

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 )  
 )

REPLY COMMENTS



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## I. INTRODUCTION

The American Cable Association (“ACA”) submits these Reply Comments in response to the Second Further Notice of Proposed Rulemaking (“Second FNPRM”) in the above-captioned docket and related comments.<sup>1</sup> In the Second FNPRM, the Commission seeks comment on a proposal to adopt rules that would require manufacturers and multichannel video programming distributors (“MVPDs”) to ensure that consumers are able to readily access user display settings for closed captioning and on its authority to do so under the Television Decoder Circuitry Act of 1990 (the “TDCA”).<sup>2</sup> ACA agrees with commenters that the TDCA does not authorize the Commission to adopt rules regulating the provision of “ready access” to closed captioning display settings by MVPDs. Although ACA and its members support accessibility of video programming and devices for consumers that are deaf or hearing impaired, the Commission cannot impose additional “ready accessibility” mandates, no matter how well-intentioned, without authority from Congress.

## II. THE TDCA DOES NOT GRANT THE COMMISSION AUTHORITY TO ADOPT ADDITIONAL REGULATIONS FOR ACCESS TO ENHANCED CAPTIONING DISPLAYS

As noted in the Second FNPRM, the TDCA requires, generally, that television receivers and other apparatus contain circuitry to decode and display closed captioning, and directs that the Commission’s “rules shall provide performance and display standards for such built-in decoder circuitry or capability designed to display closed captioned video programming.”<sup>3</sup> As codified in Section 303(b) of the Communications Act, it further provides that “[a]s new video technology is developed, the Commission shall take such action as the Commission determines appropriate to

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<sup>1</sup> *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report and Order, Order on Reconsideration, and Second Notice of Proposed Rulemaking, MB Docket No. 12-108 (rel. Nov. 20, 2015) (“Second FNPRM”).

<sup>2</sup> Second FNPRM, ¶ 33; see also Pub. L. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)) (“TDCA”).

<sup>3</sup> Second FNPRM, ¶ 34.

ensure that closed-captioned service continues to be available to consumers.”<sup>4</sup> The Second FNPRM seeks comment on whether this language gives the Commission authority to adopt rules that would require manufacturers *and MVPDs* to ensure that consumers are readily able to access user display setting requirements for closed captioning.<sup>5</sup> Pointing only to Congress’s goals in enacting the TDCA, the Commission states its belief that adopting rules requiring that MVPDs ensure consumers are able to readily access user display settings for closed captioning will “ensure that closed-captioning service continues to be available to consumers’ and, in particular, that enabling viewers who are deaf and hard of hearing to set caption display features.”<sup>6</sup>

However admirable the Commission’s goal in proposing the new requirements, there is no basis under the 25 year-old TDCA for the Commission to require MVPDs “to ensure that consumers are able to readily access user display settings for closed captioning.”<sup>7</sup> The Commission’s authority under the TDCA is limited to requiring that certain apparatus, such as television sets, have “built-in closed caption decoder circuitry or capability designed to display

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<sup>4</sup> TDCA, § 4; 47 U.S.C. § 330(b).

<sup>5</sup> The Commission has previously inquired whether Sections 204 and 205 of the Twenty First Century Communications and Video Accessibility Act of 2010 (“CVAA”) provide it with authority to adopt such regulations in this area. *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, 28 FCC Rcd 8506, ¶ 48 (2013) (“NPRM”); *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330, ¶ 140 (2013) (“FNPRM”). ACA and others argued that the CVAA does not provide the Commission with the authority to adopt a rule requiring MVPDs to ensure “ready access” to display settings. *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Reply Comments of American Cable Association at 3-4 (filed Mar. 20, 2014) (arguing that Section 205, unlike Sections 716 and 718 of the CVAA, does not authorize the Commission to require that covered products be “accessible to and usable by” individuals with disabilities). *See also Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Reply Comments of Consumer Electronics Association at 2-6 (filed Mar. 20, 2014) (arguing that Sections 204 and 205 do not authorize the Commission to regulate access to display settings); Comments of the National Cable & Telecommunications Association at 3; 5-7 (filed Feb. 18, 2014) (explaining that nothing in the text of the CVAA suggests that the Commission’s authority extends to access to enhanced captioning display features); Reply Comments of the National Cable & Telecommunications Association at 8-9 (filed Mar. 20, 2014) (noting that Section 205 lacks “accessible to and usable by” language, thus limiting the Commission from implementing certain regulations governing accessibility).

<sup>6</sup> Second FNPRM, ¶ 35. In addition, the Commission seeks comment on whether both manufacturers and MVPDs should be responsible for compliance. *Id.*, ¶ 39.

<sup>7</sup> *Id.*, ¶ 33.

closed-caption video programming”<sup>8</sup> and to adopting “performance and display standards for such built-in decoder circuitry or capability.”<sup>9</sup> Put another way, these provisions address the availability of closed captioning in apparatus, not the ability of an MVPD system to ensure “ready access” to any specific closed captioning setting on such apparatus.

The Commission’s suggestion to the contrary unacceptably elides the critical distinction between the goal of closed captioning “availability” established for television sets and apparatus in the TDCA and that of closed captioning “accessibility” established in the CVAA. The two Acts have distinctive goals. As the National Cable and Telecommunications Association (“NCTA”) aptly notes, “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 [concerning new video technology and the continuity of closed-captioning service] 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.”<sup>10</sup>

Indeed, the Commission itself has interpreted the use of “apparatus” in the TDCA and other accessibility statutes as imposing requirements on the *manufacturers* of apparatus and not distributors, such as MVPDs, that deploy such apparatus.<sup>11</sup> Although consumer groups argue that, “rules ensuring readily accessible display settings under the TDCA would also be

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<sup>8</sup> 47 U.S.C. § 303(u).

<sup>9</sup> 47 U.S.C. § 330(b).

<sup>10</sup> *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of NCTA at 4 (filed Feb. 24, 2016) (“NCTA Comments”).

<sup>11</sup> *See Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of AT&T at 4, n.6 (filed Feb. 24, 2016) (“AT&T Comments”) (citing to Commission proceedings in which “apparatus” was understood to impose regulations on manufacturers, including the 2013 Report and Order in this proceeding).

consistent with the congressional intent that closed captioning be available to and readable by consumers,”<sup>12</sup> whatever authority the TDCA grants to the Commission with respect to apparatus manufacturers, it does not authorize the Commission to impose requirements on MVPDs concerning the ready accessibility of user display settings for closed captioning. This conclusion is consistent with Congress’s finding in implementing the TDCA that “technology is now available to enable that closed-caption decoding capability to be built into new television sets during manufacture.”<sup>13</sup> In short, the TDCA grants the Commission authority to ensure that apparatus are designed and manufactured to ensure the technical availability of captioning.<sup>14</sup> But authority to require manufacturers to ensure the availability of closed captioning in apparatus is separate and distinct from the authority to require an MVPD to ensure the accessibility of closed captioning displays, which the TDCA simply does not grant the Commission.<sup>15</sup>

Moreover, as NCTA observes, the Commission’s own interpretations of the TDCA on the whole have not understood it to authorize regulations of access to closed captioning displays.<sup>16</sup> NCTA explains not only that the Commission has historically applied the TDCA to “issues other than regulating user interface design as to how to access these enhanced caption display

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<sup>12</sup> *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of Consumer Groups and RERC at 4 (filed Feb. 24, 2016) (“Consumer Groups Comments”).

<sup>13</sup> TDCA, § 2 (8).

<sup>14</sup> 47 U.S.C. §§ 303(u); 330(b).

<sup>15</sup> See NCTA Comments at 3 (“[N]either the TDCA nor its legislative history address accessing enhanced captioning display settings.”); AT&T Comments at 3 (“In essence, the Commission seeks authority to design how users access the device settings that control how ‘available’ closed captioning is displayed. That distinction – between closed captioning availability and settings – is determinative. The TDCA does not provide the Commission with that authority.”).

<sup>16</sup> See NCTA Comments at 3, n.11 (explaining that earlier Commission orders implementing the TDCA have abided by the statutory limits of the TDCA – *i.e.*, the plain language of the TDCA and the legislative history outlined above – and citing to several Commission proceedings in support).

settings,”<sup>17</sup> but that Congress too understood the limitations of the Commission’s authority under the TDCA when it passed the CVAA.<sup>18</sup> If Congress wanted to grant the Commission new or additional authority to regulate the accessibility of closed captioning displays by imposing requirements on MVPDs, it had an opportunity to explicitly do so in the CVAA and chose not to.<sup>19</sup>

The argument advanced by consumer groups that the portion of the TDCA codified at Section 330(b) regarding the development of new video technology authorizes the Commission to adopt rules it “determines appropriate to ensure that closed-captioning service and video description service continue to be available to consumers” is unavailing.<sup>20</sup> Consumer groups claim that access to user display settings is essential to making captioning available to consumers and that “rules ensuring readily accessible display settings under the TDCA would also be consistent with the congressional intent that closed captioning be available to and readable by consumers,”<sup>21</sup> but these arguments founder for the same reasons as the Commission’s statutory analysis. Whatever the TDCA authorizes the Commission to do with respect to television sets and apparatus, it does not thereby also authorize the Commission to regulate MVPDs’ provision of “ready access” to closed captioning user display settings. While

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<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 4 (“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.”). See also *United States v. Langley*, 62 F.3d 602, 605 (1995) (“It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law”); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982), quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.”).

<sup>19</sup> See NCTA Comments at 4-5; *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of the Consumer Technology Association, f/k/a Consumer Electronics Association at 7 (filed Feb. 24, 2016) (“CTA Comments”).

<sup>20</sup> Consumer Groups Comments at 3.

<sup>21</sup> *Id.*

Section 330(b) directs the Commission to take appropriate action to ensure the availability of closed captioning “as new technology is developed,” the provision itself addresses decoder circuitry and lays out requirements in that context — requirements that apply to apparatus manufacturers, not MVPDs.<sup>22</sup> This portion of the TDCA, as supported by legislative history, was not intended to give the Commission any new or general authority.<sup>23</sup> The Commission’s authority in that Section is limited to updating the specific technical requirements identified in the TDCA – Congress did not want the Commission to continue to impose outdated technical requirements and intended to authorize the Commission to update specifications as necessary to keep up with new video technologies. The ready accessibility of closed captioning display settings, as proposed in the Second FNPRM, “is unrelated to ensuring that closed-captioning service is ‘available’ as new video technology is introduced.”<sup>24</sup>

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<sup>22</sup> 47 U.S.C. § 330(b).

<sup>23</sup> See NCTA Comments at 4 (“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.”); CTA Comments at 4-5 (describing why the TDCA does not confer authority on the Commission to adopt rules with respect to the accessibility of user interfaces for closed captioning display settings).

<sup>24</sup> CTA Comments at 5 (“Making display settings “readily accessible,” as proposed in the *Notice*, is unrelated to ensuring that closed-captioning service is “available” as new video technology is introduced.”).

### III. CONCLUSION

ACA applauds the Commission's continuing efforts at ensuring the availability of video service to individuals with disabilities. Nonetheless, the Commission's authority is limited to actions required under the CVAA and TDCA, and neither statute grants the Commission authority to adopt rules that would require MVPDs to make closed captioning display settings "readily accessible."

Respectfully submitted,

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