



January 21, 2016

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Notice of Ex Parte Presentation; Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees, MB Docket No. 14-127; Closed Captioning of Video Programming, CG Docket Number 05-231

Dear Ms. Dortch:

On January 19, 2016, Ross Lieberman, Senior Vice President, Government Affairs, American Cable Association (“ACA”) and the undersigned met with Jennifer Thompson, Confidential Assistant & Special Advisor, Office of Commissioner Jessica Rosenworcel. During the meeting, ACA discussed its positions and recommendations. With respect to the online public file proceeding, ACA urged the Commission not to impose any new disclosure requirements on cable operators with respect to their cable system public files, and to take steps to minimize the burdens associated with the movement and maintenance of cable system public inspection files online. Regarding the closed captioning proceeding, ACA expressed its support for the burden-shifting proposal and its recommendations concerning the treatment of consumer complaints about television closed captioning quality.¹

Cable Online Public File Obligations

ACA appreciates the Commission’s plans to take a measured approach in this proceeding. ACA supports the Commission’s plans to provide more time for smaller systems to move their public files online than larger systems and to provide a means for third parties to upload certain documents on behalf of cable systems into the online public file database. These actions are necessary to limit the burdens that small cable operators and operators of small cable systems will face if the Commission requires online public inspection files. Nonetheless, the Commission must take several

¹ See *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Notice of Proposed Rulemaking, 29 FCC Rcd 15943 (2014) (“NPRM”); *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, MB Docket No. 14-127, Comments of the American Cable Association at 4-14, 18-19 (filed Mar. 16, 2015) (“ACA Public File Comments”); Letter to Marlene Dortch, Secretary, FCC from Barbara Esbin (filed Dec. 15, 2015); Reply Comments of the American Cable Association at 3-9 (filed Apr. 14, 2015) (“ACA Public File Reply Comments”); *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc.; Petition for Rulemaking*, CG Docket No. 05-231, Comments of the American Cable Association at 1-2 (filed Jan. 20, 2015) (“ACA Closed Captioning Comments”); Letter to Marlene Dortch, Secretary, FCC from Barbara Esbin (filed Sep. 4, 2014) (ACA Sept. 4th Closed Captioning Ex Parte Letter).

additional steps to fully mitigate the disproportionate burdens that online public inspection files will place on small cable operators and small cable systems. First, ACA urged the Commission to permanently exempt cable systems with fewer than 1,000 subscribers from all online public file requirements. Second, ACA stressed the need to not adopt any new disclosure requirements when moving the cable public files online, especially by preserving the public file exemption that allows cable systems serving between 1,000 and 5,000 subscribers to produce certain records only upon request in lieu of including these records in their public files. Finally, ACA encouraged the Commission to grant a safe harbor to cable operators that reasonably rely on third parties to upload certain documents on their behalf into the online database.² These last two steps are described in more detail below.

With respect to the small system exemption, ACA explained that elimination of the exemption that permits small systems serving between 1,000 and 5,000 subscribers to provide certain documents to the public only upon request would be a new disclosure requirement that increases compliance burdens on small system operators, and one that the Commission previously found was an administrative burden on this class of small cable systems when it established the “upon request” exemption in 1999.³ The imposition of new burdens goes above and beyond the NPRM’s stated intent simply to make available online the public file that resides in a physical form in the headends of cable systems.⁴ The effect of eliminating this long-standing exemption would be to impose new and undue disclosure obligations on operators with few employees and a smaller number of subscribers over which to spread fixed costs⁵ – facts that justified the adoption of the “upon request” exemption for operators of these systems in the first place.⁶ Imposing this new disclosure requirement on cable operators would also be unfair considering the Commission’s approach to online public file obligations for broadcasters did not result in *any* new public file disclosure obligations. In that proceeding, the Commission found that it would be “inadvisable to impose new reporting requirements at the same time stations are transitioning to the online public file.”⁷ For all of these reasons, ACA urged that the Commission

² See ACA Public File Comments at 4-14, 18-19; ACA Public File Reply Comments at 3-9. Systems with more than 1,000 subscribers but fewer than 5,000 subscribers must only provide sponsorship identification, EEO records, commercial records for children’s programming, proof-of-performance test data, and signal leakage logs and repair records upon request. 47 C.F.R. § 76.1700(a).

³ See *1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Report and Order, 14 FCC Rcd 4653, ¶ 25 (1999) (“1999 Order”). To ameliorate the administrative burdens on smaller systems, the Commission expanded its existing small system exemption from certain public file requirements – at that time covering only systems serving fewer than 1,000 subscribers – by amending the rule so that systems serving more than 1,000 but fewer than 5,000 subscribers would only be required to provide certain public file information upon request. The Commission observed that this amendment would “provide regulatory relief to a greater number of small cable systems while ensuring that the public continues to have access to important public file information.” *Id.*, ¶ 25.

⁴ See NPRM, ¶ 2 (discussing the Commission’s “modernization effort” and the process of expanding the online file to other media entities).

⁵ See ACA Public File Comments at 5-9; ACA Public File Reply Comments at 3-8.

⁶ See 1999 Order, ¶ 25.

⁷ See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535, ¶ 81 (2012) (“We wish to ensure that this *Second Report and Order*, in all major respects, involves changing only the form of disclosure and location of material already required to be included in the public file.”). To the extent the Commission wishes to re-evaluate the merits of continuing the on-request exemption for systems serving 1,000 to 5,000 subscribers once public file documents are moved online, it should do so in a separate proceeding.

retain the “upon request” exemption for small cable systems with between 1,000 and 5,000 subscribers.

ACA has been encouraged that Chairman Wheeler has stated that the Report and Order in this proceeding that he circulated to the other Commissioners “does not include new disclosure requirements.”⁸ ACA noted that a change from a requirement that certain records be provided to the public only “upon request” to a requirement that these same records be placed (and maintained) in the online public file is a new disclosure requirement, and one that the Commission previously recognized would be burdensome for small systems serving between 1,000 and 5,000 subscribers.⁹ ACA hopes the Commission will again recognize this fact and will continue to permit this class of small systems to only provide certain records only “upon request” under its new online public file rules.

Additionally, ACA discussed the need for the Commission to grant a safe harbor to cable systems that reasonably rely on third parties to upload certain documents on their behalf into the online public file database. ACA explained that the public interest would benefit from permitting third parties to upload files for individual cable systems (with their authorization) because third parties, in some cases, could upload the files into online database – thereby making them available to the public – more quickly and at lower cost, especially for smaller operators.¹⁰ This is particularly true with respect to documents that must be immediately updated and placed into a cable system’s political file,¹¹ and with respect to documents showing that programming complies with the Commission’s children’s advertising limits.¹² However, ACA explained that the benefits of allowing third party uploading could be denied if a small cable operator, based on reasonable expectations that a third party would upload the documents on their behalf in compliance with the Commission’s rules, must nonetheless accept the risk of an enforcement action, including forfeiture, if its reasonable reliance proves misplaced after the fact. To this end, ACA recommended adoption of a safe harbor for smaller operators that rely on assurances of compliance from third parties similar to the safe harbor used by

⁸ Tom Wheeler, FCC Chairman, Blog, “Kickstarting the New Year,” Jan. 7, 2016, *available at* <https://www.fcc.gov/news-events/blog/2016/01/07/kickstarting-new-year>.

⁹ Certainly, at that time, the Commission thought that placing these records in the public file rather than providing them only upon request would be a more burdensome disclosure requirement than was warranted. *See 1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Second Report and Order, 16 FCC Rcd 19773, ¶ 6 (2001) (“[The “upon request” exemption] provision gives such operators an alternative to maintaining paper files and increases flexibility in complying with the public file maintenance requirements and responding to information requests.”).

¹⁰ ACA noted the importance of the Commission designing the online upload application so that third parties can upload files for individual cable systems (with their permission), and so that systems receive notice via email when files are updated on their behalf. It should also permit third parties to do batch uploading for multiple cable systems.

¹¹ Many small cable operators do not individually sell and insert their own local advertising (including political advertising), but rather contract with third parties, such as Comcast Spotlight, Time Warner Cable, or Viamedia, for this purpose. ACA explained that under such arrangements, the cable operator has no direct relationship with the advertiser and obtains the documentation that must be included in their public inspection file from these third party cable advertising vendors.

¹² Most small and medium-sized cable operators purchase their national programming through the National Cable Television Cooperative (“NCTC”) and do not have direct relationships with these programming vendors. In many instances, NCTC secures for and makes available to its members the documentation that the programming complies with the Commission’s children’s advertising limits that must be included in cable operators’ public files.

the Commission in its implementation of the CALM Act.¹³ Specifically, smaller operators should be permitted to rely on an assurance from the third party that records will be posted to the online public file on time and kept in compliance with the Commission's rules. To qualify for safe harbor protection, the operator must have no reason to believe the assurance is false and, if noncompliance is discovered, must take steps to ensure that the noncompliance is remedied. ACA explained that once an operator becomes aware that the third party has a pattern or practice of not timely posting and keeping in compliance with the Commission's rules, the operator would no longer be entitled to safe harbor protections for that third party's actions.

Dispute Resolution Procedures for TV Closed Captioning Complaints

During the meeting, ACA reiterated its position that imposing direct liability for compliance with all closed captioning obligations on the video programmer when the programmer is demonstrated to be the source of the captioning problem (i.e. burden-shifting) is both consistent with the Commission's statutory authority and preferable from a policy perspective.¹⁴ The current system is unfair, inefficient and ineffective. It imposes unnecessary costs on video programming distributors ("VPDs"), including cable operators, because it requires them to obtain a contractual commitment from the programmer to comply with the Commission's rules and to indemnify the VPD in the event the Commission finds the VPD liable due to an error by the programmer. Moreover, video programming providers have little incentive under the current system to comply with their obligations with respect to smaller MVPDs, as these smaller providers are less likely to seek legal recourse in the event of a closed captioning problem due to the costs involved in doing so.¹⁵ The burden-shifting proposal is a better approach.

In addition to adopting the burden-shifting proposal, the Commission should take additional steps to ensure that the complaint process works as intended under the new burden-shifting regime. Specifically, ACA noted that requiring video programming providers to file their certifications of compliance with the Commission's television closed captioning rules as well as their contact information is a common sense new obligation that will improve the efficiency and effectiveness of the rules and streamline resolution of closed captioning requirements for parties as well as Commission staff.¹⁶ ACA also endorsed the "ladder of compliance" approach that would give the responsible party the opportunity to respond to a pattern of consumer complaints with voluntary corrective actions and, if that is not sufficient to address the problem, require submission of a voluntary 180-day compliance plan. This would address small operators' concerns about being liable for real-time technical problems that could happen to responsible actors.¹⁷

ACA focused its final remarks on the following practical issues that could arise under a shared closed captioning liability model and asked the Commission to address these in its order.¹⁸

¹³ ACA Public File Comments at 14-16; ACA Public File Reply Comments at 8-9. See also *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, ¶ 34 (2011) ("CALM Act Order") ("A station or MVPD will be eligible for the safe harbor with regard to the embedded commercials in particular programming if the supplier of the programming has provided a certification that its programming is compliant with the RP, and the station or MVPD has no reason to believe the certification is false.").

¹⁴ ACA Closed Captioning Comments at 1-2; ACA Closed Captioning Sept. 4th Ex Parte at 2.

¹⁵ ACA Closed Captioning Comments at 7; ACA Closed Captioning Sept. 4th Ex Parte at 1-2.

¹⁶ See ACA Closed Captioning Sept. 4th Ex Parte Letter at 2-3.

¹⁷ See ACA Closed Captioning Comments at 7; ACA Closed Captioning Sept. 4th Ex Parte Letter at 3.

¹⁸ See ACA Closed Captioning Comments at 1-3; ACA Closed Captioning Sept. 4th Ex Parte Letter at 2-4.

- The Commission should forward consumer complaints that it receives to both the VPD and the video programmer at the same time, even if the first line of responsibility for investigating the complaint lay with the VPD. Doing so would provide the programmer with advance notice of a potential problem and provide the opportunity to speed resolution if the programmer recognizes the fault is likely on its own part.
- The Commission should not expressly relinquish its right to send complaints directly to the video programmer, rather than the VPD, in instances where the complaint clearly indicates that the programmer is the most likely source of the captioning problem. That is, where the Commission becomes aware of a pattern or trend of complaints pointing to the same captioning problem across the service of multiple VPDs, the Commission should reserve to itself discretion to decide not to send the complaint to the VPD. The Commission employed this approach in the CALM Act Order, where it reserved the right to track and evaluate the individual complaints it receives to determine if there are patterns or trends that suggest a need for targeted enforcement action in cases where it “receives complaints that indicate a pattern or trend affecting multiple MVPDs or stations.”¹⁹ Relatedly, the Commission reserved the right, when determining whether to address its initial inquiries in cases indicating a pattern or trend affecting multiple MVPDs or stations, to address its inquiries to the larger stations or MVPDs in view of the “greater resources available to large entities.”²⁰ In other words, the Commission found it may be reasonable in certain circumstances to only forward similar complaints affecting multiple MVPDs to one or more of the larger MVPDs for purposes of doing testing to verify that the problem originated with the programmer, rather than burdening dozens or more smaller MVPDs with having to do the exact same testing as the larger MVPDs. With respect to closed captioning complaints, in instances where the Commission receives complaints against both large and small MVPDs indicating a pattern or trend of problems originating with the programming provider, over whom it has direct close captioning authority, it should similarly reserve the right to elect not to send the complaints to the smaller MVPDs, instead addressing its initial inquiries to the programmers directly, or at least only to larger VPDs and in view of the greater resources available to these entities.²¹
- The Commission should permit VPDs, particularly smaller VPDs (i.e., those with 400,000 or fewer subscribers) to determine for themselves what steps to take and testing to perform before they could hand-off the captioning complaint for resolution to the programming. The Commission should not expect smaller VPDs to utilize the exact same testing equipment, conduct the exact same testing procedures, or meet the same exact testing standards as large MVPDs, relying instead on the word of the

¹⁹ CALM Act Order, ¶ 48 (“If we receive complaints that indicate a pattern or trend affecting multiple MVPDs or stations, we will be conscious of the greater resources available to large entities when determining where to address our initial inquiries.”).

²⁰ *Id.* The Commission also noted that “[a]n inquiry is unlikely to be directed to a small station or MVPD even in the event of a pattern or trend of complaints, unless the complaints have come largely or solely from viewers of the small entity in question.” *Id.*, ¶ 36 n.168.

²¹ Under the CALM Act, the Commission lacked authority to directly regulate video programming providers directly, apart from digital broadcast stations, unlike its authority to impose the television closed captioning rules on video programming providers directly. In the CALM Act Order, the Commission defined “large MVPDs” as those serving more than 400,000 but fewer than 10 million subscribers nationwide as of December 31, 2011. *Id.*, ¶ 164.

smaller VPD that it has determined the captioning problem is the fault of the programmer.²² Moreover, programmers should not be able to take advantage of differences in testing among actors in the industry by expecting smaller MVPDs to test in the same way as larger MVPDs before accepting a smaller VPD's word that it satisfied the steps required to hand off the complaint. The word of a smaller MVPD that it has satisfied each step, as described above, should be sufficient.

- In cases where the VPD determines that the fault lay with the programmer, and has forwarded the complaint for resolution to the programmer, the programmer should be required to provide the VPD with a written response to forward to the consumer explaining its resolution of the problem, rather than requiring the VPD to spend the time and manpower to compose a response explaining what the programmer did or did not do to resolve the matter.

If you have any questions, or require further information, please do not hesitate to contact me directly.

Sincerely,



Barbara Esbin
Counsel to the American Cable Association

cc: Jennifer Thompson
Rebecca Almond
Edward "Smitty" Smith
Robin Colwell
Matthew Berry
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²² ACA noted that the technical capabilities of larger MVPDs often exceed those of smaller MVPDs, and the steps to be taken during a VPD's investigation of a closed captioning problem must account for these differences.