Before the
Federal Communications Commission

In the Matter of a	)	
	)	CSR-7947-Z
Motion Picture Association of America, Inc.	)	MB Docket 08-82
	)	
Petition for Waiver of 47 C.F.R. § 76.1903	)	

Reply Comments of the National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., Hearing Loss Association of America, and the Deaf and Hard of Hearing Consumer Advocacy Network

The National Association of the Deaf (NAD),[1] Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI),[2] Hearing Loss Association of America (HLAA),[3] and the Deaf and Hard of Hearing Consumer Advocacy

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[1] The NAD was established in 1880 by deaf leaders who believed in the right of the American deaf community to use sign language, to congregate on issues important to them, and to have its interests represented at the national level. These beliefs remain true to this day, with American Sign Language as a core value. As a nonprofit federation, the mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of deaf Americans. The advocacy scope of the NAD is broad, covering the breadth of a lifetime and impacting future generations in the areas of early intervention, education, employment, health care, technology, telecommunications, youth leadership, and more. For more information, please visit www.nad.org.

[2] TDI is a membership organization that promotes equal access to telecommunications, media, and information technology for 31 million Americans who are deaf or hard of hearing. TDI publishes the TDI World quarterly magazine, TDI Briefs newsletter, and the annual TDI National Directory & Resource Guide, also called the "Blue Book."

[3] HLAA is a national consumer organization representing people of all ages with all degrees of hearing loss. HLAA has a national office, 14 state organizations and over 200 chapters and groups nationwide. The mission of the HLAA is to open the world of communication for people with hearing loss through information, education, advocacy and support.

Network (DHHCAN)[4] submit these brief comments in response to the Motion Picture Association of America (MPAA) Petition for Waiver of the Prohibition on the Use of Selectable Output Controls (47 C.F.R. § 76.1903) as referenced in the Federal Communications Commission (FCC) Public Notice DA 08-1081, released June 5, 2008 (the "Petition").

We understand that MPAA is seeking to provide its members, who are producers and distributors of theatrical films (the "Petitioners"), with the opportunity to offer consumers the ability to order recently released high definition movies through their Multichannel Video Programming Distributors ("MVPDs") (the "Services"). Such movies are currently made available for direct home viewing only after they have been released for sale on DVDs. We also understand that the FCC currently has in place an encoding rule – referred to as the Selectable Output Control ("SOC") prohibition – that impacts the provision of such movies through MVPDs. Further, we understand that the FCC appears to have indicated that the SOC prohibition was needed to promote the digital transition. The FCC also recognized that certain exceptions might be made to facilitate new business models that serve the public interest. Petitioner asserts that a waiver of the SOC prohibition is necessary to provide these new Services which require secure digital outputs to reduce the risk of unauthorized copying,

[4] DHHCAN, established in 1993, serves as the national coalition of organizations representing the interests of deaf, hard of hearing, and deaf-blind citizens in public policy and legislative issues relating to rights, quality of life, equal access, and self-representation. DHHCAN also provides a forum for proactive discussion on issues of importance and movement toward universal, barrier-free access with emphasis on quality, certification, and standards.

redistribution, or other activities which might damage DVD and other downstream markets.[5]

Without surprise, comments in support of the Petition have been filed by the National Cable & Telecommunications Association, DirectTV, Inc., and others. Other organizations, such as TiVo, Inc., and Digital Transmission Licensing Administrator have expressed conditional support. We note, also, that comments in opposition to the Petition have been filed by the Consumer Electronics Association, the National Association of Theatre Owners, Independent Film & Television Alliance, and others. Questions and concerns have been raised about whether the Petition actually presents a "new" business model; the potential impact on consumers, consumer confusion, consumer rights, and consumer investments in home electronics; the potential impact on the movie exhibition and theater industry; as well technological issues and standards.

In general, we take no position with respect to the grant of the requested waiver, except as follows.

With respect to serving the public interest, Petitioners state:

> The public interest will undoubtedly be served if the Commission grants this waiver. Consumers would benefit greatly from the offering of the Services, as they will expand consumer choice in viewing options. Granting a waiver can also help promote a successful digital television transition because more high-definition content will be available to consumers, a fact that will provide increased incentives for consumers to purchase digital high-definition televisions. . . .
> The new Services would without question be in the public interest as they would expand consumer choice by dramatically improving the

[5] Petition at 3.

> timeliness and quality of home movie viewing. The Services, with their early release of high-value, high-definition content, would provide consumers with new and exciting entertainment options that do not exist today. Consumers would be able to order from the comfort of their homes movies that are recently released in theaters. At least some segment of nearly every demographic would find this option attractive when unable to go to the movie theater. For example, physically challenged or elderly consumers who have limited mobility would have greater choice in movie viewing options. It would similarly benefit parents who want to see a new movie, but who cannot find or afford a babysitter. In sum, the Services would provide significant benefits to a very broad array of consumers. . . .
> By granting the requested waiver, the Commission will enable Petitioners and their MVPD partners to evaluate opportunities to make new, high-value premium content available to consumers in high definition digital form, which will encourage the purchase of HDTV sets by consumers, and thereby ensure that a greater number of citizens have the necessary equipment to receive broadcast digital programming by February 17, 2009.[6]

First, we question the premise put forth by Petitioners that grant of this waiver will serve the public interest by helping to promote a successful digital television transition. Petitioner proposes to increase HDTV content through the provision of new Services that will only be available through an MVPD. The digital transition taking place on February 17, 2009, will impact the receipt of *broadcast* digital programming; not programming available through an MVPD. A "successful" transition to digital television is not dependent upon, nor should the goal of such transition be to increase consumer purchases of HDTVs or consumer subscriptions to high-end MVPD HDTV services. Instead, the "success" of the transition to digital television should be measured by the seamlessness with which such transition takes place. In other words, in a manner that enables the public to make the

[6] Petition at 7-9.

transition in an affordable and convenient manner and that no American, with or without disabilities, is left behind when free, over-the-air analog broadcast programming is terminated on February 17, 2009.

Second, in the event that the FCC determines that grant of Petitioners' request for waiver is in the public interest, we request that any such grant be *temporary*; not permanent. Instead, we could only support grants of any such waivers, particularly for "new business models," that are limited by some reasonable time frame that permits and provides for further review.

More importantly, it is our position that any such waiver that may be granted by the FCC provide that the requirements for pass through of closed captioning and available video description are not adversely affected. We believe there are people with disabilities who may benefit from an expanded range of audiovisual entertainment options available within the home. However, we believe strongly that any new offerings by MVPDs, whether they are on-demand "channels," pay-per-view, or other means of display of theatrical films or movies, must conform to existing requirements for accessibility and usability by people with disabilities, such as people who are deaf or hard of hearing and people who are blind or have low vision. Specifically we are referring to the regulations for closed captioning[7] and decoder circuitry[8] and requirements for cable carriage content insofar as

[7] Sections 711 and 713 of the Communications Act, 47 C.F.R. §§ 79.1 and 79.2.

[8] Sections 303(u) and 330(b) of the Communications Act, 47 C.F.R. §§ 15.119 and 15.122.

these pertain to available video description.[9]

We note, as illustrated in the Appendix to these Comments, that there have been significant problems with HDTV with respect to the transmission and display of closed captions. We do not want any new service to fuel the discontent already experienced by many viewers who are deaf or hard of hearing and who are or desire to be consumers of HDTV programming and equipment. For instance, we are learning that the highest quality picture and sound from consumer electronic equipment is best achieved when using either component or High Definition Media Interface (HDMI) connections between the display and video input devices. However, neither of these connection standards can carry caption data, thus relegating caption users to the lower-quality composite video or RF connections. This is a major disappointment to deaf and hard of hearing purchasers of new high-end equipment. This concern still has not been widely addressed and should be rectified before HDTV programming and equipment becomes more ubiquitous.

In light of the implications of the Petition – that recently released movies would be available as an MVPD Service – we find it poignant to note

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[9] The 1995 cable carriage rules provide for proper carriage of closed captions and video description via cable:

> (g) Conditions of carriage. Content to be carried. A cable operator shall retransmit in its entirety the primary video, accompanying audio, and line 21 closed caption transmission of each qualified local noncommercial educational television station whose signal is carried on the cable system, and, to the extent technically feasible, program-related material carried in the vertical blanking interval, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the vertical blanking interval or on subcarriers shall be within the discretion of the cable operator.

that while captions are provided on virtually all movie DVDs, less than 1% of movies shown in movie theaters today are shown with captions. Petitioners provide captions for only about half of the general or wide releases of movies shown in movie theaters today, or about 25% of all new movie releases. The paucity of caption display equipment in movie theaters further reduces the availability of accessible captioned movies to less than 1%. We also find it poignant to note that Petitioners provide video description for even fewer general or wide release movies shown in movie theaters or distributed on DVDs. As such, it would be a compounded injustice if captioning and video description are unavailable when such movies are distributed by an MVPD.

At a minimum, we seeks a commitment by Petitioners to work in conjunction with their prospective MVPD partners and manufacturers of set-top boxes and HDTV equipment to ensure the pass through and display of available captions and video description. *With a commitment by Petitioners to provide captions and video description for all new movie releases, regardless of the medium through which they are distributed, displayed, or otherwise made available for viewing, we could support this Petition because such a commitment would truly be a demonstration of intent to serve the public interest.*

Additionally, we would like to see requirements for controls on set-top boxes or other similar devices that control access to such movies, and other programming, to also be accessible to and usable by people with disabilities.

This means that manufacturers of these set-top boxes should design such set-top boxes to be accessible to and usable by viewers with disabilities. For instance, remote controls that control such set-top boxes should have a captioning "button" on the remote control and not buried somewhere in a menu tree. Likewise, the opportunity to select any available video description or secondary audio output should be an option at the top level of any menu selection system.

We could support a grant of a limited and *temporary* waiver of the SOC prohibition for the purpose described in the Petition *only* if accessibility safeguards for consumers with disabilities are incorporated at the outset. We believe that a grant of such a waiver may serve the public interest if these new Services are produced with captions and video description, and may expand consumer choice and improve the timeliness and quality of movie viewing by people with disabilities. However, the public interest would not be well served without a commitment to provide and ensure the pass through and display of available captions and video description for all new movie releases.

Sincerely,

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APPENDIX

DTV Access – www.dtvaccess.org

WGBH National Center for Accessible Media / Media Access Group provides links to articles and other resources about digital television captioning and description services, including links to the following outreach and policy papers about accessibility problems related to the DTV transition.

- When Good Captions Go Bad: A Story or Two About HDTV Accessibility
- Digital Television and Video Description: Service Continues, Consumer and Industry Efforts Required

News story about problem with closed captioning in regard to HDTV:

At http://www.sacbee.com/103/story/169064.html, last accessed May 24, 2007

From the newsroom of The Sacramento Bee, Sacramento, California, Sunday, May 6, 2007 .....

HDTV messes up service for deaf

By Clint Swett - Bee Staff Writer

Photo of *Janel Edmiston says her family's new high-definition TV soon quit showing captions. Sacramento Bee/Paul Kitagaki Jr.*

For two months early this year, Janel Edmiston and her family enjoyed their new Panasonic high-definition TV, which occupies a big chunk of the family room wall in their Elk Grove home.

But for Edmiston, who began losing her hearing at age 23, the pleasure was fleeting.

In March, she said, closed captioning that came via her cable box disappeared.

"It's not that I'm addicted to TV, but I was missing out on time with my family in the evenings," Edmiston said of losing the captioning feature. "I'd go into another room (to read or fold laundry) while they were watching TV. ... Without captions it's like they are speaking Russian."

Edmiston's problem is a familiar story to a growing number of the estimated 31 million hearing-impaired TV viewers nationwide.

As high-definition TV gains momentum in the United States, broadcasters, set-top box manufacturers and cable and satellite companies are struggling to provide closed captioning.

After numerous complaints and long sessions on the phone with tech support for SureWest, her cable provider, the company recently gave Edmiston an updated cable box still being tested by SureWest engineers.

Though things have improved, problems remain, including last Thursday when the captions slid off the left edge of the screen.

SureWest engineer Steve Keach said his company is constantly receiving updated software from its cable box provider in an effort to improve closed captioning.

"We expect the quality to get better, but like everyone else, we have our issues," he said.

While most older analog sets provide captions with the touch of a remote control button or via a simple on-screen menu, it's more complicated to get closed captioning on the newest digital TVs that get their signal through cable and satellite boxes rather than antennas. That's because the signal is processed by the box and the caption settings must be matched to the resolution of the TV display.

For the deaf community, captioning is a serious issue.

"What would (a hearing person) do if (they) turned on the TV and the volume control wasn't working and there were no voices or sound accompanying the program?" asked Sheila Conlon Mentkowski, an official with the California Department of Rehabilitation in Sacramento and chairwoman of the National Association of the Deaf's technology committee.

There appears to be plenty of blame to go around for the captioning troubles, said Larry Goldberg, director of media access at Boston public TV station WGBH and an expert on captioning.

"I'm getting reports all the time about closed-captioning problems," said Goldberg, who helped write many of the captioning regulations for the Federal Communications Commission.

"If there was one organization we could blame it would make it a lot easier. But there are at least a few different causes."

For instance, not all broadcasters properly encode their closed-caption data, even though there's a standard mandated by the FCC, Goldberg said.

In addition, not every channel provides digital closed captions 100 percent of the time. The FCC required that digital captioning be available by 2006, but granted some exemptions. New networks have four years to implement HD captioning, and networks with revenue under $3 million a year also are exempt.

Some long-time broadcasters however, are saying their newly launched HD channels qualify as new networks, and claim the four-year exemption, wrote Ron Bibler, a deaf financial planner in Great Falls, Mont., and an activist on the issue.

He points to NBC's Universal HD channel, which he said often doesn't provide captioning while identical programming on its sister USA Network has the captions. After complaining to NBC, Bibler said, he received a letter from the network saying Universal HD expected closed captioning by the end of 2007. Universal executives could not be reached for comment.

In addition, most high-definition cable and satellite set-top boxes control the caption settings through often obscure and confusing menus.

"I learned that ... digital captioning options must be controlled from the cable box via a hidden menu that comes with no instructions," wrote Pamela Holmes, a deaf cable customer in Madison, Wis.

In an e-mail, Holmes said it took nearly 12 hours with installers, phone support and other resources to get her closed captioning operating.

Representatives of Motorola and Scientific Atlanta, the two major makers of set-top boxes, did not respond to requests for comment on the closed captioning problem.

Further complicating things, people are now discovering that if an HDTV set is hooked to the cable box through a connection called HDMI, captions won't be displayed at all.

All of this frustrates deaf viewers, who feel they are being short-changed by the industry.

"Deaf and hard of hearing people pay the same amount for their HDTV, cable or satellite hookups and therefore should be afforded to enjoy TV as our hearing peers," wrote Sheri Farinha, chief executive of the NorCal Center on Deafness in Sacramento. "We should not have to haggle with any of the companies to get the captioning to work and/or appear on the HDTV screens."

Even as the the deaf community complains about the captioning problem, the issue appears to have escaped the notice of many in the broadcast industry.

Representatives of Comcast in Sacramento, the National Cable Television Association, the Society of Cable Television Engineers, and Cable Labs, a cable technology research consortium, all said they were unaware of any problem involving closed captions on HDTV.

"To the extent it's a problem, we wouldn't know about it," said Jason Oxman, a spokesman for the Consumer Electronics Association.

At the FCC, spokesman Clyde Ensslin said his agency is aware of the issue and is "watching it closely." Still, the FCC has received only about 70 complaints regarding "accessibility issues" in the second and third quarters of 2006, compared with more than 214,000 obscenity and decency complaints during the same period.

Mentkowski, of the National Association of the Deaf, isn't sure why more closed captioning complaints haven't been filed, given that online discussion groups for the deaf are filled with postings on the issue.

"We don't sit on our couches with a piece of paper and a pen to write down the date, time, name of the program that has not had captions or has garbled captions," she wrote in an e-mail. "We usually just surf to another channel."

Goldberg of WGBH said he's confident all the issues eventually will be resolved.

"It's a matter of time and a critical mass of complaints reaching the right people," he said. "But eventually all the powers that be will deal with it."

Now using an experimental device from her cable service, the closed captioning sometimes works properly and sometimes doesn't. Sacramento Bee/Paul Kitagaki Jr.

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From the newsroom of The Sacramento Bee, Sacramento, California, Sunday, May 6, 2007.

CERTIFICATE OF SERVICE

I, Rosaline Crawford, Director of the National Association of the Deaf Law and Advocacy Center, hereby certify that on this 31st day of July, 2008, I caused a copy of the foregoing Reply Comments on Petition for Expedited Special Relief and Petition for Waiver of 47 C.F.R. § 76.1903 to be served by first-class mail, postage prepaid, to the following:

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