

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Accessibility of User Interfaces, and Video) MB Docket No. 12-108
Programming Guides and Menus)

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”)¹ hereby responds to the Second Further Notice of Proposed Rulemaking (“*Second Further Notice*”) in the above-captioned proceeding, which seeks comment on a potential regulatory requirement for multichannel video programming distributors (“MVPDs”) to ensure consumers can readily access enhanced closed captioning user display settings.² As explained below, the Commission should not adopt additional rules in this area.

INTRODUCTION

Pursuant to Commission rules adopted to implement the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),³ cable operators and other MVPDs, by year-end, will be rolling out navigation devices that will provide customers a

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 80 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$230 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to approximately 30 million customers.

² See *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report & Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 13914 ¶¶ 33-40 (2015) (“*Second Further Notice*”).

³ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 205 (as codified at 47 U.S.C. § 303) (“CVAA”).

mechanism, similar to a button, key or icon, to activate and deactivate closed captioning.⁴ The *Second Further Notice* seeks comment – for the third time – on whether the Commission can and should impose additional requirements on cable operators and other MVPDs to provide “ready access” to enhanced captioning display settings, such as font size and color.

Previously, NCTA demonstrated that the CVAA does not provide the Commission with such authority. The Commission now asks whether it can find such authority under the Television Decoder Circuitry Act (“TDCA”).⁵ As we explain herein, Congress did not grant the Commission such authority under any statute, and the Commission should refrain from adopting any additional rules governing access to enhanced captioning display settings.

DISCUSSION

The Commission sought comment on its authority to adopt regulations in this area pursuant to Section 205 of the CVAA in both the original *Notice* and *Further Notice* in this proceeding.⁶ In response, NCTA and other parties explained that the CVAA does not provide a basis for such regulations.⁷ As Verizon summarized, “Congress clearly did not want the

⁴ See *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, Report & Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 ¶¶ 104-08 (2013) (“*Report & Order*” or “*Further Notice*”).

⁵ See *Second Further Notice* ¶¶ 33, 35.

⁶ See *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, 28 FCC Rcd. 8506 ¶ 48 (2013) (“*Notice*”) (seeking comment on “whether the term ‘accessibility features’ in Sections 204 and 205 includes accessibility settings (such as font, color, and size of captions”); *Further Notice* ¶ 140 (seeking “further comment on whether the phrase ‘accessibility features’ in Sections 303(aa)(3) and 303(bb)(2) of the Act includes user display settings for closed captioning and whether those sections can be interpreted to require covered entities to ensure that consumers are able to locate and control such settings”); see also *Second Further Notice* ¶ 33, n.136 (stating “we received comments on the issue of our authority under Sections 204 and 205, which we are continuing to evaluate”).

⁷ See NCTA Comments at 5-6; NCTA Reply Comments at 7-8 (describing evidence submitted in the comment round demonstrating that the Commission does not have authority pursuant to the CVAA); Am. Cable Ass’n Reply Comments at 6-7; CenturyLink Reply Comments at 3-4; Consumer Elec. Ass’n Reply Comments at 2-5; Entm’t Software Ass’n Reply Comments at 3-4. Unless otherwise indicated, all comments and reply comments cited herein were filed in MB Dkt. Nos. 12-108 & 12-107 on Feb. 18, 2014 and Mar. 20, 2014, respectively.

Commission to micromanage the technical solutions implementing the accessibility features.”⁸

Indeed, the Commission has not identified any authority under which it may proceed to adopt additional regulations under Section 205 (or any other section) of the CVAA.

The Commission now turns to the Television Decoder Circuitry Act of 1990 (“TDCA”) as a possible basis for authority, but neither the TDCA nor its legislative history address *accessing* enhanced captioning display settings.⁹ In enacting the TDCA, Congress required that certain apparatus be equipped with built-in decoder circuitry to display closed captions, and assigned specific, limited regulatory tasks to the Commission.¹⁰ Commission orders implementing the TDCA, including the *DTV Captioning Order* cited in the *Second Further Notice*, have respected these statutory limits.¹¹ Indeed, in the two dozen years since its enactment, the Commission has consistently understood the TDCA to address issues other than regulating user interface design as to how to access these enhanced caption display settings. The TDCA provides authority to adopt rules addressing the parameters for caption display and standards for the transmission and receipt of captions. But that is a far cry from what would be

⁸ Verizon Comments at 7.

⁹ See *Second Further Notice* ¶¶ 33-35 (citing to the Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960 (1991) (codified at 47 U.S.C. §§ 303(u), 330(b) (“TDCA”) and querying “whether the TDCA provides authority to adopt regulations that would facilitate such access because it mandates that the Commission take steps to ensure that closed captioning service continues to be available to consumers”).

¹⁰ Namely, Congress directed the Commission to adopt “performance and display standards for such built-in decoder circuitry” and rules requiring that apparatus “be able to receive and display closed captioning which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and display specifications set forth in the Public Broadcasting System engineering report” See TDCA §§ 3 (as codified at 47 U.S.C. § 303(u)), 4(a) (as codified at 47 U.S.C. § 330(b)).

¹¹ See, e.g., *Second Further Notice* ¶ 32 (citing *In re Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report & Order, 15 FCC Rcd 16788 ¶ 10 (2000) (“*DTV Captioning Order*”); *In re Amendment of Part 15 of the Commission’s Rules to Implement the Provisions of the [TDCA]*, Report & Order, 6 FCC Rcd 2419 (1991) (amending Part 15 of the Commission’s rules to implement the TDCA); *In re Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report & Order, 15 FCC Rcd 16788 (2000) (amending Part 15 of the Commission’s rules to adopt technical standards for the display of closed captions on digital television receivers).

entailed in requiring cable operators and others to make those captioning settings “readily accessible” through their on-screen menus and guides.

The *Second Further Notice* points to a TDCA passage that states that “[a]s new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that closed-captioning service . . . continue[s] to be available to consumers.”¹² But the *Second Further Notice* takes this provision out of context as a source of authority. Here, there is no threat to the availability of closed-captioning service; closed-captioning service has been and will continue to be made available to consumers. A review of the legislative history shows that this particular sentence was not intended to provide additional authority to the Commission, but instead reflects Congress’ desire to ensure that the particular technical requirements Congress directed the Commission to adopt would be revised as necessary to keep pace with future technology changes.¹³

Furthermore, Congress was well aware of the requirements of the TDCA when it enacted the CVAA. If Congress wanted to provide additional authority to the Commission with respect to ensuring access to enhanced captioning display settings, it would have done so with the later statute.¹⁴ As CEA [now CTA] previously explained, “[g]iven its knowledge of Commission

¹² *Second Further Notice* ¶ 35 (quoting TDCA § 4 (as codified at 47 U.S.C. § 330(b))).

¹³ Indeed, the Senate Report specifically references the transition to HDTV as an example:

The Committee does not intend to mandate that FCC impose the same requirements on new technologies as those on older technologies if there are other means to achieve the objective of this legislation—to ensure that closed captioning continues to be widely available to consumers. For example, in the FCC’s consideration of *High Definition Television*, the FCC should ensure that whatever standards are adopted provide for closed captioning of programming without the need for a separate decoder.

S. Rep. No. 101-393, at 7 (1990) (emphasis added), as reprinted in 1990 U.S.C.C.A.N. 1438, 1447.

¹⁴ We note that Section 203 of the CVAA amended Section 303(u) of the TDCA, broadening its scope from “apparatus designed to receive television pictures broadcast simultaneously with sound” to “apparatus that receive or play back video programming transmitted simultaneously with sound.” 47 U.S.C. § 303(u) (as amended by CVAA § 203(a)).

efforts to provide viewers with the tools to control the appearance of closed captioning, if Congress had intended the Commission to require a mechanism for ‘activating’ caption display settings that is reasonably comparable to a button, key, or icon, it would have said so in the CVAA.”¹⁵ The same reasoning applies to the adoption of regulations requiring ensured access to enhanced captioning display settings. Congress simply did not provide the Commission such authority.

In any event, there is no reason to adopt new rules. Notably, the *Second Further Notice* acknowledges that industry is making progress in this area and queries “whether there is a need to adopt regulations given current plans of industry with regard to facilitating access to user display settings for closed captioning.”¹⁶ NCTA member companies have made significant changes to their navigation device menus and guides since the Commission first adopted rules implementing Sections 204 and 205 of the CVAA, making enhanced captioning settings easier than ever to locate. Among other things, as we previously reported to Commission staff, cable operators are working to develop intuitive ways for users to access enhanced captioning display settings on navigation devices – some companies have already rolled out new electronic program guides that provide easy access to such features.¹⁷ Given that significant efforts are already well underway in this area (plus the fact that companies are busy working to otherwise meet upcoming CVAA deadlines) any changes to the rules going forward are unnecessary in addition to being statutorily unfounded.

¹⁵ CEA Comments at 7.

¹⁶ *Second Further Notice* ¶ 38.

¹⁷ Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. Nos. 12-108, 12-107, & 11-43 at 1 (Apr. 20, 2015); *see also* Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. Nos. 12-108 & 12-107 at 1 (Mar. 3, 2015).

Moreover, there are real-world challenges with implementing any such requirement. For example, the *Second Further Notice* asks about whether access should be required at the first level of a menu, but it's unclear what that means.¹⁸ The *Second Further Notice* fails to explain why it does not make sense to provide consumers the ability to make choices about display settings under a “settings” or “accessibility” category below the first level of a menu.¹⁹ Nor has the Commission suggested an approach that would guard against potentially hampering future innovation in methods of selecting display options. Rather than adopt additional rules at this time that could be very expensive to implement and impeded the innovation of user guides and menus, the Commission should adopt a wait-and-see approach – at least until a problem in need of a solution can be identified.

If the Commission ultimately adopts rules, the *Second Further Notice* seeks comment on what time frame would be appropriate for the new requirements to become effective.²⁰ Given the late day, it would be unreasonable for the Commission to adopt deadlines that coincide with rules adopted years earlier (such as the deadline for the closed captioning activation mechanism adopted three years ago pursuant to Sections 204 and 205 of the CVAA). Meeting such deadlines would not be realistic, particularly if compliance would require modification to existing electronic guides and/or new equipment. As the Commission has repeatedly

¹⁸ See *Second Further Notice* ¶ 37 (noting that proponents of additional rules contend that “access to closed captioning display features should not be lower than the first level of a menu,” while, at the same time, citing approvingly to a video player that requires multiple steps to reach the enhanced captioning display settings).

¹⁹ Even the National Association of the Deaf *et al.* recognizes that “users generally set the closed captioning display settings . . . to the type of access they need” and as a result there is not the same need for a “single action” mechanism comparable to a button, key or icon used for ready on or off access to captioning generally. NAD *et al.* Comments at 10.

²⁰ See *Second Further Notice* ¶ 40.

acknowledged, it takes time for companies to prepare to comply with such new regulatory obligations.²¹

CONCLUSION

For the foregoing reasons, the Commission should not adopt additional requirements for access to enhanced captioning display settings.

Respectfully submitted,

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²¹ As the Commission has explained in this proceeding, it “has repeatedly determined that manufacturers generally require approximately two years to design, develop, test, manufacture, and make available for sale new products.” *Report & Order* ¶ 112, n.437.