

Hope M. Babcock
Laura M. Moy
Directors
Angela J. Campbell
Director Emeritus
Benjamin Barczewski†
Lindsey Barrett*
Michael Rosenbloom
David Schwartz
Staff Attorneys

600 New Jersey Avenue NW
Suite 312
Washington, DC 20001-2075
Telephone: 202-662-9535
Fax: 202-662-9634



GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

May 11, 2020

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12 St. SW
Washington, DC 20554

Re: MB Docket No. 11-154, *Closed Captioning of
Internet Protocol-Delivered Video
Programming*

Dear Ms. Dortch:

On Thursday, May 7, Erik Kaika of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), with their counsel Laura Moy and Michael Rosenbloom of the Institute for Public Representation at Georgetown Law, along with Mark Hill of the Cerebral Palsy and Deaf Organization and Christian Vogler of the Gallaudet University Technology Access Program (collectively, “Consumer Groups”) met by phone with Michelle Carey, Sarah Whitesell, Maria Mullarkey, and Michael Scurato of the Media Bureau to discuss matters in the above-referenced proceeding.

Consumer Groups urged the FCC to consider that Pluto, Inc. (“Pluto”) has not complied with the IP captioning requirements for over five years. Pluto should have been aware of its obligations under the IP captioning requirements since at least 2014. To the extent that Pluto now faces difficulty bringing its app into compliance across multiple platforms, Pluto can only blame its own deliberate actions. Consumer Groups explained that based on the available information, it appears Pluto made some early software design decisions that neither included closed captioning nor anticipated the

† Admitted to the Pennsylvania bar. Supervised by a member of the DC bar.

* Admitted to the New York bar. Supervised by a member of the DC bar.

later integration of compliant captioning. If Pluto had made different design decisions early on, it would not find itself in this situation.

Consumer Groups stated that they are very concerned about the precedent that would be set if the FCC were to grant the requested waivers. To do so would send a message to companies that it is acceptable for them to ignore IP Requirements for years, wait until the noncompliant platforms become old enough that coming into compliance would be technically difficult, then simply seek a waiver and never have to comply.

Consumer Groups pointed out that the law does not say “Only make content available to people with disabilities if you can figure it out.” Rather, the goal is, “to the fullest extent made possible by technology, people who are deaf and hard of hearing have equal access to the television medium.”¹ It would not be “equal” to tell users, “If you need closed captions, you have to use a different platform.”

Consumer Groups acknowledged that Pluto has managed to come into compliance on two platforms and withdrawn its petition with respect to those two platforms. But this is not enough. Consumer Groups observed that Pluto has been egregiously noncompliant for over five years, and now is only a little less so. Pluto remains noncompliant on no fewer than eight platforms. This is unacceptable.

Pluto’s petition fails under the economic burden standard

Consumer Groups reiterated that Pluto’s petition plainly fails under the economic burden standard. Pluto has not even tried to meet this standard. Both the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) and the FCC’s rules set out the economic burden standard as the standard for evaluating petitions for exemption from the IP Requirements.² Consumer Groups expressed frustration that although the economic burden standard is the most appropriate standard for consideration of this type of waiver, there is a complete

¹ *Closed Captioning Requirements for Digital Television Receivers Report and Order*, 15 FCC Rcd at 16794, ¶ 13; *Closed Captioning of Internet Protocol-Delivered Video Programming Report and Order*, 27 FCC Rcd at 787, ¶ 109.

² 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).

absence of financial information in the record. Pluto has not provided any information about its labor and equipment costs, nor about its financial resources, that would enable one to evaluate whether it would be economically burdensome for Pluto to comply with the IP captioning requirements.

Pluto's petition fails under the good cause standard

Consumer Groups also reiterated that Pluto's petition fails under the good cause standard. As an initial matter, Consumer Groups pointed out that the good cause standard must set a high bar. As previously mentioned, the primary standard here is the economic burden standard. The good cause standard must not be read to present a lower bar. To do so would negate the incentive for parties ever to make a showing of economic burden, essentially rendering that standard superfluous.

Consumer Groups stated that the requested waivers would not be in the public interest because failure to provide compliant captioning denies deaf and hard of hearing people full, equal access to Pluto's content. Pluto provides no captions at all on a number of platforms, and only basic captions on several other platforms.

Pluto says it provides compliant captions to ninety percent of its 18 million monthly average users, but Consumer Groups pointed out that this still leaves approximately 1.8 million people unable to fully access Pluto's content. 1.8 million is not a small number – it's more than twice the population of Washington, D.C.³

Consumer Groups argued that Pluto has not demonstrated special circumstances justifying its requested waivers. Consumer Groups object to Pluto's supposition that technical challenges of its own creation – the result of years of blatant disregard for federal closed captioning requirements – could ever be considered "special circumstances" establishing cause for the FCC to explicitly condone Pluto's failure to meet the requirements for an even longer period of time.

³ The U.S. Census Bureau estimates that on July 1, 2019, there were 705,749 people living in Washington, D.C. *QuickFacts: District of Columbia*, U.S. Census Bureau, <https://www.census.gov/quickfacts/DC>.

Even if this state of affairs theoretically could justify a waiver of the rules, Consumer Groups reiterated that Pluto's claim must fail because it has not provided sufficient information about its technical challenges. In their February Opposition, Consumer Groups highlighted the insufficiency of Pluto's technical arguments:

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. 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. 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. 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.⁴

Consumer groups also noted in their Opposition that other providers have managed to deliver captions and update apps on the Xbox 360 and PlayStation 3—two platforms on which Pluto claims it cannot comply.⁵ For example, Hulu provides compliant captions for its Xbox 360 app and releases updates on the platform, and Tubi and Netflix provide at least basic captions for their PlayStation 3 apps.⁶

Consumer Groups stated that they have raised a number of questions about Pluto's technical challenges directly with Pluto's counsel and, together with Pluto's

⁴ Opposition to the Petition for Waiver by Pluto, Inc., *Closed Captioning of Internet Protocol-Delivered Video Programming*, Dkt. 11-154 (Feb. 21, 2019), at 15-16 (citations omitted).

⁵ *Id.* at 18-19.

⁶ *Id.*

counsel, even arranged a call with Pluto and its counsel in February seeking answers to these questions. Consumer Groups explained that are not at liberty to disclose any details regarding that discussion, but that they remain unsatisfied that Pluto's technical challenges are truly insurmountable. Pluto also has not bothered to respond to the questions raised in Consumer Groups' filing by supplementing the record with any additional information about its claimed technical challenges. Without substantial additional information, neither the public nor, indeed, the FCC can assess whether the challenges can be overcome.

The Commission should deny Pluto's petition

Consumer Groups urged the FCC to deny Pluto's petition. Closed captioning is important – it is what ensures that television and streaming content is not completely closed off to people who are deaf and hard of hearing. But Pluto completely ignored federal captioning requirements for years, and now wants extra time to figure out how to comply because – out of its disregard for accessibility obligations – it made design decisions that are incompatible with compliance. Even more outrageously, Pluto now seeks permanent waivers for its service on three platforms. There is no good justification for the requested waivers. The FCC should therefore deny Pluto's petition.

Consumer Groups stated that they have not considered what, if anything less than full compliance – such as partial compliance on certain platforms – might constitute a satisfactory settlement. No such proposal has been presented by Pluto.

Consumer Groups argued that Pluto should be required to withdraw its service from all platforms on which it remains noncompliant. Pluto requested one-year waivers on several platforms, and this Friday, May 15th, one year will have passed since Pluto filed its petition. It has been long enough. If it is important for Pluto to continue operating on the eight platforms on which it remains noncompliant, it will come into compliance immediately. It has not demonstrated that it is incapable of doing so.

If Pluto continues to operate its service on several platforms without fully compliant captions, in violation of the IP captioning requirements, Consumer Groups urged the FCC to initiate enforcement action.

If Pluto wishes to petition again for a waiver of closed captioning rules in the future, Consumer Groups urged the FCC to require Pluto to provide the information necessary to complete an economic burden analysis. At present there is nothing in the record facilitating such an analysis, even though the economic burden standard is the appropriate standard to apply when considering requested closed captioning waivers. Pluto also should provide additional information about its claimed technical challenges so that both the public and the agency can understand why Pluto is seeking waivers.

Consumer Groups repeated again that if the FCC were to grant Pluto's petition, this would reward Pluto for its disregard of the law. It would furthermore send a signal to other content providers that it is okay to ignore the captioning rules for years and then simply appeal to the agency when they get in trouble. This precedent would not serve the goal of the IP captioning requirements, that "to the fullest extent made possible by technology, people who are deaf and hard of hearing have equal access to the television medium."⁷

Respectfully submitted,

/s/

Laura M. Moy
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue NW
Suite 312
Washington, DC 20001
(202) 662-9547

*Counsel for Telecommunications for the Deaf
and Hard of Hearing, Inc. (TDI)*

⁷ *Closed Captioning Requirements for Digital Television Receivers Report and Order*, 15 FCC Rcd at 16794, ¶ 13; *Closed Captioning of Internet Protocol-Delivered Video Programming Report and Order*, 27 FCC Rcd at 787, ¶ 109.