may be released annually, they are designed to last for several years.<sup>166</sup> ESA argues that because games depend upon the underlying hardware and network technology, the waiver for Class III should track the waivers granted for Classes I and II.<sup>167</sup>

38. As discussed earlier, because “[a]ll products and services covered by a class waiver will ordinarily be subject to the waiver for the duration of the life of those particular products and services[,]”<sup>168</sup> a waiver extends to particular models of equipment for as long as the covered models are sold without significant upgrades. Consequently, in defining the waiver period for each of ESA’s products and services, we only consider the time it takes for a product to be developed and initially introduced in the market, and not the period of time it is deployed.<sup>169</sup> The remainder of the lifecycle—that is, the time after introduction when the product or service is sold and the consumers continue to use

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<sup>160</sup> 47 C.F.R. §§ 14.20, 14.21 and 14.31. The waiver of these rules also includes a waiver of the obligation to conduct an achievability analysis during the period of the waiver. *See ACS Report and Order*, 27 FCC Rcd at 14607-14619, ¶¶ 119-148.

<sup>161</sup> ESA Petition at 21-22, 27, 34. The waiver requested would start with the implementation date of the ACS rules, October 8, 2013.

<sup>162</sup> ESA Petition at 20-21. *See also* TIA Reply Comments (on ESA Petition) at 2-3. ESA adds that the current cycle is longer “on account of console makers’ significant mid-cycle improvements to current generation consoles.” ESA Petition at 19-20. We note that ESA’s estimated product lifecycle period is not consistent with the guidance in the *ACS Report and Order*. Since a significant upgrade is considered a new product or service for ACS achievability purposes, *ACS Report and Order*, 26 FCC Rcd at 14609, ¶ 124, and substantial upgrades require new waivers, *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192, a “significant mid-cycle improvement” as described by ESA, ESA Petition at 19-20, is thus a new product for development cycle purposes.

<sup>163</sup> ESA Petition at 27.

<sup>164</sup> ESA Petition at 26.

<sup>165</sup> ESA Petition at 27. *See also id.* at 34.

<sup>166</sup> ESA Petition at 33.

<sup>167</sup> ESA Petition at 34.

<sup>168</sup> *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. *See also* 47 C.F.R. § 14.5(c)(2).

<sup>169</sup> In particular, the life of a game console already sitting on a user’s shelf has no bearing on whether the waiver should extend to consoles not yet manufactured. *See* Consumer Groups Opposition to ESA Petition at 13.

the product—is relevant for making a public interest assessment of the ongoing impact of the waiver.

39. If, as ESA suggests, the development cycle for video games is five to seven years,<sup>170</sup> were we to grant the waivers for the full eight years that ESA requests (until October 8, 2021), inaccessible products and services introduced just prior to the end of the waiver period would continue to be sold for another five to seven years – *i.e.*, somewhere in the 2026 to 2028 timeframe. There is considerable record evidence demonstrating the pervasiveness of gaming in American society,<sup>171</sup> and the rapidly expanding role of online communications services in gaming systems and services.<sup>172</sup> ESA acknowledges that although the popularity of video games occurred decades before online chat became possible through broadband, ACS is “an evolutionary feature that some game designers have added as Internet connectivity has become prevalent to enhance game play. . . .,”<sup>173</sup> and that gaming “Class I systems have ACS capabilities outside of any game function.”<sup>174</sup> Other commenters have submitted evidence that game manufacturers and service providers are beginning to promote video gaming equipment and services for their ACS features, and consumers are beginning to enjoy these features, both for strategizing with team players about game play and for multiple purposes unrelated to game play.<sup>175</sup> Moreover, as gaming takes on an ever-present role in our society, use of online gaming systems that have ACS options may have increasing applications in the employment and educational contexts,<sup>176</sup> as well as becoming a tool of social integration.<sup>177</sup> In this manner, gaming environments may increasingly take on the attributes of a

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<sup>170</sup> ESA Petition at 19.

<sup>171</sup> ESA’s website notes that \$24.75 billion was spent on video games, hardware and accessories in 2011. *See* Consumer Groups Opposition to ESA Petition at 3. ESA itself notes that gaming software is one of the fastest growing industries in America. <http://www.theesa.com/facts/econdata.asp> (last visited, October 4, 2012).

<sup>172</sup> *See, e.g.*, Consumer Groups Opposition to ESA Petition at 7-10.

<sup>173</sup> ESA Petition at 28.

<sup>174</sup> ESA Petition at 15. ESA’s website further states that 62 percent of gamers play games with others, either in-person or online. <http://www.theesa.com/facts/index.asp> (last visited, October 4, 2012).

<sup>175</sup> *See* Consumer Groups Comments at 4. *See* ¶ 32, *supra*, describing various uses of online game communication services.

<sup>176</sup> *See e.g.*, <http://www.ere.net/2010/12/22/6-tips-on-using-games-and-simulations-for-recruiting-success/> (last visited, October 4, 2012) (U.S. Army has used Xbox video games to garner new recruits, L’Oreal has used video games to help job candidates determine marketing skills, and IBM has used an interactive game “targeted at business leaders, city planners and government agencies” to allow “players to react to a variety of crises and see how their decisions affect outcomes.”); <http://chronicle.com/article/5-Lessons-Professors-Can-Learn/63708/> (last visited, October 4, 2012) (describing studies of video gamers that focused on the use of games in higher education to conduct complex problem solving and collaborative learning, including “players in a chat room that used complex mathematics to argue for a certain plan of attack”); <http://www.abcya.com/teachers.htm> (last visited, October 4, 2012) (a teacher-created website with downloadable educational games for children in grades kindergarten to fifth grade). We note that although ESA limits its Class I definition to gaming consoles that are designed for “multiple entertainment purposes,” there is no such limitation on its Class II and Class III definitions, and therefore games used for employment and education purposes potentially could be included in these classes.

<sup>177</sup> Consumer Groups point out that Rockstar Games, a developer of mass market titles such as *Grand Theft Auto* and *Max Payne*, has established its own in-house gaming community, “Rockstar Games Social Club,” emphasizing the social component of online game play. Consumer Groups Supplement to Opposition at 6, *citing* <http://socialclub.rockstargames.com> (last visited, October 4, 2012). Similarly, according to one gaming website, “[r]omantic relationships aren’t the only type that we see develop in video games. Non-romantic relationships form as well, such as close friendships between two people with similar interests that might never have met one another otherwise. These friendships tend to last long after the game has grown cold and even after one or both players have (continued....)

social network for which communication is essential.<sup>178</sup> As Congress explained, the benefits of modern communications technologies “have profoundly altered our everyday lives . . . allowing mobile access to the Internet and a diverse menu of applications and services.”<sup>179</sup> Though many advances have improved the communications capabilities of persons with disabilities, Congress noted that “the extraordinary benefits of these technological advances are often still not accessible to individuals with disabilities.”<sup>180</sup> Because we are concerned about the harm to consumers with disabilities that might result from the denial of access to ACS for so long a duration, we find that that granting a waiver for video game consoles, services and software for an eight-year period would be contrary to the public interest.

40. We are also concerned that the evidence provided by ESA may not correlate with the actual development cycles that apply to each of the classes within the meaning of the ACS waiver framework. First, as noted above, it is not clear that ESA’s determination of a five to seven year lifecycle for Class I properly accounts for significant mid-cycle upgrades.<sup>181</sup> When a product or service is substantially upgraded, the ACS Report and Order considers it a new product or service for the purpose of determining its lifecycle.<sup>182</sup> Second, ESA claims that services and software in Classes II and III each merit an eight-year waiver because of their interdependency with each other and with the gaming hardware covered under Class I.<sup>183</sup> However, the services and software encompassed within Classes II and III (as defined by ESA) are not necessarily limited to use with Class I equipment. As such, their development cycles may be shorter than offerings that are linked to gaming consoles and other equipment covered by Class I. In light of our concern that people with disabilities will be denied access to essential ACS, and the lack of more definitive evidence in the record on the development cycle for the products and services of the covered classes, we find that granting ESA’s request for waivers for a two-year period, beginning on October 8, 2013 and ending on October 8, 2015, is reasonable and will best serve the public interest. Adopting a two-year waiver period for ESA will encourage product engineers and manufacturers to strive to incorporate accessibility sooner into their gaming products and services, which will in turn

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stopped playing the original game which they met in.” <http://voices.yahoo.com/a-world-warcraft-wedding-206654.html?cat=19> (last visited, October 4, 2012).

<sup>178</sup> In the *ACS Report and Order*, the Commission explained that while it recognizes that Congress’s “primary concerns . . . are focused on more traditional, two-way, interactive services,” [it does] not interpret that expression of primary concerns or focus to exempt new or less traditional electronic messaging services that fully meet the definition in the Act.” *ACS Report and Order*, 26 FCC Rcd at 14575, ¶ 43 n.83, quoting Senate Report at 6, House Report at 23. The Commission accordingly found it consistent with Congress’s intent to conclude that electronic messaging service covered by sections 716 and 717 of the Act (defined by Section 3(19) of the Act, 47 U.S.C. § 153(19)) includes two-way interactive services such as text messaging, instant messaging, and electronic mail, even when such services are provided through social networking or related sites. *ACS Report and Order*, 26 FCC Rcd at 14574-14575, ¶ 43, citing Senate Report at 6; House Report at 23. It is consistent with this line of reasoning to conclude that online communication that takes place within an online social gaming community network can be covered by section 716.

<sup>179</sup> Senate Report at 1; House Report at 19.

<sup>180</sup> Senate Report at 2; House Report at 19.

<sup>181</sup> See ¶ 37 n.160, *supra*; ESA Petition at 19-20 (describing significant mid-cycle improvements to current generation consoles).

<sup>182</sup> See *ACS Report and Order*, 26 FCC Rcd at 14639, ¶ 192 (substantial upgrades require new waivers).

<sup>183</sup> ESA Petition at 34 (there is an “interdependency of Class III offerings with game hardware and online game networks,” which means that “major changes to Class III offerings are likely to track or result from significant changes in these other classes, such as the release of new consoles or other major game technology”).

promote innovation – not only for people with disabilities, but for the general public.<sup>184</sup> Finally, granting ESA a two-year waiver will enable the Commission’s analysis of any future requests to extend the waivers to be informed not only by the evidence specific to game products and services, but more generally by the development of accessibility features throughout ACS industries.<sup>185</sup>

41. The action we take herein is without prejudice to ESA exercising its right to come back to the Commission at a later time to request an extension of the waivers. We recognize, given the lengthier product cycles for video game consoles, that accessibility for these products may not be achievable by October 8, 2015 in all cases. However, manufacturers and service providers will be expected to plan for accessibility over the next three years and to consider accessible design early during the development stages of the next generation of their products and services to better enable them to eliminate accessibility barriers when the class waiver expires on October 8, 2015.<sup>186</sup> Given the dynamism of the electronic software industry, should ESA seek to renew or extend the class waivers granted herein, it may be necessary for ESA to define with greater specificity the classes of equipment and services under consideration at that time.

## VI. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j) and 716 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j) and 617, and sections 0.361, 1.3 and 14.5 of the Commission’s Rules, 47 C.F.R. §§ 0.361, 1.3 and 14.5, this *Order* IS ADOPTED.

43. IT IS FURTHER ORDERED that the Consumer Electronics Association Petition for Waiver IS GRANTED to the extent discussed above and IS OTHERWISE DENIED.

44. IT IS FURTHER ORDERED that the National Cable & Telecommunications Association Petition for Waiver IS GRANTED to the extent discussed above and IS OTHERWISE DENIED.

45. IT IS FURTHER ORDERED that the Petition of the Entertainment Software Association IS GRANTED to the extent discussed above and IS OTHERWISE DENIED.

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<sup>184</sup> We disagree with TIA that application of the ACS rules to gaming necessarily would discourage investment and innovation and hamper the proliferation of ACS features in gaming products. TIA Reply Comments (on ESA Petition) at 3-4. In many instances, innovative accessibility features are used by people without disabilities, such as talking caller ID systems, which enable people who are blind to ascertain the identities of incoming callers, but which also are used by sighted people seeking to enjoy dinner without getting up from the table to answer a call.

<sup>185</sup> We also believe that a waiver period of two years will better correlate with the delivery of the second biennial CVAA Report, due to Congress in 2014. The preparation for such report will necessarily entail a review of the development of added accessibility features and functions in new ACS products and services.

<sup>186</sup> See *ACS Report and Order*, 26 FCC Rcd at 14609, ¶ 124 (“we believe in many instances, accessibility is more likely to be achievable if covered entities consider accessibility issues early in the development cycle”). We recognize, however, that the achievability analysis conducted for products and services already under development at the time when the class waiver expires may take into consideration the developmental stage of those products or services and the effort and expense needed to achieve accessibility at that point in the developmental stage. See *ACS Report and Order*, 26 FCC Rcd at 14640, ¶ 194. See also 47 C.F.R. § 14.5(c)(2). However, if a manufacturer or provider of video game consoles, services or software attempts to demonstrate, in response to an enforcement action, that accessibility is not achievable for models introduced after October 8, 2015, the manufacturer or provider would also need to demonstrate that it has conducted accessibility planning throughout the time period of the class waiver, as early as possible during the design process for equipment and services. *ACS Report and Order*, 26 FCC Rcd at 14602, ¶ 108.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Acting Chief  
Consumer and Governmental Affairs Bureau