

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF CONSUMER GROUPS AND RERC

**Telecommunications for the Deaf and Hard of Hearing, Inc.
National Association of the Deaf
Hearing Loss Association of America
Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of
Hearing, Gallaudet University**

Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, and Hearing Loss Association of America (collectively “Consumer Groups”), and Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing—Gallaudet University (“RERC”), respectfully reply to comments filed on the Federal Communications Commission’s (“FCC” or “Commission”) November 18, 2015 Second Further Notice of Proposed Rulemaking in the above-referenced proceeding (“Second Further Notice”), which raises issues around the accessibility of user display settings for closed captioning, and the Commission’s authority to enact rules requiring that such settings be accessible from no lower than the first level of a menu.

I. The Commission has broad authority under the TDCA to ensure the availability and accessibility of closed captioning, including readily accessible user display settings.

Consumer Groups and RERC disagree with the narrow interpretation of the Television Decoder Circuitry Act of 1990 (“TDCA”) offered in comments by industry. Under the TDCA,

“[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.”¹ Comments from industry offer an interpretation of this mandate that would render it utterly toothless, which surely was not the intent of Congress. For example, NCTA argues that, contrary to the Second Further Notice,² and despite the use of the term “shall,” the provision is nevertheless not a source of relevant authority. Instead, NCTA suggests that the provision is irrelevant because “[h]ere, there is no threat to the availability of closed-captioning service” because “closed-captioning service has been and will continue to be made available to consumers.”³ This interpretation seems to suggest that anything short of the impending extinction of captioning would not trigger the Commission’s authority under the TDCA.

However, Congress did not take such a narrow view of closed captioning “availability” when it passed the TDCA, and the Commission should not adopt such a narrow interpretation now. At the time the law was passed, Congress was clearly concerned with barriers to accessing captioning, including the burden that the TeleCaption II posed to consumers trying to access captions.⁴ Congress was therefore not concerned that new video technology would threaten the very existence of captioning, but rather that new technology might present barriers to the practical accessibility of captioning on those new technologies, and that the Commission should respond to those barriers appropriately as necessary.

¹ Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, §4 (codified at 47 USC § 330(b)) (emphasis added) (“TDCA”).

² See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MB Dkt. No. 12-108, ¶ 35 (Nov. 20, 2015) (“Second Further Notice”).

³ *Comments of the National Cable & Telecommunications Association* at 4 (February 24, 2016) (“NCTA Comments”).

⁴ See *Comments of Consumer Groups and RERC in Response to Second FNPRM* at 3-4 (February 24, 2016) (“Consumer Groups and RERC Comments”).

Some commenters claim that only the CVAA, and not the TDCA, governs user interface issues, and suggest that the Commission has exhausted its authority regarding user interface issues with the new requirement that closed captioning be activated through a mechanism that is reasonably comparable to a button, key, or icon.⁵ Under such a narrow interpretation, manufacturers and MVPDs could bury critical user settings as deep as they want in a complicated series of menus without such a burden on accessibility ever rising to the level of those contemplated under the TDCA. The Commission should not take such a constrained view. Rather, the proposed rule would support the TDCA’s goals of removing technical barriers and ensuring practical accessibility and readability of captions.⁶

Consumer Groups and RERC also disagree with the assertion of AT&T that an order under the TDCA could not apply to MVPDs. AT&T cites as support portions of the DTV Closed Captioning Order from 2000 which imposed certain requirements on, and provided guidance to, manufacturers pertaining to DTV closed captioning functionality,⁷ but provides no evidence that all non-manufacturers are somehow precluded from the scope of the TDCA. To the contrary, the TDCA itself explicitly implicates non-manufacturers.⁸

AT&T also argues that any requirements imposed on manufacturers will only lessen the reason to impose any requirements on MVPDs.⁹ Consumer Groups and RERC strongly disagree. MVPDs play an integral role in “ensur[ing] that closed-captioning service . . .

⁵ See, e.g., *Comments of The Consumer Technology Association F/K/A The Consumer Electronics Association* at 6-8 (February 24, 2016) (citing 28 FCC Rcd 17330, 17308 ¶ 79 (2013); 30 FCC Rcd 13914, 13939-30 ¶ 27 (2015)) (“CTA Comments”).

⁶ See Consumer Groups and RERC Comments at 3-4.

⁷ *Comments of AT&T* at 4-5 n. 8 (February 24, 2016) (“AT&T Comments”) (citing *Closed Captioning Requirements for Digital Television Receivers, Report and Order*, ET Docket No. 99-254, MM Docket No. 95-176, 65 FR 58467 (2000)).

⁸ See 47 USC §330(b) (mandating in part that “no person shall ship in interstate commerce, manufacture, assemble, or import from any foreign country into the United States, any apparatus described in section 303(u) and (z) of this title”).

⁹ AT&T Comments at 5 n.9.

continue[s] to be available to consumers”¹⁰ because of the relationship consumers have with their programming distributors—a relationship they do not share with manufacturers.¹¹ As such, MVPDs must play a central role in ensuring that user settings are readily accessible to consumers.

II. There is great need for a rule regarding readily accessible closed captioning settings, and industry has not indicated that it is making progress to negate this need.

While Consumer Groups and RERC appreciate the efforts of industry to make closed captioning more accessible, the record does not indicate specific steps taken by industry that negate the need for the proposed rule regarding the accessibility of settings, as requested in the Second Further Notice.¹² Instead, industry comments assert that general progress is being made, and advocate for a “wait-and-see” approach when it comes to the accessibility of settings.¹³

These unsupported assurances stand in stark contrast to the experiences of Consumer Groups, which indicate that closed captioning settings remain difficult to access and, in many instances, are becoming less accessible.¹⁴ For instance, Consumer Groups and RERC note the difficulty experienced by many in trying to change the captioning settings for Netflix on various devices.¹⁵ Moreover, the fact that YouTube is no longer a model first-level-of-a-menu example¹⁶ indicates that neither the passage of time nor the overall advancement of technology necessarily mean that captioning will continue to be available with readily accessible critical user settings.

Consumer Groups have consistently advocated for the need for readily accessible closed captioning settings, contrary to a suggestion in the comments of NCTA. In a footnote, NCTA

¹⁰ TDCA §4 (codified at 47 USC § 330(b)).

¹¹ See Consumer Groups and RERC Comments at 11.

¹² See Second Further Notice at ¶38.

¹³ See, e.g., Comments of NCTA at 6, CTA at 8.

¹⁴ See Consumer Groups and RERC comments at 7-9.

¹⁵ *Id.* at 7-8.

¹⁶ See Consumer Groups and RERC Comments at 8.

suggests that Consumer Groups have previously conceded that settings are infrequently accessed and changed by users.¹⁷ Consumer Groups have not, in fact, suggested that closed captioning settings are infrequently accessed, but rather that they are *less frequently accessed than an activation mechanism*; therefore, whereas an activation mechanism should be comparable to a button, key, or icon, closed captioning settings are more appropriately accessed from the first level of a menu. Even if certain consumers do not frequently access closed captioning settings, those settings must still be readily accessible in the first instance if they are to be utilized at all. Consumer Groups continue to maintain that the first-level-of-a-menu rule would be a practical and effective solution to the current challenges faced by consumers.

III. The proposed rule is clear, and would not require complex modifications or an implementation timeframe comparable to more complex requirements.

The proposed first-level-of-a-menu requirement is a clear, simple, practical solution that would not be overly burdensome to implement. Contrary to suggestions by industry, there is no reason that industry cannot continue to innovate in the long term while making a small software modification to make settings more accessible in the short term.

The rule proposed by the Commission in the Second Further Notice is clear, despite arguments to the contrary by some commenters.¹⁸ The first-level-of-a-menu is a simple concept: closed captioning settings should be among the first set of options available for users to select on the main screen of a video player's menu. The Second Further Notice cited to Consumer Groups' past example of YouTube's web video player as one that utilizes such a menu.¹⁹ Contrary to an assertion in NCTA's comment, the Second Further Notice did not contradict its

¹⁷ See NCTA Comments at 6 n. 19 (“Even the National Association of the Deaf *et al.* recognize 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.”).

¹⁸ See NCTA Comments at 6; CTA Comments at 1, 4, 7-8.

¹⁹ See Second Further Notice at ¶37 n. 152 (Nov. 20, 2015).

proposal by “citing approvingly to a video player that requires multiple steps to reach the enhanced captioning display settings.”²⁰ Rather, as described clearly in the Second Further Notice, users of the YouTube player cited simply had to click the “CC” button (i.e. the menu) on YouTube’s player, and then select “settings” (i.e. the item in the first level of that menu) in order to adjust the closed captioning settings.²¹ Although these settings are, in many instances, no longer as accessible on YouTube’s current video players, the model as described in the Second Further Notice remains a desirable one. In any event, Consumer Groups and RERC in their comments cite to and describe CNN’s web video player as a current example of closed captioning settings that are accessible from the first level of a menu.²²

Comments by industry also failed to demonstrate that the proposed rule would be excessively expensive, or how it would hamper innovation.²³ They also failed to demonstrate that the proposed rule would require anything more than a small software modification. TIA suggests that “[i]n many cases” adjusting the level or location of such settings would require “significantly more than a simple software change,” and speculates that “factory level reconfigurations . . . *could* be required by the FCC’s proposed rules,” which would “require significant coordination between multiple internal and external design and engineer teams.”²⁴ Even if these speculative steps do end up being necessary in order to comply with the proposed

²⁰ See NCTA Comments at 6 n. 18.

²¹ See Second Further Notice ¶37 n. 152 (explaining that “[t]o access the captioning settings on the YouTube player, the user first clicks the ‘CC’ button at the bottom of the screen, then clicks ‘Settings...,’ and then a box appears which allows users to adjust the closed captioning settings”).

²² See Consumer Groups and RERC Comments at 6 (describing CNN’s video player as one “where a user simply clicks the settings ‘gear’ icon and selects ‘caption settings’”).

²³ NCTA merely speculates that the rule “*could* be very expensive to implement and impede[] the innovation of user guides and menus,” and asserts, without support or elaboration, that the rule would not “guard against *potentially* hampering future innovation in methods of selecting display options.” NCTA Comments at 6 (emphases added).

²⁴ TIA Comments at 2 (emphasis added).

rule, they would not warrant deadlines comparable to past timeframes implemented by the Commission for much more complex requirements, as argued by industry. TIA, AT&T, NCTA, and CTA all advocate for an implementation timeframe of at least two years, largely relying on the fact that the Commission “has repeatedly determined [that] manufacturers generally require approximately two years to design, develop, test, manufacture, and make available for sale new products.”²⁵ The proposed rule here, however, would not require a “new product,” but rather only a small software modification to a product that already exists or is currently being developed. Therefore, it is appropriate for this compliance deadline to be the same as the existing December 20, 2016 deadline for complying with the requirements adopted pursuant to Sections 204 and 205 of the CVAA.²⁶

For these same reasons, it would not be necessary for the Commission to implement the waiver process proposed by TIA and CTA.²⁷ There is no indication in the comments that any device with the processing power to render video and closed captioning would somehow nevertheless be unable to include a first-level menu item for these settings. Consumer Groups and RERC maintain, however, that if the Commission considers exemptions from the proposed rule, the standard should resemble that discussed in the IP Closed Captioning Order, where the requirement is not found to be technically infeasible simply because it would be costly to implement or because it would require physical modifications to the product, but rather only if it is actually “not physically or technically possible.”²⁸

Consumer Groups and RERC again urge the Commission to adopt the proposed rule that requires user display settings for closed captioning to be accessible from no lower than the first

²⁵ See, e.g., TIA Comments at 2 (citing IP Closed Captioning Order, 27 FCC Rcd 787 ¶122 (2012)); NCTA Comments at 7 n. 21 (citing the First User Interface Report and Order at ¶112 n. 437).

²⁶ See Consumer Groups and RERC Comments at 12.

²⁷ See Comments of TIA at 2, CTA at 9.

²⁸ See IP Closed Captioning Order, at ¶¶ 97-98; Consumer Groups and RERC Comments at 11.

level of a menu. This rule, as clearly proposed in the Second Further Notice and elaborated upon in the comments of Consumer Groups, would best alleviate the challenges currently faced by consumers who seek to utilize user display settings in ways that enable them to access captions. The proposed first-level menu item rule would provide equal access to video programming by removing technical barriers that currently prevent captions from being readable by many consumers.

Respectfully submitted,

/s/

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