

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

In the Matter of)	
)	
Accessible Emergency Information, and Apparatus)	MB Docket No. 12-107
Requirements for Emergency Information and)	
Video Description: Implementation of the Twenty-)	
First Century Communications and Video)	
Accessibility Act of 2010)	
)	
Video Description: Implementation of the Twenty-)	MB Docket No. 11-43
First Century Communications and Video)	
Accessibility Act of 2010)	

PETITION FOR WAIVER



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March 9, 2018

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PETITION FOR WAIVER



I. INTRODUCTION AND BACKGROUND

Pursuant to 47 C.F.R. § 1.3, the American Cable Association (“ACA”) petitions the Media Bureau to waive, for analog-only cable systems that lack the equipment to pass-through a secondary audio programming (“SAP”) stream, the upcoming June 12, 2018 deadline for compliance with the Commission’s rules requiring video programming distributors (“VPDs”) to pass-through emergency information via an SAP stream.¹

¹ 47 C.F.R. § 79.2; see also *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*; *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871 (2013) (“2013 EI/VD Order”) (describing in Appendix B the

It is in the public interest to grant permanent relief for this small class of systems. Most analog-only systems that remain in operation today, which often provide a value-based product in rural areas, still lack the necessary equipment to comply with the Commission's rules and are not financially in a position to purchase such equipment by the June 12, 2018 deadline, especially given their poor and deteriorating financial health. Imposing the financial burdens of compliance on these systems would cause operators to prematurely close them. Permanent relief is therefore necessary to ensure that analog-only systems that lack the necessary equipment to comply with the Commission's rules can sustain prolonged operations for the benefit of the communities they serve.

The obligation to ensure that emergency information reaches consumers through an SAP stream stems from the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA").² Pursuant to the CVAA's statutory directives, the Commission in 2013 adopted rules (the "2013 EI/VD Order") requiring VPDs, which include cable systems, and video programming producers to ensure that emergency information provided visually during programming that is neither a regularly scheduled newscast nor a newscast that interrupts regular programming is accompanied by an aural tone and is made aurally accessible to individuals who are blind or visually impaired through the use of an SAP stream.³ Since cable

Final Rules as to be amended in Part 79 of Title 47 of the Code of Federal Regulations). In addition, ACA supports continued compliance with the condition adopted by the Media Bureau in the Order granting an initial waiver of the emergency information pass-through rules for analog-only systems that lack equipment to pass through SAP that requires operators subject to waiver to provide notice on an annual basis to current and potential customers that emergency information will not be audibly accessible on the SAP stream due to the waiver. See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Memorandum Opinion and Order, 30 FCC Rcd 5012, ¶ 12 (MB 2015) ("2015 Waiver Order").

² Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, § 202 (2010) ("CVAA").

³ 47 C.F.R. § 79.2(b)(2)(ii).

systems typically do not produce the programming that they distribute to their subscribers, the Commission's rules effectively require cable systems to pass-through the aural representation of the emergency information, including the accompanying aural tone, contained in the programming to consumers via an SAP stream. The Commission set a compliance deadline of May 26, 2015.⁴

During the 2013 EI/VD proceeding, ACA raised concerns about the ability of analog-only cable systems to pass-through emergency information in compliance with the proposed rule.⁵ The Commission, although sympathetic, chose not to address ACA's concerns at that time, and instead delegated authority to the Media Bureau to consider waiver or extension of time requests.⁶ Accordingly, in March 2015, ACA filed a Petition for Waiver on behalf of its members with cable systems that provided analog-only service and lacked the necessary equipment to pass-through an SAP stream.⁷ ACA requested that the Media Bureau waive the requirement for such systems until June 12, 2018, with the opportunity to seek further waiver if still needed.⁸ In

⁴ See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*; *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Small Compliance Guide, 31 FCC Rcd 4460 (2016).

⁵ Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-107 (filed Mar. 7, 2013) ("ACA Mar. 7 Ex Parte"); Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-107 (filed Mar. 22, 2013); Letter from Barbara S. Esbin, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-107 (filed Apr. 2, 2013); Letter from Ross J. Lieberman, Vice President of Government Affairs, American Cable Association, to Marlene Dortch, Secretary, FCC, MB Docket No. 12-107 (filed Apr. 5, 2013).

⁶ 2013 EI/VD Order, ¶ 20.

⁷ *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*; *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket Nos. 12-107, 11-43, Petition for Waiver of the American Cable Association (filed Mar. 18, 2015) ("2015 Petition").

⁸ *Id.* at 2. The 2015 Petition also requested a waiver for hybrid systems by allowing for an alternative method for compliance. ACA requested that the Media Bureau permit such systems that lack the equipment to pass-through an SAP stream to substantially meet their regulatory obligation through the provision of free set-top boxes for up to three analog television sets per household of each eligible customer, until such time that the hybrid system obtains compliant equipment. *Id.* at iii.

its Petition, ACA expressed the hope that, without the added cost of purchasing and implementing the SAP equipment, more analog-only systems would make the transition to digital or analog/digital hybrid, and thus be able to comply with the pass-through requirements.⁹ The Media Bureau granted ACA's Petition, agreeing that "it would be financially infeasible at this time for analog-only systems (which currently lack the necessary equipment) to purchase new equipment to pass through secondary audio streams."¹⁰

The Media Bureau's decision proved successful in that it provided many operators of analog-only systems that lacked equipment to pass-through an SAP stream the time they needed to upgrade these systems to offer digital services and come into compliance with the emergency information pass-through rules over the last three years. As expected, during this same period many also closed, but a number of these analog-only systems remain in operation today.

As the Commission has previously recognized, analog-only systems "are very small in size, often serve rural areas, [] generally lack resources and utilize dated technology," and "frequently provide a value-priced option for subscribers that only need very basic service."¹¹ They also face unique difficulties in complying with the SAP stream pass-through requirements.¹² Any additional financial burdens on these systems, which are often already under-resourced, threaten their ability to stay in operation, an outcome that would not benefit the subscribers they serve, including any that may be blind and visually impaired. Accordingly,

⁹ *Id.* at 14 ("The hope is that in the coming years, more analog-only systems will be able to upgrade to hybrid or all digital systems, whether through upgrades made possible by declining costs, interconnection, consolidation, technological innovation or by upgrading their equipment to provide the SAP in a more cost-efficient manner.").

¹⁰ 2015 Waiver Order, ¶ 11. The Media Bureau further required that such systems provide notice to current and potential customers that emergency information may not be audibly available due to the exemption. *Id.*, ¶ 12.

¹¹ *Id.*, ¶ 11 (internal citations omitted).

¹² *Id.*, citing 2013 E/VD Order, ¶ 20 ("We recognize that small cable systems, particularly those that are analog-only, may face unique difficulties in complying with the rules adopted herein.").

as this Petition demonstrates, a permanent waiver of the emergency information pass-through requirements is warranted for the remaining analog-only cable systems that continue to lack equipment to pass-through an SAP stream. However, if the Bureau believes that a permanent waiver is not appropriate, ACA requests that it grant these analog-only systems an additional five years to comply and pledge to review the marketplace at that time to determine whether further relief is necessary.

II. PERMANENT RELIEF IS WARRANTED FOR THE REMAINING ANALOG-ONLY SYSTEMS THAT LACK EQUIPMENT NECESSARY TO PASS-THROUGH A SECONDARY AUDIO STREAM

Analog-only cable systems that lack equipment necessary to pass-through an SAP stream continue to need relief from the emergency information pass-through requirements. Despite the continuing industry transition to digital transmission, there are still some analog-only systems in operation today, many of which provide a valued basic video service in rural communities. As in 2015, these systems lack economically feasible options for compliance, so the risk of these systems shuttering if faced with additional regulatory costs remains. A permanent waiver of the emergency information pass-through requirements will recognize the unfortunate reality that most of these systems will likely never transition to digital nor be able to afford to comply with the Commission's emergency information rules. Subjecting them to compliance burdens will do nothing more than put them out of business sooner than otherwise destined – a result that is not in the public interest. A further, permanent waiver of the emergency information pass-through rules is therefore warranted.

For the last two decades, the cable industry has undertaken a self-funded technological transition from analog to digital (or even IP) delivery of video programming. Operators who have done so understand that offering digital services is essential to their survival and to serve customers. For those who have not yet transitioned fully, it remains an important goal, and investments in such upgrades are being made where feasible. Not surprisingly, the number of

analog-only systems has declined and continues to decline.¹³ In 2013, when the Commission first adopted its emergency information pass-through requirements, ACA determined that its members operated 987 all-analog systems (cumulatively serving 203,000 subscribers).¹⁴ According to data provided by the National Cable Television Cooperative, roughly half of those systems have either made the transition to digital or hybrid analog/digital, or have closed down completely, such that only 455 of the previously reported 987 all-analog systems remain. These 455 all-analog systems serve approximately 62,000 subscribers.¹⁵

The transition to digital technology is costly. For systems that have not yet started, the opportunity to do so is diminishing, particularly given the increasing economic challenges of being a small MVPD. Although a few of these systems may still get there, such as those that are acquired by larger cable providers who can subsidize such upgrades, most analog-only systems that remain in operation today will never upgrade and will remain all-analog until they are ultimately shut down by their owners.

As one would suspect, imposing new compliance obligations on these systems – including requiring them to absorb the financial burden of acquiring equipment to comply with the Commission’s pass-through requirements – will make it even more difficult for them to

¹³ The Commission has noted the widespread adoption of digital cable service and its superiority over analog service and has repeatedly encouraged cable operators to make the transition from analog to digital. See *Cable Television Technical and Operational Standards, et al.*, Report and Order, 32 FCC Rcd 7754, ¶ 3 & n.4 (2017), citing, e.g., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fifth Report and Order, 27 FCC Rcd 6529, ¶ 16 (2012) (sunsetting the “viewability” rule for mandatory carriage formatting); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, ¶¶ 45-49 (2010) (adopting a limited exemption to the set-top box integration ban to promote the cable digital transition).

¹⁴ See 2015 Petition at 13-14; ACA Mar. 7 Ex Parte at 9.

¹⁵ These 62,000 homes represent less than .07% of all residential multichannel video customers (including cable, DBS, and telco subscribers) reported in the third quarter of 2017. See Ian Olgeirson and Tony Lenoir, *US multichannel declines surpass 1.1 million in Q3*, SNL KAGAN, Nov. 15, 2017, available at <https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=42630733&KeyProductLinkType=2> (subscription required).

transition to digital. If forced to shift resources toward purchasing any costly new equipment, including devices that allow them to pass-through an SAP stream, it's reasonable to predict that operators of these systems would shut them down before incurring the extra cost – an outcome which will harm their existing customers and not expand the accessibility options for blind and visually impaired consumers.

Therefore, permanent waiver from the emergency information pass-through requirements is appropriate for these smallest cable systems that lack equipment to pass-through an SAP stream because it would prolong their operations. First, because these systems serve so few subscribers, giving them a permanent waiver would not materially impact the Commission's goal of ensuring that blind and visually impaired subscribers have access to emergency information. Indeed, blind and visually impaired customers of these systems already have access to at least two competing VPDs who comply with the pass-through requirements (DirecTV and DISH) so a permanent waiver will not deprive them of any alternative accessibility opportunities that currently exist. Second, because these systems would likely shut down if forced to comply, granting them a permanent waiver would not result in their subscribers having any more options for receiving emergency information than they have today. Further, ACA supports the continued condition that operators under the waiver notify current and potential subscribers that certain emergency information may not be audibly accessible, thus ensuring that subscribers are aware of the accessibility options available through their current video service. Under these circumstances, permanent waiver of the emergency information pass-through requirement for analog-only systems serves the public interest and should be granted.

III. IN THE ALTERNATIVE, IF THE BUREAU DECLINES TO GRANT PERMANENT RELIEF, IT SHOULD EXTEND THE EXISTING WAIVER FOR AN ADDITIONAL FIVE YEARS

If the Media Bureau declines to grant permanent relief for this class of systems, ACA requests that in the alternative, the Bureau waive its rules for an additional five years, setting a new compliance deadline of no earlier than June 12, 2023. ACA further requests that the Bureau review the marketplace again in five years' time to determine if further relief is warranted.¹⁶

As stated above, the number of analog-only systems in operation has declined in the past three years and will likely continue to decline. ACA had hoped that over the last three years all analog-only cable systems not passing through emergency information would have upgraded to offer digital services and therefore be in compliance with the emergency info rules; alas, there are still some of these analog-only systems in operation. Although a few might find a way to upgrade to offer digital services in the coming years, most of these systems will likely be out of business within five years. In absence of a permanent waiver, operators of such systems and their customers can benefit from a waiver that delays the compliance deadline because it will extend the date for when these systems will ultimately have to shut down. At a minimum, the Bureau should consider such relief through a five-year extension.

IV. THIS PETITION MEETS THE COMMISSION'S STANDARD FOR WAIVER

Section 1.3 of the Commission's rules allow for the suspension, revocation, amendment, or waiver of any of the Commission's rules for good cause shown.¹⁷ Moreover, in the 2013 EI/VD Order, the Commission expressly delegated authority to the Media Bureau to consider

¹⁶ As before, ACA requests that the Media Bureau retain its authority to consider further waivers beyond the extended deadline in the event analog-only systems continue to serve their communities beyond the deferral period.

¹⁷ 47 C.F.R. § 1.3.

requests for waivers *or* extensions of time.¹⁸ For the reasons stated herein, ACA's Petition for permanent waiver meets the Commission's standard for waiver.

Under its waiver rules, the Commission has the discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁹ The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁰ To this end, when granting ACA's 2015 Waiver, the Media Bureau stated that "to waive a requirement for good cause, [the Bureau] must (1) explain why deviating from the general requirement serves the public interest, and (2) explain the nature of the special circumstances."²¹ As ACA has demonstrated, strict compliance with the pass-through requirement poses a real risk that all-analog system operators who cannot endure the financial hardship of compliance may cease operations. These systems, which largely operate in rural areas and provide a valued video service for customers looking for affordable basic service, could be forced to shutter if compelled to comply with additional regulatory burdens. As then-Commissioner Pai previously stated, "[s]uch an outcome would be especially unfortunate for those living in rural America, *including* those who are blind or visually impaired."²² This result is most definitely not in the public interest.

The same reasons that persuaded the Media Bureau to grant the compliance deadline extension in 2015 only heighten the need for a permanent waiver now. In 2015, the Media Bureau acknowledged that "the per-subscriber costs on these very small systems to upgrade equipment to comply with the secondary audio stream pass-through requirement might cause

¹⁸ 2013 EI/VD Order, ¶ 20. Then-Commissioner Pai expressed his hope that the Media Bureau would look favorably upon such requests. *Id.*, Pai Statement.

¹⁹ *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁰ *WAIT Radio v. Federal Communications Com.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

²¹ 2015 Waiver Order, ¶ 3.

²² 2013 EI/VD Order, Pai Statement.

them to shut down.”²³ In 2018, the threat of shutting down has only increased, as the remaining analog-only systems that have not found a way to upgrade in the past three years increasingly suffer from significant subscriber losses and declining video margins. Those operators with the most financial resources have found a way to come into compliance, while those that could not upgrade are in worse financial shape as a class than those that needed relief in 2015. If the costs of compliance force these operators to shut down completely, the result is detrimental to all subscribers, whether blind or visually impaired or not. Therefore, it is in the public interest to grant this permanent relief for this small class of analog-only systems.

V. CONCLUSION

The Commission’s goals to provide blind and visually impaired individuals with access to emergency information through their video service is laudable, and ACA supports the Commission’s initiatives to improve accessibility to all subscribers. Nonetheless, the costs of compliance for analog-only systems that lack equipment necessary to offer a secondary audio stream, which represent some of the smallest video systems across the country, pose a financial hardship and may threaten these systems’ existence. On behalf of its members still operating these all-analog systems, ACA thanks the Commission for granting relief in 2015 and for considering further relief at this time. To minimize the risks associated with compliance, ACA requests that the Media Bureau grant a permanent waiver of the requirement to pass-through certain emergency information through the SAP stream for analog-only cable systems that lack such equipment to pass-through and continue to require systems under the waiver to notify current and potential subscribers that certain emergency information may not be audibly accessible. In the alternative, should the Bureau decline to grant permanent relief, a five-year extension of the existing waiver for analog-only systems is warranted, which should also include the requirement to give notice to consumers, with favorable consideration of further extension in

²³ 2015 Waiver Order, ¶ 11.

five years. Such relief balances the desired outcome of the regulation against the costs of compliance for analog-only systems and is in the public interest.

Respectfully submitted,



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