

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Expanding Consumers’ Video Navigation Choices)	MB Docket No. 16-42
)	
Commercial Availability of Navigation Devices)	CS Docket No. 97-80
)	

COMMENTS OF CONSUMER GROUPS AND DHH-RERC IN RESPONSE TO NPRM

**Telecommunications for the Deaf and Hard of Hearing, Inc.
National Association of the Deaf
Cerebral Palsy and Deaf Organization
Deaf Seniors of America
Hearing Loss Association of America
Association of Late Deafened Adults
American Association of the DeafBlind
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, Cerebral Palsy and Deaf Organization, Deaf Seniors of America, Hearing Loss Association of America, Association of Late Deafened Adults, American Association of the DeafBlind, and Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing, Gallaudet University (collectively, “Consumer Groups and DHH-RERC”), respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) February 18, 2016 Notice of Proposed Rulemaking in the above-referenced proceedings.

Consumer Groups and DHH-RERC seek to promote equal access to telecommunications, including video programming, for the 48 million Americans who are deaf, hard of hearing, late-

deafened, or deafblind, as well as those with additional disabilities in addition to being deaf or hard of hearing, so that they may fully experience the informational, educational, cultural, and societal opportunities afforded by the telecommunications revolution. In considering its proposal to expand consumers' video navigation choices in this proceeding, we urge the Commission to ensure that all video navigation devices are accessible to deaf and hard of hearing consumers. Accessibility to competitive navigation devices for deaf and hard of hearing consumers is essential if the proposed rules are to achieve their goal of ensuring competition in the navigation device market because, as the NPRM emphasizes, "consumers may be dissuaded from opting for a competitive navigation solution if they are not confident that their interests will be protected to the same extent as in an MVPD-provided solution."¹ If competitive devices are not subject to the same accessibility rules as current set-top boxes, many of which have their own accessibility problems notwithstanding the rules,² then deaf and hard of hearing consumers² might be dissuaded from exploring competitive navigation device options.

I. The Commission's accessibility rules must apply to all competitive navigation devices in the multichannel video programming ecosystem.

In this NPRM, the Commission proposes to grant access to multichannel video programming from "all hardware manufacturers, software developers, application designers, system integrators, and other such entities . . . who are involved in the development of navigation devices or whose products enable consumers to access multichannel video programming over any such device."³ Any action taken by the Commission in this proceeding must ensure the

¹ *Expanding Consumers' Video Navigation Choices, Notice of Proposed Rulemaking and Memorandum Opinion and Order* ("NPRM"), MB Docket No. 16-42, ¶ 75 (Feb. 18, 2016).

² For example, many deaf and hard of hearing consumers are currently forced to pay to rent set-top boxes that are so old that they are not equipped with the ability to customize caption settings. Upgrading to a newer box could mean paying extra for features that the consumer does not need, in order to access the accessibility features that they do need.

³ NPRM at ¶ 21.

accessibility of the video programming that is made available through all of these competitive navigation devices, no matter how those devices are defined.

The Commission’s proposed definition of navigation devices “include[s] both the hardware and software (such as applications) employed in such devices that allow consumers to access multichannel video programming and other services offered over multichannel video programming systems.”⁴ As an initial matter, under this definition, these competitive navigation devices would be subject to the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)⁵ as covered “apparatus designed to receive or play back video programming transmitted simultaneously with sound,”⁶ and therefore would be required to be equipped and capable of displaying closed captioning.⁷ The Commission explained in its IP Closed Captioning Report and Order that these covered apparatus include “set-top boxes, PCs, smartphones, and tablets . . . designed to receive or play back video programming transmitted simultaneously with sound and any integrated software.”⁸ Accordingly, these covered “apparatus” would include competitive set-top boxes, as well as any other competitive navigation device with “integrated software”⁹ that delivers the multichannel video programming to consumers after receiving the required three information flows from MVPDs. The Commission should make clear that these devices would be directly subject to the CVAA,

⁴ NPRM at ¶ 22.

⁵ Pub. L. No. 111-260, 124 Stat. 2751 (2010) (“CVAA”).

⁶ CVAA § 203(a)(1).

⁷ See 47 U.S.C. § 303(u)(1)(A).

⁸ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communication and Video Accessibility Act of 2010, Report and Order*, (“IP Closed Captioning Report and Order”) MB Docket No. 11-154, ¶ 93 (Jan 12, 2012).

⁹ “Integrated software” is “software installed in the device by the manufacturer before sale or that the manufacturer requires the consumer to install after sale.” IP Closed Captioning Report and Order at ¶ 93.

regardless of whether those devices are required to certify their compliance with the Commission's accessibility rules.¹⁰

The NPRM also proposes an “alternative[.]” definition of “navigation device” that would “treat software on the device (such as an application) that consumers use to access multichannel video programming and other MVPD services as a ‘navigation device,’ separate and apart from the hardware on which it is running.”¹¹ Under current rules, these software-only third party applications might not be subject to the Commission's accessibility rules because, under the IP Closed Captioning Report and Order, the current definition of “apparatus” excludes “third-party software that is downloaded or otherwise added to the device independently by the consumer after sale and that is not required by the manufacturer to enable the device to play video.”¹² Because, by definition, these competitive applications would be delivering the same programming to consumers as their regulated MVPD counterparts, the same accessibility rules should apply. A failure to ensure accessibility of programming made available through competitive navigation devices would seriously undermine the accessibility of video programming required by the CVAA.

Accordingly, if the Commission adopts its proposed rules, it should subject to the accessibility rules all applications that allow consumers to access multichannel video programming and other services offered over multichannel video programming systems by way

¹⁰ See *infra* Part II.

¹¹ NPRM at ¶ 24.

¹² Consumer Groups and DHH-RERC believe that the Commission should revise its definition of “apparatus” to include these applications. When it adopted its current definition in 2012, the IP Closed Captioning Report and Order indicated that it might consider broadening its definition of apparatus “if video programming is increasingly provided using third-party software [like applications] unaffiliated with both VPDs and device manufacturers.” IP Closed Captioning Report and Order at ¶ 94, n. 372. The NPRM's proposed rules would result in exactly this form of video programming consumption by consumers, and the rules should reflect this shift.

of receiving the three information flows, through ancillary jurisdiction.¹³ The Commission has taken this approach with regard to accessibility of evolving technologies before. For instance, in 1999, the Commission determined that its Title I subject matter jurisdiction over voicemail and interactive menu services extended to that which was provided by carriers and non-carriers alike.¹⁴ In doing so, it concluded: “we are not breaking new ground, but are simply continuing our longstanding practice of asserting jurisdiction over voicemail and interactive menus.”¹⁵ In this proceeding, the Commission would likewise not be breaking new ground, but rather simply continuing its longstanding practice of asserting jurisdiction over multichannel video programming and the entities that deliver it.

This approach to ensuring fair and consistent application of the Commission’s accessibility rules should not be controversial, as this jurisdiction is more than reasonably ancillary to the directives of the CVAA.¹⁶ Congress intended the CVAA to “update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming,”¹⁷ and to “ensure that devices consumers use to view video programming are able to display closed captions.”¹⁸ In the same way that the Commission feared that “inaccessible voicemail and interactive menus

¹³ “Ancillary jurisdiction may be employed, in the Commission’s discretion, where the Commission has subject matter jurisdiction over the communications at issue and the assertion of jurisdiction is reasonably required to perform an express statutory obligation.” *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Report and Order and Further Notice of Inquiry*, (“Voicemail Report and Order”) WT Docket No. 96-198, ¶ 95 (Sept. 29, 1999) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994 (1968)).

¹⁴ Voicemail Report and Order at ¶ 98.

¹⁵ *Id.* at ¶ 97.

¹⁶ See e.g., CVAA (describing the Act’s goal “[t]o increase the access of persons with disabilities to modern communications”).

¹⁷ See S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010) (“Senate Committee Report”); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010).

¹⁸ Senate Committee Report at 13.

could defeat the effective implementation of sections 255 and 251(a)(2) [of the Communications Act],”¹⁹ inaccessible multichannel video programming on competitive navigation devices could defeat the effective implementation of the CVAA. If the Commission adopts its proposed rules, it must make clear that all navigation devices will be subject to the same accessibility rules.

II. If the Commission requires certification of competitive navigation devices, compliance with accessibility rules should be among the public interest requirements certified.

The NPRM “propose[s] to require that MVPDs authenticate and provide the three Information Flows only to Navigation Devices that have been certified by the developer to meet certain public interest requirements” in order to “ensure that the public policy goals underlying these requirements are met regardless of which device a consumer chooses to access multichannel video programming.”²⁰ It lists among these proposed public interest requirements “privacy protections, pass through EAS messages, and . . . children’s programming advertising limits,”²¹ and asks whether “the proposed certification [should] address any other issues, including compliance with the Commission’s accessibility rules,”²² or whether it should “leave these matters to the market.”²³ Consumer Groups and DHH-RERC reiterate that all competitive navigation devices should be subject to the Commission’s accessibility rules either directly or through the Commission’s reasonable ancillary jurisdiction, and should not be merely left to the market.

That being said, if the Commission requires certification of compliance with certain public interest requirements, then the Commission’s accessibility rules should be among those

¹⁹ Voicemail Report and Order at ¶ 99.

²⁰ NPRM at ¶ 73.

²¹ *Id.* (citations omitted).

²² *Id.* (citing 47 CFR 79.102-79.109).

²³ *Id.*

public interest requirements. Such certification would serve to put MVPDs and competitive navigation devices on notice regarding the accessibility obligations of the competitive navigation devices. In addition, the certification would help facilitate the resolution of consumer complaints against competitive navigation devices, which would likely be directed by consumers to their MVPDs, with whom consumers have an established and ongoing relationship. Finally, certification would aid the FCC in its enforcement of its accessibility rules against both MVPDs and competitive navigation devices, in the event that the programming is not accessible to deaf and hard of hearing consumers. The Commission should address these aspects of certification in order to avoid consumer confusion.

III. If the Commission adopts its proposed rules, accessibility should be addressed in the “Content Delivery” and “Service Discovery” data flows.

In order to allow competitive navigation device developers to design their devices and deliver multichannel video programming to consumers, the NPRM requires MVPDs to provide three “information flows” to certified competitive navigation devices. The NPRM proposes to define one of the information flows, “Content Delivery Data,” as data that “contains the Navigable Service and any information necessary to make the Navigable Service accessible to persons with disabilities.”²⁴ Consumer Groups and DHH-RERC support this definition, which correctly recognizes accessibility as a critical component of the navigable service itself. Competitive navigation devices will only be able to make programming accessible to consumers if they have access to this information from the MVPD.

In addition, the NPRM considers defining “Service Discovery Data” as “information about available Navigable Services and any instructions necessary to request a Navigable Service [including] . . . at a minimum, channel information (if any), program title, rating/parental control

²⁴ NPRM at ¶ 40.

information, program start and stop times (or program length, for on-demand programming), and an ‘Entertainment Identifier Register ID.’”²⁵ The NPRM considers whether “Service Discovery Data” should also “include information about . . . whether the program has accessibility features such as closed captioning and video description.”²⁶ Consumer Groups and DHH-RERC support including this information about accessibility in the “Service Discovery Data” definition because “whether [a] program has accessibility features” is a critical piece of information for deaf and hard of hearing consumers when navigating multichannel video programming on a device. Many deaf and hard of hearing consumers have become accustomed to relying on this information when using their current set-top boxes. Consumers should not lose access to this important information if they decide to access their programming through a competitive device. Including information about whether a program has accessibility features as part of the “Service Discovery Data” provided by MVPDs to competitive devices will make it more likely that these competitive devices are just as accessible to deaf and hard of hearing consumers as devices provided by MVPDs.

Conclusion

Consumer Groups and DHH-RERC urge the Commission to ensure that all video navigation devices are accessible to deaf and hard of hearing consumers. If competitive devices are not subject to the same accessibility rules as current set-top boxes, then deaf and hard of hearing consumers might be dissuaded from exploring competitive navigation device options, defeating the Commission’s goal of encouraging competition and choice in the navigation device market. The Commission should make clear that competitive set-top boxes would be directly subject to the CVAA. It is well within the Commission’s ancillary jurisdiction to subject to the accessibility rules all other software-only applications that allow consumers to access

²⁵ NPRM at ¶ 38.

²⁶ *Id.*

multichannel video programming and other services offered over multichannel video programming systems by way of receiving the three information flows. Finally, if the Commission adopts its proposed rules, compliance with the Commission’s accessibility rules should be included in any required certification by competitive navigation devices, and accessibility should be addressed in the “Content Delivery” and “Service Discovery” data flows.

Respectfully submitted,

/s/

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