

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

In the Matter of

Closed Captioning of Video Programming

Telecommunications for the Hard and Deaf of
Hearing, Inc.

Petition for Rulemaking

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CG Docket No. 05-231

PRM11CG

COMMENTS



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I. INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”) submits these comments in response to Section VI.A of the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.¹ The FNPRM sought comment on several matters to ensure the accessibility of television programming for individuals who are deaf and hard of hearing and improve the Commission’s procedural rules governing television closed captioning.² Specifically, Section VI.A of the FNPRM sought comment on extending at least some of the captioning compliance responsibilities from video programming distributors (“VPDs”) to other parties in the programming creation and distribution chain.

ACA supports the Commission’s efforts to improve the quality of television closed captioning and ensure that individuals who are deaf and hard of hearing receive accurate and complete captions. Problems with closed captioning originate from either of two general sources.³ First, the problem may arise due to actions or inactions on the part of a video programmer. For instance, the programmer may fail to properly generate and/or embed the closed captioning in their programming, or to transport the captioning to receive points of VPDs. Second, the problem may come about due to actions or inactions by a VPD. For example, a VPD may fail to pass through to their customers the closed captioning in the received video programming due to issues with the VPD’s facilities, such as equipment in a cable headend, or

¹ *Closed Captioning of Video Programming, Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking*, CG Docket No. 05-231, PRM11CG, FCC 14-12 (rel. Feb. 24, 2014) (“Report & Order” and “Further Notice” or “FNPRM”).

² For ease of reference, we refer to the television closed captioning rules adopted pursuant to Section 713 herein simply as “closed captioning” rules, 47 C.F.R. § 79.1, and the IP closed captioning rules adopted pursuant to the CVAA, 47 C.F.R. § 79.4, as “IP closed captioning” where appropriate.

³ See Report and Order, ¶ 11 (noting how captioning problems can arise from “a host of technical and non-technical problems, including problems with local broadcast station signals, local cable provider transmissions, broadcast and cable network transmissions, maladjustment of consumer equipment that is purchased or leased from cable or satellite companies, satellite transmission signals, and/or improper encoding and transmission by caption providers”), *quoting* FCC Consumer Advisory Committee Report, MB Docket No. 07-148, October 1, 2007, § II.B at 11 (quotations omitted).

in the customer premises equipment. Under existing rules, VPDs are responsible for all problems, regardless of whether the problem originated with the programmer or the VPD. However, fairness should dictate that the ultimate responsibility for compliance with the Commission's closed captioning rules should rest with the party most directly responsible for the problem. ACA therefore recommends that the Commission attach responsibility for the new captioning quality standards to video programmers when it is clear that the VPD's equipment is properly functioning and similarly extend analogous responsibility to programmers for all closed captioning obligations. As discussed below, the Commission has the authority to take these actions.

ACA generally supports the burden-shifting enforcement model outlined by Comcast Corporation and NBCUniversal (together, "Comcast") and included in Section VI.A of the FNPRM as a method for extending some of the compliance burdens to video programmers. Comcast's proposed approach is a practical and efficient means to place responsibility on video programmers as well as VPDs. Under this proposal, upon receiving a captioning complaint, VPDs remain liable for investigating captioning issues as they are under the Commission's current rules. Liability would then shift to the video programmer only after the VPD investigates the captioning issue and only if the VPD finds that the captioning issue is not within their control. Put another way, this approach ensures that the entity most able to remedy the captioning issue will have the responsibility to fix the problem. In a slight modification to the Comcast proposal, ACA suggests that in the event the Commission receives complaints pointing to the same captioning problem occurring on the service of multiple VPDs, the Commission should have the discretion to forward complaints directly to video programmers.

Finally, ACA's comments address a number of related questions posed by the Commission. Specifically, ACA recommends that the Commission: (i) maintain the requirement that VPDs only report investigation results to the Commission in cases where a consumer has filed the complaint with the Commission and the Commission has forwarded the complaint to

the VPD; (ii) declare that all liability for a captioning issue passes to the video programmer after the VPD informs the video programmer that the captioning issue is not within the VPD's control; and (iii) establish a safe harbor for VPDs that comply with the Commission's quality standards and technical compliance rules adopted in the Report and Order released with the FNPRM.

II. THE COMMISSION SHOULD EXTEND SOME OF THE RESPONSIBILITIES FOR COMPLIANCE WITH ITS CLOSED CAPTIONING RULES TO VIDEO PROGRAMMERS

Section VI.A of the FNPRM sought comment on whether the Commission should extend some of the responsibilities for compliance with its closed captioning quality standards for programming shown on television to video programmers.⁴ Section VI.A further asks whether to apply any changes generally to all captioning obligations.⁵ ACA recommends that the Commission extend some of the compliance responsibilities for the new captioning quality standards to video programmers and apply these procedures to all closed captioning obligations.

A. The Commission Has the Authority to Extend Compliance Responsibilities to Video Programmers.

The Commission has authority under Section 713 of the 1996 Telecommunications Act to shift compliance responsibilities from VPDs to video programmers. In particular, Section 713 directs the Commission to prescribe regulations that "shall ensure" that "video programming providers or *owners* maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions."⁶ As the

⁴ FNPRM, ¶ 123.

⁵ *Id.*, ¶ 127 ("Should any changes to the apportionment of these responsibilities apply generally to all captioning obligations, or only to the newly adopted captioning quality rules?").

⁶ See 47 U.S.C. § 613(b)(2); see also 47 U.S.C. § 613(d) (Commission may exempt programs, classes of programs, or services if the provision of closed captioning "would be economically burdensome to the provider or *owner* of such programming.") (emphasis added).

Commission has recognized, this “authorizes the Commission to regulate closed captioning of programming by providers and owners of video programming.”⁷

B. Extending Quality Standards Responsibilities to Video Programmers is More Efficient and Will Better Ensure High Quality Closed Captioning by Placing Liability with the Entity Most Directly Responsible.

Since 1997, the Commission has placed ultimate responsibility for meeting closed captioning requirements on VPDs.⁸ Yet, as ACA has previously noted, multichannel video programming distributors (“MVPDs”) and cable operators play no role in generating or embedding the closed captioning, except where they produce original programming (subject to certain exemptions).⁹ Instead, cable operators simply pass through the programming signal, including closed captioning data, as received from the program network or broadcaster (i.e., the “video programmer”).¹⁰

Placing the compliance burden entirely on VPDs has, in effect, inefficiently required VPDs to play policeman to hundreds of programmers with regard to the closed captioning rules, even though “video programmers typically are the entities with the most direct control over the quality of closed captioning of their programming.”¹¹ ACA agrees with other distributors that VPDs should no longer be held responsible for indirectly enforcing video programmers’ closed

⁷ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787, ¶ 20 (2012) (“IP Closed Captioning Order”) (emphasis added).

⁸ *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, CG Docket No. 05-231, Report and Order, 13 FCC Rcd 3272 (1997), ¶ 27 (“1997 Order”).

⁹ Comments of the American Cable Association, at 2 (Nov. 10, 2005).

¹⁰ Most programming agreements specifically prohibit a cable operator from modifying the signal once it receives it at the cable system’s headend, except for brief carve-outs for local ad insertions. The Commission’s crafting of a system to forward relevant complaints to programmers and emphasis on the VPD’s role in passing through captions illustrates the lack of actual control that VPDs have over the quality or content of the closed captions the viewer receives. See 47 C.F.R. § 79.1(g)(3) (providing for a seven-day timeframe for a VPD to forward a “complaint regarding programming of a broadcast television licensee, or programming over which the video programming distributor does not exercise editorial control” to the relevant programmer); 1997 Order, ¶ 212 (noting that a VPD’s responsibility lies with passing through captions and that VPDs can rely on certifications from programmers for compliance purposes).

¹¹ See Report & Order, ¶ 52.

captioning obligations through contractual representations, particularly with respect to the new rules related to quality and content.¹² The current regulatory regime rests upon the VPD obtaining a contractual commitment from a video programmer to (1) comply with the Commission's closed captioning obligations, and (2) indemnify the VPD in the event that the Commission fines the VPD due to an error by the programmer.¹³ This regime imposes unnecessary costs on a VPD. These costs are included in the price that consumers pay for VPD services, and are particularly burdensome for smaller VPDs with tight budgets. Carrying over this same regime with regard to compliance with the new closed captioning quality rules, instead of extending quality standards responsibilities to video programmers is inefficient, and would impose additional costs on VPDs.

More importantly, adopting the current regime for the rules applying to closed captioning quality is less likely to produce the public interest benefit of higher quality closed captioning than a system in which the programmer is directly responsible for their own errors. Especially for smaller VPDs, contractual representations do not induce programmers to comply with the closed captioning rules. Video programmers have little reason to worry that a smaller VPD will seek legal recourse if the programmer breaches its contractual obligation to provide captioning. In most cases, it is likely that the smaller VPD's financial and administrative costs to pursue legal action to obtain reimbursement will far outweigh the benefits gained by holding the programmer liable for its breach. Knowing this market reality, video programmers do not have a strong incentive to proactively address closed captioning quality standards, particularly those that affect customers of smaller VPDs.

¹² See Letter from Jordan Goldstein, Exec. Director – Reg. Affairs, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, at 2 (Jan. 28, 2014); Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 2 (Dec. 9, 2013) (DIRECTV and DISH Network Ex Parte). In placing the ultimate compliance responsibility on VPDs in its 1997 Order, the Commission expressed its belief that VPDs and video programmers “will negotiate for an efficient allocation of captioning responsibilities,” and that “program owners and producers will cooperate with [VPDs] to ensure that nonexempt programming is closed captioned in accordance with [its] rules.” See 1997 Order, ¶ 28.

¹³ See Report & Order, ¶ 41.

By comparison, extending liability for captioning issues that originate with the video programmer to the video programmer will better motivate the programmer to ensure captioning quality. This is because complaints will need to be directly answered by the party ultimately responsible for the captioning failure. By holding the programmer directly responsible when the captioning problem is due to its own error, the programmer will have the appropriate direct exposure to any enforcement actions when closed captioning issues arise, as well as being subject to public scrutiny when it fails to provide appropriate captioning.

Such a change in policy is more efficient, and would fully incentivize each source of potential captioning problems – VPDs *and* programmers – to do all that is necessary to ensure captioning quality, and therefore lead to higher quality closed captioning. This is a step the Commission has already taken regarding IP closed captioning.¹⁴ As the Commission stated in the accompanying Report and Order, “imposing obligations on VPDs to ensure compliance with the captioning quality standards is a critical *first step* toward achieving Congress’s goal of making television programming fully accessible to people who are deaf or hard of hearing.”¹⁵ Including video programmers in the Commission’s regulatory framework would be the natural next step to extend closed captioning compliance responsibilities to the party that “enter[s] into contracts with captioning vendors, control[s] when programming is delivered to captioning vendors to be captioned, and incorporate[s] captioning with the programming for delivery to VPDs.”¹⁶

¹⁴ FNPRM, ¶ 128 (in the IP captioning context, the Commission found that “leaving VPOs’ responsibilities to be defined entirely by private contractual arrangements would be more costly and less efficient than appropriately allocating certain responsibilities among both VPOs and VPDs), *citing* IP Closed Captioning Order, ¶ 17.

¹⁵ *Id.*, ¶ 51 (emphasis added).

¹⁶ *Id.*, ¶ 52.

C. Comcast's Proposed Enforcement Model is a Practical and Efficient Means to Shift the Burden of Compliance from VPDs to Video Programmers When Necessary.

Under the Commission's current rules, consumers who have complaints about closed captioning may either bring their complaints directly to a VPD, or may file with the Commission who will then forward the complaint to their VPD. This process works well for consumers and the Commission, at least at this initial stage, because consumers can easily identify their VPD, and VPDs are well positioned to provide an initial response to subscriber complaints about captioning issues.¹⁷

Consistent with this approach, Comcast proposes to place the initial investigation burden on the VPD. Then, if the VPD finds that the problems raised by the captioning complaint are within its control (i.e., a pass-through problem or equipment issue), the VPD remains responsible for fixing the problem and for any associated liability.¹⁸ However, if the VPD's investigation reveals that the captioning issue is not within its control, the compliance burden shifts to the video programmer.¹⁹ In these situations, the video programmer would have the obligation to fix the problem, and the VPD would be relieved of any liabilities associated with the captioning problems.²⁰ This general approach is a practical and efficient means to shift responsibility from VPDs to video programmers. It retains VPDs as the initial point of contact, which provides consumers an entity to which they can address their complaints. It also keeps VPDs in the chain of responsibility until it becomes clear the problem originated with the video programmer. Finally, it allows the VPD to assist in identifying other entities that may be

¹⁷ *Id.*, ¶ 51 ("The Commission chose to place exclusive responsibility for compliance with the closed captioning requirements on VPDs because they are ultimately responsible for ensuring the delivery of programming to consumers."); see also 1997 Order, ¶ 27 (Placing compliance obligations on VPDs would promote more efficient monitoring and enforcement of the closed captioning rules because there would "be a single entity to which complaints must be addressed, and there would be no need for tracking the entities responsible for producing programs alleged to violate the rules.").

¹⁸ FNPRM, ¶ 125.

¹⁹ *Id.*

²⁰ *Id.*

responsible for the captioning errors,²¹ ultimately leading to a more efficient means of affixing responsibility on the right party.

D. The Commission Should Have the Discretion to Forward Complaints Directly to Video Programmers.

In response to the Commission's request for comment on other issues relating to captioning requirements,²² ACA proposes that the Commission adopt the Comcast proposal with the slight modification that the Commission retain the discretion to forward complaints filed by consumers directly to the video programmer, thus bypassing the VPD, when available evidence suggests that the problem originated with the video programmer. For example, a captioning issue on a program airing on major national satellite network (e.g., Game of Thrones on HBO) may result in numerous complaints springing from that single captioning problem, filed from multiple locations in the country against different VPDs. If this occurs, the Commission should not automatically first forward complaints to each VPD. Rather, the Commission should have the discretion to deduce from the situation that VPDs are not responsible for the captioning quality problem and forward the complaints directly to the video programmer responsible for captioning the programming.

The Commission's implementation of the CALM Act provides a model in which the Commission has already implemented and exercised such a discretionary scheme. The concern about loud commercials presents a similar problem to that of poor captioning quality – both unwelcome disruptions to the viewing experience can be caused by a fault with either the programmer or the VPD. In the case of reports of a widespread commercial loudness problem manifesting itself in downstream distributors (across multiple MVPDs or systems) from a single upstream programming source (the station or network inserting the ad and controlling the

²¹ Report & Order, ¶ 51 (“Because VPDs are the entities that provide video programming directly to customers’ homes, keeping them in the chain of responsibility will provide consumers an entity to which they can address their complaints, and which can assist in identifying other entities responsible for the captioning quality errors.”).

²² See FNPRM, ¶ 129.

dialnorm settings), the Commission allowed for the possibility that the cause of the problem was the programmer rather than the distributors and that this would be apparent from the situation presented. The Commission acknowledged this in the context of the CALM Act by giving itself the discretion to monitor the pattern or trend of “sufficiently specific” loudness complaints and then opening an investigation with the “station or MVPD” in question.²³ Given that the Commission has shown its ability and inclination to narrowly target the cause of viewing disruptions prior to acting, there is little reason to not apply this model to the instant case involving captioning quality, which exhibits the same one-to-many characteristic.

E. The Commission Should Extend Compliance Responsibilities to Video Programmers for All Closed Captioning Obligations, Not Just Captioning Quality Issues.

The Commission asks whether changes to the apportionment of these responsibilities should apply generally to all captioning obligations, or only to the newly adopted captioning quality rules.²⁴ ACA asserts that the Commission should apply any changes to all captioning obligations. So long as the Commission extends compliance responsibilities to video programmers in some aspects of closed captioning, there is no reasonable justification to not extend compliance responsibilities to video programmers for all closed captioning obligations. For the reasons ACA outlines above to extend compliance responsibilities to video programmers in ensuring closed captioning quality, it naturally follows to extend those same compliance responsibilities to video programmers for all closed captioning obligations. Moreover, extending some of the compliance responsibilities to video programmers for all closed captioning obligations will avoid unnecessary confusion for all parties in the distribution chain as well as for consumers between two different complaint processes.

²³ *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222 ¶ 41 (2011) (emphasis added) (“CALM Act Order”).

²⁴ FNPRM, ¶ 127.

III. ALONG WITH EXTENDING COMPLIANCE RESPONSIBILITIES TO VIDEO PROGRAMMERS, THE COMMISSION SHOULD ADDRESS A NUMBER OF RELATED ISSUES

Below, ACA addresses several additional issues raised by the Commission in Section VI.A of the FNPRM. Each proposal would help make burden shifting a more effective process for consumers, the Commission, VPDs, and video programmers.

VPDs should only be required to report investigation results to the Commission when the Commission forwards the complaint to the VPD. Under the current closed captioning rules, a consumer may choose to file a complaint directly with the VPD or first file with the Commission.²⁵ The Commission asks whether each VPD should be obligated to report to the Commission when the compliance burden shifts to the video programmer, along with the results of its initial investigation to warrant this shift.²⁶

Under the existing closed captioning complaint process, a VPD is not required to report to the Commission any records or documentation to demonstrate that it is in compliance with Commission's rules when the consumer files its complaint directly with the VPD.²⁷ As the Commission found when adopting its original complaint structure, this approach properly incentivizes VPDs to fully investigate consumer complaints to avoid their filing of a complaint with the Commission, and leads to quicker action to resolve complaints.²⁸ The rule only requires VPDs to submit a response to the Commission in the event that the consumer

²⁵ Until 2008, consumers were required to first file a complaint with the VPD. In 2008, the FCC amended its rules to allow consumers to file a written captioning complaint with the Commission or their VPD within 60 days of the captioning problem. If the consumer files the complaint directly with the VPD, and the VPD fails to respond within 30 days or the consumer finds the response unsatisfactory, the consumer may refile the complaint with the Commission. Complaints filed with the Commission (initially or after the consumer refiles the complaint) will be forwarded to the VPD, and the VPD must respond within 30 days of receipt of the complaint. See 47 C.F.R. §§ 79.1(g)(1)-(4).

²⁶ FNPRM, ¶ 126.

²⁷ See 47 C.F.R. § 79.1(g)(5).

²⁸ See 1997 Order, ¶ 27 (placing compliance obligations on VPD promotes more efficient monitoring and enforcement) and ¶¶ 240-243 (filing complaints with VPDs would "lead to quicker action to resolve a complaint than if the complaint were filed directly with the Commission.")

complaint was filed with the Commission and the Commission forwarded the complaint to the VPD.

For the same reasons that the Commission did not originally require VPDs to report investigation results to the Commission when the VPD receives complaints directly from consumers, the Commission should not require the filing of sufficient records and documentation of their response to consumers under the closed captioning quality rules. First, this alternative approach would increase VPD's costs in dealing with complaints received directly from their customers. Second, this alternative approach would put VPDs in the difficult position of determining whether their customer has submitted a valid complaint that, if found not to be their fault, would require a response to the Commission. Due to the potential extra cost that would be incurred whenever a VPD receives a valid complaint, rather than leading to faster action to resolve complaints as under the current complaint process, the alternative approach would have the perverse effect of discouraging VPDs from wanting to validate and address some consumer complaints.

Accordingly, if a consumer files its complaint directly with the VPD, the VPD should not be required to forward its response to the Commission. VPDs should only be required to provide documentation to the Commission that the closed captioning problem is outside of its control, along with evidence that the VPD's closed captioning equipment is in good working order, when the consumer complaint comes from the Commission.

ACA opposes joint liability. The Commission asks whether VPDs should remain jointly responsible with the video programmer after informing the programmer about the need for the programmer to address the problem.²⁹ ACA opposes the concept of joint responsibility when the problem is solely caused by the video programmer. Once a VPD completes an investigation and finds that the captioning issue is not within the VPD's control, the video programmer should

²⁹ FNPRM, ¶ 126.

become wholly liable to address the problem. Anything other than full liability on the video programmer when the captioning problem originates with them, introduces factors that raise costs for VPDs and would lead to a less effective mechanism for ensuring closed captioning quality.

The Commission should establish a safe harbor, and allow VPDs to take corrective actions prior to initiating enforcement action against the VPD. The Commission asks whether to allow VPDs to assert a safe harbor defense and take corrective actions to demonstrate compliance prior to being subject to enforcement action.³⁰ ACA supports the adoption of a safe harbor for VPDs.

In the accompanying Report and Order, the Commission adopted new technical compliance rules where VPDs must monitor and maintain their closed captioning equipment by conducting technical equipment checks and keep records of their monitoring and maintenance activities for at least two years.³¹ These new rules ensure that VPDs are taking all reasonable preventative steps to ensure its captioning equipment is passing through the captions as received from the video programmer.

A safe harbor is appropriate because there is no way to prevent a real-time technical problem from occurring that might affect the delivery of closed captioning. Equipment failures are an unavoidable problem, and rarely does a cable operator have advance notice. The actions operators have already taken, and will take to minimize these problems by actively monitoring and maintaining their equipment lowers the likelihood of failure and the impact of a problem.³² It would be unjust to hold VPDs responsible for unexpected breakdowns in

³⁰ *Id.*, ¶ 129.

³¹ Report & Order, ¶¶ 94, 101.

³² The Commission previously endorsed a similar safe harbor in the CALM Act context. See CALM Act Order, ¶¶ 30-44 (explaining that stations and MVPDs cannot directly control the loudness of commercials in real-time and accordingly establishing a safe-harbor that insulates MVPDs from some liability when they perform spot checks in an effort to reduce the likelihood of noncompliance and quickly resolve problems to the extent that they do arise).

equipment when the VPD is taking appropriate preventative steps to minimize such occurrences. Thus, VPDs that comply with the Commission's new technical compliance rules should also be deemed as falling under a safe harbor that permits it to take corrective actions to demonstrate compliance prior to being subject to enforcement action.

IV. CONCLUSION

ACA fully supports the Commission's efforts to improve closed captioning quality and ensure that individuals who are deaf and hard of hearing receive accurate and complete captions. ACA submits that extending compliance responsibilities to the video programmers that provide the captioning and adopting a burden shifting mechanism from the VPD to the programmers, in the event that a VPD's investigation of a complaint reveals that the problem lies with the video programmer rather than the VPD's equipment, will best advance the Commission's goals in the proceeding. In addition, consistent with the foregoing, the Commission should (i) not require a VPD's report investigation results to be sent to the Commission when the Commission forwards a complaint to the VPD; (ii) not establish joint liability for video programmers and VPDs; and (iii) establish a safe harbor and allow VPDs to take corrective actions prior to initiating enforcement action against the VPD.

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