

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

In the Matter of

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

**Opposition to the Petition for Waiver by Pluto, Inc. of**

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)  
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)  
Hearing Loss Association of America (HLAA)  
National Association of State Agencies of the Deaf and Hard of Hearing, Inc.  
(NASADHH)  
Deaf Seniors of America (DSA)  
Rehabilitation Engineering Research Center Technology for the Deaf and Hard of  
Hearing (DHH-RERC)  
National Association of the Deaf (NAD)  
Association of Late-Deafened Adults, Inc. (ALDA)  
Cerebral Palsy and Deaf Organization (CPADO)  
American Association of the Deaf-Blind (AADB)  
Rehabilitation Engineering Research Center on Inclusive Information and  
Communications Technology (IT-RERC)

Laura M. Moy  
Michael Rosenbloom  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Suite 312  
Washington, DC 20001  
(202) 662-9535

*via electronic filing*

February 21, 2020

*Counsel for TDI*

## Summary

Consumer Groups respectfully oppose Pluto’s petition for waiver of the Federal Communication Commission’s (“Commission”) closed captioning rules for video programming delivered over Internet Protocol (“IP Requirements”). Pluto’s petition generally fails to provide sufficient information for the Commission or the public to evaluate its merits. Publicly available information undermines some of the information that Pluto does provide. Pluto fails to show that providing closed captioning would be an economic burden or that there is good cause to grant its petition. As a result, the Commission should reject Pluto’s petition.

The Commission should not grant Pluto’s petition under the economic burden standard. Pluto fails to provide sufficient information to show the IP Requirements would be economically burdensome. First, Pluto does not provide any information about the labor or equipment costs for providing closed captioning. Pluto asserts confidentiality instead of providing the required documentation of the costs of providing closed captioning. Second, Pluto provides no concrete documentation about its financial resources and could seek a sponsorship from its parent company, Viacom.

The Commission should not grant Pluto’s petition under the good cause standard. Pluto fails to provide sufficient information to show good cause supports its waiver petition. Pluto must show that its waiver petition is in the public interest and warranted by special circumstances. Pluto’s petition is not in the public interest because it denies deaf and hard of hearing people full, equal access to Pluto’s content. A majority of the platforms for which Pluto seeks waiver are completely

inaccessible to deaf and hard of hearing people because the platforms provide no basic captions. An estimated 1.8 million Pluto users cannot access compliant captions. Moreover, Pluto has been out of compliance with the IP Requirements for over five years.

Pluto also fails to show special circumstances warrant a good cause waiver. By providing insufficient financial information, Pluto fails to show its financial situation justifies a good cause waiver. Pluto also fails to satisfy the special circumstances requirement because: Pluto provides insufficient information about its technical challenges; publicly available information undermines Pluto's factual claims about three platforms; and Pluto's ignorance of the IP Requirements for over five years contributed to its technical challenges.

**Table of Contents for Opposition**

**I. Introduction..... 1**

**II. Procedural History ..... 3**

**III. Pluto’s Petition Does Not Satisfy the Economic Burden Standard..... 4**

    A. Pluto Provides No Information About the Cost of Compliant Captions ..... 4

    B. Pluto Provides No Information About Its Financial Resources ..... 7

**IV. Pluto Fails to Show Its Petition Should Be Granted for Good Cause.. 8**

    A. Pluto’s Petition Is Not in the Public Interest Because It Denies Deaf and  
    Hard of Hearing People Full and Equal Access to Pluto’s Service..... 9

    B. Pluto Fails to Show Special Circumstances Warrant Waiver of the IP  
    Requirements ..... 13

        1. Pluto Fails to Show Its Financial Situation Is a Special Circumstance  
        Warranting a Waiver..... 13

        2. Pluto Fails to Show Its Technical Challenges Are a Special Circumstance  
        Warranting a Waiver..... 14

**V. Conclusion..... 20**

## Opposition

### I. Introduction

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Hearing Loss Association of America (HLAA), National Association of State Agencies of the Deaf and Hard of Hearing, Inc. (NASADHH), Deaf Seniors of America (DSA), Rehabilitation Engineering Research Center Technology for the Deaf and Hard of Hearing (DHH-RERC), National Association of the Deaf (NAD), Association of Late-Deafened Adults, Inc. (ALDA), Cerebral Palsy Deaf Organization (CPADO), American Association of the Deaf-Blind (AADB), and Rehabilitation Engineering Research Center on Inclusive Information and Communications Technology (IT-RERC) (collectively, “Consumer Groups”), respectfully oppose Pluto, Inc.’s (“Pluto”) petition for waiver of the closed captioning requirements for video programming delivered over Internet Protocol (“IP”).<sup>1</sup>

Pluto seeks a waiver of §79.4 of the Commission’s rules (“IP Requirements”), requiring video programming distributors (“VPDs”) to provide closed captioning for non-exempt video programming.<sup>2</sup> As part of the IP Requirements, closed captioning must have the ten functional requirements described in 47 CFR §79.103(c).<sup>3</sup> Pluto,

---

<sup>1</sup> Petition for Waiver of Pluto, Inc., *Closed Captioning of Internet Protocol-Delivered Video Programming*, Dkt. 11-154 (May 15, 2019) (“Pluto Petition”).

<sup>2</sup> For the purposes of this opposition, “provide closed captioning” means rendering or passing through closed captioning. 47 CFR §79.4.

<sup>3</sup> For the purposes of this opposition, closed captioning that fully complies with the IP Requirements, including the functional requirements of §79.103(c), is referred to

as a VPD, must comply with the IP Requirements.<sup>4</sup> Pluto instead seeks one-year and three-year waivers of the IP Requirements for seven platforms on which Pluto does not provide compliant captions.<sup>5</sup>

Pluto’s petition should not be granted under either of the two applicable standards. First, Pluto fails to satisfy the economic burden standard because it fails to disclose either the costs necessary to add compliant captions, or the company’s finances. Both the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) and the IP Requirements set out the economic burden standard as the standard for evaluating petitions for exemption from the IP Requirements.<sup>6</sup> Second, assuming the good cause standard applies to Pluto’s petition, Pluto fails to satisfy the Commission’s general good cause standard, because Pluto’s petition is not in the public interest and is not supported by special circumstances.<sup>7</sup> Because Pluto satisfies neither standard, the Commission should reject Pluto’s petition.

---

as “compliant captions.” Closed captioning that does not comply with the functional requirements of §79.103(c) is referred to as “basic captions.” 47 CFR §79.103(c).

<sup>4</sup> Pluto acknowledges that it is a VPD. Pluto Petition at 2-3.

<sup>5</sup> Pluto seeks a one-year waiver for the following platforms: Hisense smart TVs, Vizio WatchFree (“WatchFree”), PlayStation 3 (“PS3”), Samsung Orsay 2013/2014 and Tizen 2015/2016 TVs, and Vizio V.I.A. and V.I.A. Plus TVs using the Blink browser (“Vizio Blink TVs”). Pluto seeks a three-year waiver for Xbox 360 and Vizio V.I.A. and V.I.A. Plus TVs using the Presto browser (“Vizio Presto TVs”). *Id.* at 5-6, 10-11.

<sup>6</sup> See Twenty-First Century Communications and Accessibility Act of 2010 §202(b), 47 USC §613(c)(2)(C) (West 2019); 47 CFR §79.4(d).

<sup>7</sup> See Pluto Petition at 1; 47 CFR §1.3.

## II. Procedural History

On May 13, 2019, Pluto filed a petition for waiver of the FCC’s closed captioning rules.<sup>8</sup> Two comment extensions were granted. The first comment deadline was extended on July 22, 2019 to October 24, 2019, due to difficulties the parties faced in gathering “the information necessary to prepare meaningful comments.”<sup>9</sup> The second comment deadline was extended on November 6, 2019 to February 21, 2020, due to a good cause showing that TDI and Pluto would “work together to reach a solution to the issues raised in the Petition that is mutually acceptable both to Pluto TV and the deaf or hard of hearing community.”<sup>10</sup>

After multiple attempts by TDI to schedule a meeting with Pluto, a call was held on February 13, 2020. During the call, Pluto provided an update on its progress of bringing platforms into compliance with the FCC’s closed captioning rules and discussed some of the technical challenges the company outlined in its petition for waiver. Ultimately, TDI remains unpersuaded that Pluto’s progress and explanation of technical challenges satisfy either the economic burden or good cause standard.

---

<sup>8</sup> Petition for Waiver of Pluto, Inc., *Closed Captioning of Internet Protocol-Delivered Video Programming*, Dkt. 11-154 (May 15, 2019) (“Pluto Petition”).

<sup>9</sup> Order Granting Extension of Time to File Comments and Reply Comments, *Closed Captioning of Internet Protocol-Delivered Video Programming*, Dkt. 11-154 (July 22, 2019).

<sup>10</sup> Order Granting Further Extension of the Time to File Comments and Reply Comments, *Closed Captioning of Internet Protocol-Delivered Video Programming*, Dkt. 11-154 (Nov. 6, 2019).

### III. Pluto’s Petition Does Not Satisfy the Economic Burden Standard

Pluto fails to show the IP Requirements would be economically burdensome because Pluto provides insufficient information about (1) the cost of providing compliant captions and (2) Pluto’s financial resources. The IP Requirements state that VPDs like Pluto may seek exemption from the IP Requirements if such requirements would be “economically burdensome.”<sup>11</sup> “Economically burdensome” means “imposing significant difficulty or expense.”<sup>12</sup> The Commission determines whether the IP Requirements would be economically burdensome using four factors: the nature and cost of the closed captioning for the programming; the impact on the operation of the VPD; the financial resources of the VPD; and the type of operations of the VPD.<sup>13</sup>

#### A. Pluto Provides No Information About the Cost of Compliant Captions

The economic burden of captioning cannot even be considered unless petitioners provide information about the cost and nature of closed captioning.<sup>14</sup> If a VPD seeks an exemption from the functional requirements of §79.103(c), the VPD must provide information about the cost of implementing such requirements.<sup>15</sup> The

---

<sup>11</sup> 47 CFR §79.4(d).

<sup>12</sup> *Id.* §79.4(d)(2).

<sup>13</sup> *Id.*

<sup>14</sup> 47 CFR §79.4(d)(2); *Anglers for Christ Ministries, Inc.*, 26 FCCR 14941, 14956 (2011) (“*Anglers*”).

<sup>15</sup> See 47 CFR §79.103(c) and Note. See also *Closed Captioning of Internet-Protocol Delivered Video Programming*, R&O, 27 FCCR 787, 854 n.461 (2012); *Notice of Electronic Filing Procedures for Closed Captioning Exemption Requests for Video Programming Delivered Using Internet Protocol*, 29 FCCR 12592, 12593 n.9 (2014).



Commission requires petitioners to submit particular documentation to demonstrate the cost of complying with the IP Requirements. Petitioners seeking an exemption from captioning their programming must submit at least two quotes from third-party caption providers describing the cost “to produce, convert, or deliver closed captioning specifically for [the petitioner’s] program(s).”<sup>16</sup> Such petitioners may also submit estimates of costs such as equipment, maintenance, and labor if they considered producing, converting, or delivering closed captioning in house.<sup>17</sup> The Commission does not similarly describe what documentation must be provided by VPDs that render or pass through captions, such as Pluto.<sup>18</sup> However, providing no documentation is plainly insufficient. The Commission needs this information to determine whether the costs of providing compliant captions are economically burdensome.

Pluto fails to show the IP Requirements would be economically burdensome because it provides no information about the labor and equipment costs to provide compliant captions. Pluto states only that it spent “4000 hours of engineering resources” to provide compliant captions on ten types of platforms.<sup>19</sup> This is

---

<sup>16</sup> *Required Information and Documentation to Provide When Filing a Petition for Exemption from the IP Closed Captioning Requirements*, FEDERAL COMMUNICATIONS COMMISSION, <https://transition.fcc.gov/cgb/dro/information-for-filing-petition-exempt-internet-closed-captioning.pdf> (last accessed on Oct. 16, 2019).

<sup>17</sup> *Id.*

<sup>18</sup> The Commission has not previously considered a closed captioning exemption petition by an individual VPD that renders or passes through closed captioning. The Commission’s guidance is focused on programmers that produce video programming. See *Required Information and Documentation to Provide When Filing a Petition for Exemption from the IP Closed Captioning Requirements*.

<sup>19</sup> Pluto Petition at 7.

insufficient information for two reasons. First, costs cannot be determined from hours without knowing the labor or equipment costs for each hour. Second, Pluto acknowledges that the costs of providing compliant captions likely will differ between the already-compliant platforms and the platforms for which Pluto seeks waiver.<sup>20</sup> Pluto provides no information on what the likely difference in cost will be. This information is insufficient to meet Pluto’s burden under this factor.

Pluto’s assertion of confidentiality cannot overcome its burden to provide concrete documentation of the anticipated cost of providing compliant captions. In a footnote, Pluto asserts, “The amount of money spent working on captions is confidential.”<sup>21</sup> Pluto additionally notes its willingness to “provide this information to the FCC staff on a confidential basis.”<sup>22</sup> Petitioners are permitted to seek confidential treatment of information in their petition, provided they satisfy the requirements of §0.459.<sup>23</sup> However, the Commission has indicated that a petitioner must make public “sufficient documentation” so that “members of the public have notice of the basis for [the petitioner’s] exemption request and can comment on its merits.”<sup>24</sup> Pluto fails to provide the Commission with any of this documentation, let alone make an appropriate request for confidential treatment. Pluto’s assertion of

---

<sup>20</sup> *See id.*

<sup>21</sup> Pluto Petition at 7 n.7.

<sup>22</sup> *Id.*

<sup>23</sup> 47 CFR §0.459.

<sup>24</sup> *See, e.g.*, Letter from Caitlin Vogus, Atty., DRO, to Chante Green, Media Director, Charles Perry Ministries, Inc., *Closed Captioning Petitions for Waiver*, Dkt. 06-181 (June 23, 2015).

confidentiality does not satisfy its burden to show the costs of providing closed captioning.

### **B. Pluto Provides No Information About Its Financial Resources**

Although petitioners must provide the Commission with “documentation of its financial status to demonstrate its inability to afford closed captioning,” Pluto provides no such documentation.<sup>25</sup> To satisfy this requirement, the Commission requires that the petitioner provide audited financial statements or federal income tax returns and statements of all cash receipts and expenses.<sup>26</sup> Pluto provides no concrete documentation or other information.

Pluto fails to show it sought a sponsorship for the costs of providing compliant captions, even though Pluto could seek a sponsorship from its parent company, Viacom. The Commission requires that petitioners seek a sponsorship or additional resources (or explain why they cannot) to defray closed captioning costs.<sup>27</sup> Viacom has stated that it views Pluto as important to Viacom’s overall advertising business and intends to “leverage Viacom’s reach, infrastructure, and capabilities to expand Pluto TV globally.”<sup>28</sup> Viacom also has stated it will invest in Pluto to assist

---

<sup>25</sup> *Anglers*, 26 FCCR at 14956.

<sup>26</sup> Both sets of documents must be provided for the two most recently completed calendar or fiscal years. *Required Information and Documentation to Provide When Filing a Petition for Exemption from the IP Closed Captioning Requirements*.

<sup>27</sup> *Anglers*, 26 FCCR at 14956.

<sup>28</sup> Viacom, Inc., 2019 Quarter 3 Earnings Call (Aug. 8, 2019), <https://seekingalpha.com/article/4283300-viacom-inc-viab-ceo-bob-bakish-q3-2019-results-earnings-call-transcript?part=single> (transcript) (“Quarter 3 Earnings Call”); Viacom, Inc., 2019 Quarter 1 Earnings Call (Feb. 5, 2019), <https://seekingalpha.com/article/4238323-viacom-inc-viab-ceo-robert-bakish-q1->

its expansion.<sup>29</sup> Viacom already works with Pluto’s advertising team to develop Pluto’s advertising business.<sup>30</sup> Viacom is invested in Pluto’s success and likely would provide financial support for closed captioning costs.<sup>31</sup> By failing to provide any financial information, Pluto fails to show the IP Requirements would be economically burdensome.

#### **IV. Pluto Fails to Show Its Petition Should Be Granted for Good Cause**

Pluto does not satisfy the good cause standard for a waiver, either, because Pluto provides insufficient information to show the petition is in the public interest and warranted by special circumstances. The Commission may waive a Commission rule for “good cause shown.”<sup>32</sup> The Commission may grant a good cause waiver only if (1) the waiver will benefit the public interest and (2) “special circumstances warrant” the waiver.<sup>33</sup> Petitioners face a “high hurdle” in showing that a waiver

---

2019-results-earnings-call-transcript?part=single (transcript) (“Quarter 1 Earnings Call”).

<sup>29</sup> Quarter 3 Earnings Call.

<sup>30</sup> Scott Porch, *Pluto TV’s CEO Tom Ryan Grabs Starring Role in the New Viacom-CBS*, DECIDER (Aug. 21, 2019), <https://decider.com/2019/08/21/pluto-tv-tom-ryan-interview/> (last accessed on Oct. 15, 2019).

<sup>31</sup> Viacom likely has the financial resources to provide this sponsorship. Using the current assets and current liabilities Viacom reported in its Form 10Q for Quarter 3, 2019, Viacom appears to have net current assets of \$1.439 billion in 2019 and \$2.022 billion in 2018. *See* Viacom Inc., Quarterly Report (Form 10-Q) (Aug. 8, 2019).

<sup>32</sup> 47 CFR §1.3.

<sup>33</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)).

should be granted.<sup>34</sup> Pluto fails to overcome this hurdle for both parts of the good cause standard.

**A. Pluto’s Petition Is Not in the Public Interest Because It Denies Deaf and Hard of Hearing People Full and Equal Access to Pluto’s Service**

The Commission must not lose sight of the fact that Pluto has not complied with the IP Requirements for *over five years*, and now seeks to delay its compliance further. Pluto stated that it discovered its noncompliant captions in January 2018.<sup>35</sup> Pluto should have been aware of its obligations under the IP Requirements since at least January 1, 2014, when the IP Requirements fully came into effect.<sup>36</sup> Pluto has had years to provide compliant captions on all platforms. Pluto has not done so.

Pluto fails to provide even basic captions, which denies deaf and hard of hearing people access to Pluto’s content. Deaf and hard of hearing people need closed captioning to fully access programming. Without closed captioning, deaf and hard of hearing people are denied their right to accessible content. Pluto provides no captions on a majority of the platforms in its waiver petition.<sup>37</sup> These platforms are inaccessible to deaf and hard of hearing users. As noted above, Pluto has been out of compliance with the IP Requirements for years. The Commission should not allow

---

<sup>34</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>35</sup> Pluto Petition at 3.

<sup>36</sup> *See Closed Captioning of Internet Protocol-Delivered Video Programming*, MO&O, 27 FCCR 9630, (2012) (“DiMA MO&O”) (setting January 1, 2014 compliance date for functional requirements for IP-delivered closed captioning).

<sup>37</sup> Pluto provides no captions on Hisense TVs, PS3, Xbox 360, and Vizio Presto televisions. Pluto Petition at 5, 10-11.

Pluto to delay its compliance with the IP Requirements further and keep platforms inaccessible to deaf and hard of hearing people.

The Commission has previously denied a good cause waiver because it would “cause captions to be entirely inaccessible to end users.”<sup>38</sup> In 2012, the Commission denied the Digital Media Association’s (“DiMA”) petition to waive the compliance date for VPDs to render at least basic closed captioning (“Rendering Petition”).<sup>39</sup> In addition to denying users access to captions, the Commission found the petition was overbroad, and that VPDs had known since 2010 that they would be required to render captions.<sup>40</sup> For similar reasons, the Commission should not grant Pluto’s petition.

On some platforms, Pluto provides basic captions but not fully compliant captions, which denies access to people who are deaf-blind or have visual disabilities. Basic captions are not a sufficient substitute for fully compliant captions. End users who are deaf-blind or have visual disabilities may not be able to view the captions without formatting the captions’ size, color, or background opacity. Therefore, the availability of basic captions on some platforms does not render Pluto’s petition in the public interest because people who are deaf-blind still are denied access to content.

---

<sup>38</sup> The Digital Media Association sought a waiver of the compliance date for rendering closed captioning. DiMA MO&O, 27 FCCR at 9639.

<sup>39</sup> *Id.* at 9638.

<sup>40</sup> *Id.* at 9639.

Although Pluto provides compliant captions to ninety percent of its 18 million monthly average users, this still leaves approximately 1.8 million people unable to fully access Pluto’s content.<sup>41</sup> Consumer Groups appreciate Pluto’s compliance with the IP Requirements on a number of platforms, but the fact that ninety percent of users use the compliant platforms is no consolation at all to the ten percent who use the non-compliant platforms. Nearly two million users have no access to captions because they use platforms that lack even basic captions. It is not in the public interest to continue to deny access to accessible programming to such a large group of people.

Pluto should not be allowed to circumvent its obligations by asking its customers to use other platforms.<sup>42</sup> People who are not deaf or hard of hearing can use the platforms listed in Pluto’s waiver petition. By contrast, deaf and hard of hearing people cannot use these platforms if they want to fully access Pluto’s programming. Moreover, not all deaf and hard of hearing people will have access to alternate platforms with compliant captions. Asking deaf and hard of hearing people to use alternate, compliant platforms is an inequitable alternative to complying with the IP Requirements on all platforms.

The Commission should not credit Pluto’s unsupported assertion that it may remove its app from Vizio Presto TVs and Xbox 360, when deaf and hard of hearing

---

<sup>41</sup> Pluto Petition at 1; Quarter 3 Earnings Call.

<sup>42</sup> See Pluto Petition at 13 (“[S]ome users may possess more than one device upon which Pluto TV may be accessed, and accordingly may benefit from captions on another platform, even if they also own one of these devices.”).

people currently cannot access content on these platforms.<sup>43</sup> As described in Section III.B, Pluto provides insufficient information to conclude its financial situation or technical challenges prevent Pluto from providing compliant captions. Until Pluto shows it cannot provide compliant captions without a waiver, nothing supports Pluto's claim that it may remove its apps from these platforms. By contrast, deaf and hard of hearing people already are denied accessible content on these platforms. Pluto's waiver petition would deny them access for another three years. It is not in the public interest for the Commission to deny deaf and hard of hearing people access to Pluto's content on these platforms based solely on Pluto's unsupported argument.

The Commission has only granted a good cause petition for waiver of the IP Requirements in this docket once before, and that was under substantially different circumstances than Pluto's petition. The Commission should distinguish between the two. In 2012, the Commission granted DiMA's petition for a good cause waiver of §79.4(c)(2)(i)'s requirement that VPDs provide compliant captions for their applications and plug-ins ("708 Petition").<sup>44</sup> DiMA sought an extension of the compliance date for this part of the IP Requirements, which had been adopted a few months earlier and were not yet in effect.<sup>45</sup> The IP Requirements also imposed closed captioning requirements on entities that previously did not have to offer

---

<sup>43</sup> *See id.* at 12-13 ("In the absence of a waiver, a highly possible impact would be to consider end-of-life procedures for Pluto TV service on these specific devices.")

<sup>44</sup> DiMA MO&O, 27 FCCR at 9631, 9640.

<sup>45</sup> *Id.* at 9632.



compliant captions.<sup>46</sup> The Commission determined VPDs needed time to implement and test the new technical capabilities.<sup>47</sup> By contrast, Pluto seeks waiver of the IP Requirements more than five years after they went into effect. No new requirements have been imposed on Pluto; Pluto must implement the same requirements it has failed to comply with for over five years.

**B. Pluto Fails to Show Special Circumstances Warrant Waiver of the IP Requirements**

Pluto fails to show its financial situation or the alleged technical challenges it faces are special circumstances justifying a waiver. First, Pluto provides insufficient financial information to show its financial situation warrants a waiver. Second, Pluto provides insufficient information to describe the nature of its technical challenges or to conclude Pluto lacks the time and engineering resources to provide compliant captions. Publicly available information also undermines Pluto’s claims of technical challenges on some platforms. The Commission should not grant Pluto’s waiver petition because Pluto fails to show any special circumstances warrant such a result.

**1. Pluto Fails to Show Its Financial Situation Is a Special Circumstance Warranting a Waiver**

Like the petitioner in *San Fernando Cathedral*, Pluto provides insufficient financial documentation to support its waiver petition. In *San Fernando Cathedral*,

---

<sup>46</sup> *See id.* at 9633-9634, 9634 n.28 (“The IP closed captioning rules apply to some entities that may not previously have dealt with Commission compliance issues, such as online video distributors.”).

<sup>47</sup> *Id.* at 9634, 9637.

the Commission denied a petitioner's good cause waiver request, in part because the petition lacked sufficient financial documentation.<sup>48</sup> The petitioner argued it lacked the financial resources to comply with the television closed captioning requirements.<sup>49</sup> Similarly, Pluto argues it lacks the financial resources to comply with the IP Requirements. Pluto provides no concrete documentation of its financial resources or the cost of providing compliant captions. There is no basis upon which to conclude that Pluto lacks the financial resources to provide compliant captions. The Commission should not find Pluto's financial situation is a special circumstance warranting a waiver for the same reasons it should not grant Pluto's petition under the economic burden standard.

## **2. Pluto Fails to Show Its Technical Challenges Are a Special Circumstance Warranting a Waiver**

Pluto fails to show that its technical challenges are a special circumstance. Pluto created its own technical challenges and should be required to correct them. In addition, the information that Pluto provides about its technical challenges is far too vague to establish a showing of special circumstance.

Pluto should not be permitted to claim that technical challenges created by its own ignorance of the IP Requirements constitute a special circumstance. Pluto generally asserts it faces challenges with most of the platforms because they use older hardware and software that struggle to support the latest version of Pluto's service.<sup>50</sup> Pluto would not have faced these challenges if it had complied with the IP

---

<sup>48</sup> *San Fernando Cathedral of San Antonio, Tex.*, 31 FCCR 1349, 1353-54 (2016).

<sup>49</sup> *Id.* at 1354.

<sup>50</sup> *See* Pluto Petition at 8-9, 11-12.

Requirements from the start, beginning in 2014 (or when it launched its app on a platform), as it was legally required to do. Pluto would have provided compliant captions on these platforms before it began using the modern technologies it currently deploys. The technical challenges likely would not have existed. The fact that Pluto has failed to comply with IP Requirements for so many years that compliance has now become more difficult to achieve is no excuse for Pluto to delay its compliance with the IP Requirements even further. Moreover, for the Commission to grant Pluto's petition under these circumstances would send a message to other providers that if they simply ignore accessibility obligations for long enough, eventually the changes in technology will make it possible for them to claim that they cannot comply at all. This would set an unacceptable precedent.

Pluto also does not sufficiently explain the technical challenges on which it rests its petition. Pluto does not explain whether the technical challenges affect only its app or the entire platform. Pluto also does not explain whether the various "bugs" it cites for its difficulties result from adding compliant captions to its app or unrelated problems or features. The answers to these questions affect the public's and the Commission's ability to assess the merits of Pluto's argument. Additionally, the information that Pluto provides for some platforms is vague. For example, it is unclear whether Pluto's video player problems affect all Hisense TVs or only models with a particular operating system. Different Hisense TV models use different

operating systems.<sup>51</sup> It is unclear whether two of these operating systems, Android TV and Roku TV, are the same as the Android TV and Roku TV platforms on which Pluto provides compliant captions.<sup>52</sup> Similarly, it is unclear whether the same unspecified bugs affect all of the listed Samsung TVs. The Samsung 2013/2014, 2015, and 2016 models support different streaming formats and filetypes, which likely affects the technical challenges Pluto faces.<sup>53</sup> As the petitioner, Pluto bears the burden of showing the technical challenges warrant a waiver of the IP Requirements. Pluto provides insufficient information to meet this burden.

The Commission cannot assess whether Pluto can provide compliant captions because Pluto does not explain whether hiring new engineers, contracting with third parties, or acquiring new hardware or software would reduce its alleged technical challenges. At bottom, Pluto asserts the technical challenges it faces will consume more time and engineering resources than Pluto has available.<sup>54</sup> Additional engineers and hardware or software may reduce the time and increase the available resources needed to resolve the technical challenges and to provide compliant captions. For example, Pluto asserts it cannot provide compliant captions through non-stitched streams on Vizio Presto TVs because it is “no longer focused

---

<sup>51</sup> See, e.g., *Televisions*, HISENSE, <https://www.hisense-usa.com/televisions/all-tvs/> (last accessed Sept. 18, 2019) (listing smart TVs with VIDAA, Android TV, and Roku TV operating systems).

<sup>52</sup> See *Televisions*, HISENSE; Pluto Petition at 4.

<sup>53</sup> See *General Specifications*, SAMSUNG DEVELOPERS, <https://developer.samsung.com/tv/develop/specifications/general-specifications> (last accessed on Sept. 20, 2019).

<sup>54</sup> See Pluto Petition at 7, 11.

on or staffed for” non-stitched streams.<sup>55</sup> This implies Pluto could provide compliant captions if it simply added or reallocated engineers or resources. Pluto may be merely unwilling, but not unable, to do so. Without information about the anticipated impact of additional engineers and hardware or software, it is difficult to assess whether Pluto lacks the time and engineering resources to provide compliant captions (without granting its waiver petition).

In addition, publicly available information directly undermines Pluto’s factual claims. Pluto made the following claims about three platforms:

- (1) WatchFree launched without compliant captions because the company did not learn about the IP Requirements prior to the product’s release;
- (2) Pluto’s app on Xbox 360 cannot be updated because Microsoft barred developers from updating their apps; and
- (3) Designing for PS3 presents a more challenging ecosystem.

First, Pluto launched WatchFree without compliant captions after it learned of its IP Requirements obligations. Pluto and Vizio launched WatchFree in August 2018.<sup>56</sup> Pluto learned it did not comply with the IP Requirements in January 2018.<sup>57</sup> Pluto asserts Vizio has not provided the digital style support that Pluto needs to provide compliant captions.<sup>58</sup> Pluto does not explain why it released WatchFree

---

<sup>55</sup> *Id.* at 12.

<sup>56</sup> Chris Welch, *Vizio Is Launching a Free Streaming Service and Giving It Its Own TV Input*, THE VERGE (Aug. 1, 2018), <https://www.theverge.com/2018/8/1/17639790/vizio-watchfree-free-streaming-service-features-channels> (describing rollout for WatchFree).

<sup>57</sup> Pluto Petition at 3.

<sup>58</sup> *Id.* at 6.

without compliant captions, especially when it knew of its noncompliant captions on other platforms. Pluto also does not explain why it did not ask Vizio to provide digital style support prior to launching WatchFree. Vizio may have been able to provide the necessary update at that time to ensure Pluto would comply with the IP Requirements.

Second, other content providers have managed to provide fully compliant captions on Xbox 360. Pluto claims that it cannot provide compliant captions on Xbox 360 because the platform has become difficult to update—a problem that theoretically would be faced by other content providers as well. But other content providers have managed to provide fully compliant captions on their platforms. Hulu, a streaming service that distributes programming covered by the IP Requirements, provides compliant captions for its Xbox 360 app and releases updates on the platform.<sup>59</sup> Hulu’s last update was released on October 7, 2019. The updates include both bug fixes and new features.<sup>60</sup> Pluto’s explanation for its

---

<sup>59</sup> See *Format Closed Captions*, HULU, [https://help.hulu.com/s/article/format-captions?language=en\\_US](https://help.hulu.com/s/article/format-captions?language=en_US) (last accessed on Sept. 12, 2019) (describing how to format closed captions for platforms running the latest Hulu app); *Hulu Supported Devices*, HULU, [https://help.hulu.com/s/article/supported-devices?language=en\\_US#latest](https://help.hulu.com/s/article/supported-devices?language=en_US#latest) (last accessed on Sept. 12, 2019) (listing PS3 and Xbox 360 as platforms running the latest Hulu app); *Having Trouble With Closed Captions on PS3*, REDDIT, [https://www.reddit.com/r/Hulu/comments/6endqd/having\\_trouble\\_with\\_closed\\_captions\\_on\\_ps3/](https://www.reddit.com/r/Hulu/comments/6endqd/having_trouble_with_closed_captions_on_ps3/) (last accessed on Oct. 16, 2019) (describing different formatting options for closed captions after experiencing formatting issue).

<sup>60</sup> Hulu has released thirteen updates to its Xbox 360 app since April 2019. See *Xbox 360 Release Notes*, HULU, [https://help.hulu.com/s/article/xbox-360-release-notes?language=en\\_US](https://help.hulu.com/s/article/xbox-360-release-notes?language=en_US) (last accessed on Oct. 15, 2019) (listing each update and its features from April 9, 2019 to October 7, 2019).

inability to update its app—that Microsoft barred developers from updating their apps on Xbox 360 in January 2018—seems inconsistent with Hulu’s ability to update its app. Hulu provides compliant captions on these platforms using the same “outdated” hardware and software that (according to Pluto) struggle to support modern streaming formats and compliant closed captioning.<sup>61</sup> Pluto offers no explanation for why Hulu is able to provide compliant captions, yet Pluto allegedly struggles to do the same.

Third, other apps have provided compliant captions on PS3. The streaming services Tubi and Netflix provide at least basic captions for their PS3 apps.<sup>62</sup> Pluto provides no captions on PS3.<sup>63</sup> Pluto does not explain why it cannot provide compliant captions while other streaming services provide them. Given this and the lack of information supplied by Pluto, Pluto’s petition fails to provide sufficient information to conclude that Pluto’s asserted technical problems warrant a good cause waiver.

---

<sup>61</sup> See Pluto Petition at 8-9, 11-12.

<sup>62</sup> Netflix has provided at least some captions on the PS3 since 2012. See *How to Activate Subtitles on PS3/PS4?*, TUBI, <https://help.tubitv.com/hc/en-us/articles/115004595274-How-to-activate-subtitles-on-PS3-PS4-> (last accessed on Oct. 15, 2019) (describing how to turn on subtitles/closed captioning on PS3 and PS4); Mark Rejhon, *List of Streaming Services with CC/Subtitles [Netflix, AppleTV, Vudu, Amazon, etc]*, ALLDEAF (Jan. 4, 2012), <http://www.alldeaf.com/threads/list-of-streaming-services-with-cc-subtitles-netflix-appletv-vudu-amazon-etc.97926/> (listing all services and platforms supporting closed captioning as of January 4, 2012).

<sup>63</sup> Pluto Petition at 5.

**V. Conclusion**

Pluto shows insufficient grounds for the Commission to grant its petition and continue to deny people who are deaf, hard of hearing, or deaf-blind access to Pluto's content. Pluto fails to satisfy the economic burden standard under section 79.4(d) and the good cause standard under 1.3. Accordingly, the Commission should not grant Pluto's petition for waiver.



Respectfully submitted,



Laura M. Moy  
Michael Rosenbloom  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue NW  
Washington, DC 20001  
Tel. (202) 662-9535  
Laura.Moy@georgetown.edu  
Michael.Rosenbloom@georgetown.edu  
*Counsel to Telecommunications for the  
Deaf and Hard of Hearing, Inc.*

Nancy B. Rarus, President  
Alfred Sonnenstrahl, Vice President  
Deaf Seniors of America (DSA)  
5619 Ainsley Court  
Boynton Beach, FL 33237  
nbrarus1@verizon.net  
alsonny@icloud.com

Christian Vogler, PhD  
Rehabilitation Engineering Research  
Center on Technology for the Deaf and  
Hard of Hearing (DHH-RERC)  
Gallaudet University  
800 Florida Avenue NE, TAP – SLCC  
1116  
Washington, DC 20002  
Christian.Vogler@galludet.edu

Howard Rosenblum, Chief Executive  
Officer  
Zainab Alkebsi, Policy Counsel  
National Association of the Deaf  
(NAD)  
8630 Fenton Street Suite 820  
Silver Spring, MD 20910  
Howard.Rosenblum@nad.org  
Zainab.Alkebsi@nad.org

Dated February 21, 2020

Claude L. Stout, Executive Director  
Telecommunications for the Deaf and  
Hard of Hearing, Inc. (TDI)  
8630 Fenton Street, Suite 121  
Silver Spring, MD 20910  
cstout@TDIforAccess.org

Zainab Alkebsi, Chair  
Deaf and Hard of Hearing Consumer  
Advocacy Network (DHHCAN)  
8630 Fenton Street, Suite 121  
Silver Spring, MD 20910  
Zainab.Alkebsi@nad.org

Barbara Kelley, Executive Director  
Lise Hamlin, Director of Public Policy  
Hearing Loss Association of America  
(HLAA)  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814  
BKelley@hearingloss.org  
LHamlin@hearingloss.org

Sherri Collins, President  
National Association of State Agencies  
of the Deaf and Hard of Hearing, Inc.  
(NASADHH)  
100 N. 15th Avenue Suite 104  
Phoenix, AZ 85007  
S.Collins@acdhh.az.gov

Richard Brown, President  
Association of Late-Deafened Adults,  
Inc. (ALDA)  
8038 MacIntosh Lane Suite 2  
Rockford, IL 61107  
President@alda.org

Mark Hill, President  
Cerebral Palsy and Deaf Organization  
(CPADO)  
14510 Homecrest Road Unit 3008  
Silver Spring, Maryland 20906  
President@cpado.org

René Pellerin, President  
American Association of the Deaf-  
Blind (AADB)  
248 Rainbow Drive Unit Suite 14864  
Livingston, TX 77399  
Renegp@comcast.net

Gregg Vanderheiden, PhD, Director  
Rehabilitation Engineering Research  
Center on Inclusive Information and  
Communications Technology (IT-  
RERC)  
Trace Research and Development  
Center  
University of Maryland  
4130 Campus Drive  
College Park, MD 20742  
GreggVan@umd.edu

*This opposition was drafted with considerable assistance by Joanna Torres and Leetal Weiss, students in the Communications & Technology Law Clinic of the Institute for Public Representation.*