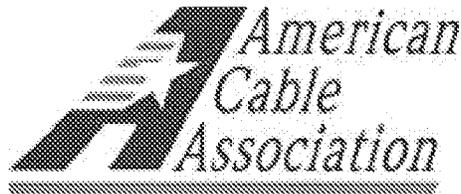


**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
Implementation of the Commercial ) MB Docket No. 11-93  
Advertisement Loudness Mitigation (CALM) )  
Act )

**COMMENTS OF THE**



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July 8, 2011

## SUMMARY

The American Cable Association (“ACA”) represents 900 multichannel video distributors (“MVPDs”), most of whom serve fewer than 2,000 subscribers. ACA members provide video services using different technologies. A few ACA members’ systems provide all-digital service, but most offer a hybrid digital/analog service and many still provide only analog service. ACA members that offer digital channels generally have deployed audio (AC-3) equipment compliant with ATSC digital television standards, even though they are not mandated by any statute or industry-standards organization to do so. Using this equipment, ACA members pass through the metadata embedded in the programming feed that ensures their customers receive a level volume of programming and commercial advertisements to the extent the programmer correctly employs the ATSC A/85 recommended practice. ACA members that do not insert their own commercials generally do not deploy equipment that monitors a programmer’s feed, and then encodes and re-encodes commercial advertisements. Even if an ACA member has deployed such equipment, the equipment does not work in real-time to monitor, decode, and re-encode commercial advertisements inserted by programmers in digital transmissions. To the best of ACA’s knowledge, there is no equipment on the market that performs these functions in real-time for both long form content (i.e. programming lasting longer than a couple of minutes) and short form content (e.g. commercials, promotions, public service messages) each in accordance with ATSC A/85.

Some ACA members insert local commercial advertisements; however, many do not insert any advertisements, particularly those operating analog-only systems. All ACA members that insert commercial advertisements themselves into digital transmissions deploy and utilize equipment that monitors a programmer’s feed, and encodes and re-encodes commercials in

conformance with the ATSC A/85. Additionally, some ACA members that utilize a third-party vendor to insert commercials may deploy equipment to monitor programmers' feeds, but would not deploy equipment capable of encoding and re-encoding commercials, as that process is performed exclusively by the vendor. In either instance, as discussed above, none of the equipment that is deployed by ACA members or used by third-party vendors is capable of monitoring programming feeds, and then encoding and re-encoding commercials in real-time.

ACA agrees that loud commercial advertisements can be a problem for television viewers and that concern about this problem continued as television service transitioned from analog to digital delivery because program producers and MVPDs were unaccustomed to working with the new digital transmission technology, and common practices were not yet established.

Fortunately, the ATSC has formally adopted, on November 4, 2009, standards regarding digital television audio, vendors have produced equipment compliant with the standards, and producers and providers have developed practices to address loud advertisements. As a result of these improvements and other actions by MVPDs and their vendors, few ACA members receive complaints today about loud advertisements.

The CALM Act's mandates too have evolved as Congress became more familiar with how the industry was directly addressing concerns about loud advertisements. As originally introduced, the legislation was broadly written, directing the Commission to adopt a regulation, "in connection with any video programming that is broadcast or that is distributed by any multi-channel video programming distributor" to prohibit loud advertisements. However, as passed by Congress, the legislation is far more limited and focused on the implementation of a single, particular industry standard (and any successor standards), which provides "guidance to broadcasters and creators of audio for ATSC high-definition (HD) or standard-definition (SD)

television content.” The statute’s mandate only directs the Commission to incorporate and make mandatory ATSC A/85 “only insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multi-channel video programming distributor.” Thus, the Commission’s charge under the CALM Act is circumscribed, and the obligations on MVPDs stem just from the explicit directives in ATSC A/85.

Because of the highly specific nature of this legislation, in these comments, ACA analyzes at length the limited and specific requirement of the CALM Act to incorporate and make mandatory ATSC A/85, especially as the ATSC Recommended Practice applies to MVPDs. As demonstrated herein, it is clear that the obligations placed on MVPDs by ATSC A/85 are much more limited than set forth in the Commission’s Notice of Proposed Rulemaking (“NPRM”). That standard, at most, only requires MVPDs to be responsible for the loudness of commercial advertisements when they insert the material and not when they receive it from upstream programmers and merely pass it through. Further, ATSC A/85 applies only to an MVPD’s digital transmissions to subscribers and not to any analog transmissions.

Once the mandates stemming from ATSC A/85 are properly analyzed and determined, ACA next addresses the many issues raised by the Commission in the NPRM about compliance, enforcement, and waivers. In regard to these, ACA submits that:

(A) The Commission should find that an MVPD is in compliance if:

(1) It has deployed equipment that passes through the dialnorm metadata in their digital transmissions from the programmer to the customer premise equipment using the AC-3 system.

(2) It has a good faith expectation that the programmers are inserting their commercial advertisements in conformance with ATSC A/85.

(3) With respect to its insertion of commercials –

(i) It uses a third-party vendor to insert commercials on its behalf and has a good faith expectation that the vendor is inserting commercial advertisements in conformance with ATSC A/85; or,

(ii) It installs, utilizes, and maintains equipment that would ensure that the commercial advertisements inserted include the appropriate dialnorm metadata.

(B) Because of the substantial costs of compliance, small MVPDs should be granted automatic financial hardship waivers and should be able to use financial hardship as a basis to obtain a good cause waiver.

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Act )

**COMMENTS OF  
THE AMERICAN CABLE ASSOCIATION**

The American Cable Association (ACA), by its attorneys, respectfully submits these Comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.<sup>1</sup> ACA’s comments address all major issues raised by the Commission in the NPRM, including scope of the statutory mandates, compliance with those mandates, and financial hardship and general waivers.

**I. INTRODUCTION AND OVERVIEW OF ACA’S COMMENTS**

ACA has a major interest in the Commission’s implementation of the Commercial Advertisement Loudness Mitigation (“CALM”) Act, which incorporates and makes mandatory subject to waivers the “Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television” (A/85) approved by the Advanced Television Systems Committee (“ATSC A/85”).<sup>2</sup> ACA has approximately 900 members covering 49 states who provide multichannel video service to approximately 7.6 million subscribers.<sup>3</sup> ACA members

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<sup>1</sup> *In the Matter of Implementation of the Commercial Advertisement Loudness Migration (CALM) Act*, Notice of Proposed Rulemaking, MB Docket No. 11-93, (rel. May 27, 2011).

<sup>2</sup> P.L. 111-311.

<sup>3</sup> Under the Commission’s rules (47 CFR § 76.1000(e)), ACA members providing video service would be considered multichannel video distributors (“MVPDs”).

vary greatly in size, from entities serving hundreds of video subscribers to one serving in aggregate over one million. Most, however, serve fewer than 2,000 subscribers, and the vast majority serve fewer than 100,000 subscribers. Compared with the largest MVPDs, which serve between 10 and 25 million subscribers, almost all ACA members would normally be considered small MVPDs.<sup>4</sup>

ACA members provide video services using different technologies. A few ACA members' systems provide all-digital service, but most offer a hybrid digital/analog service and many still provide only analog service. ACA members that offer digital channels generally have deployed audio (AC-3) equipment compliant with ATSC digital television standards, even though they are not mandated by any statute or industry-standards organization to do so.<sup>5</sup> Using this equipment, ACA members pass through the metadata embedded in the programming feed that ensures their customers receive a level volume of programming and commercial advertisements to the extent the programmer correctly employs the ATSC A/85 recommended

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<sup>4</sup> The Commission (§ 40) inquires whether it would be “appropriate to define a ‘small MVPD system’ as one with fewer than 15,000 subscribers...and that is not affiliated with a larger operator.” While this benchmark is based on an existing regulation, the Commission has adopted other thresholds to fit the specific policy being considered and the specific burdens placed on small MVPDs. (*See e.g.*, the “bargaining agent” condition adopted in the Comcast-NBC Universal Order, which set the threshold at 1,500,000 subscribers (*In the Matter of Applications of Comcast Corporation, General Electric Company, and NBCU Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, Jan. 20, 2011, Appendix A, VII.D.1).) Because equipment that can monitor programming transmissions to determine variances in audio, decode such transmissions to correct for loud advertisements, and then re-encode audio in real-time has large economies of scale (if such equipment even exists), the costs of installing and using such equipment are disproportionately large for MVPDs with small systems (i.e. on a per subscriber basis). Given this reality and the substantial cost of the equipment, the Commission should define a small MVPD as it did in the “bargaining agent” condition in the Comcast-NBC Universal proceeding.

<sup>5</sup> ACA notes that the cable industry has its own ANSI-accredited standards setting body, SCTE. Two of those standards, ANSI/SCTE 30 2009 and ANSI/SCTE 35 2007, deal with the methods for digital program insertion. In addition, ANSI/SCTE 54 2009 refers to the AC-3 audio system (5.8.3.1). None of these standards are mentioned in the CALM Act or the reports on the legislation.

practice. ACA members that do not insert their own commercials generally do not deploy equipment that monitors a programmer's feed, and then encodes and re-encodes commercial advertisements. Even if an ACA member has deployed such equipment, the equipment does not work in real-time to monitor, decode, and re-encode commercial advertisements inserted by programmers in digital transmissions. To the best of ACA's knowledge, there is no equipment on the market that performs these functions in real-time for both long form content (i.e. programming lasting longer than a couple of minutes) and short form content (e.g. commercials, promotions, public service messages) each in accordance with ATSC A/85.

Some ACA members insert local commercial advertisements; however, many do not insert any advertisements, particularly those operating analog-only systems.<sup>6</sup> All ACA members that insert commercial advertisements themselves into digital transmissions deploy and utilize equipment that monitors a programmer's feed, and encodes and re-encodes commercials in conformance with the ATSC A/85. Additionally, some ACA members that utilize a third-party vendor to insert commercials may deploy equipment to monitor programmers' feeds, but would not deploy equipment capable of encoding and re-encoding commercials, as that process is performed exclusively by the vendor. In either instance, as discussed above, none of the equipment that is deployed by ACA members or used by third-party vendors is capable of monitoring programming feeds, and then encoding and re-encoding commercials in real-time.

Thus, the Commission's implementation of the CALM Act will affect most ACA members, and it has the potential to impose new and burdensome requirements on them.

ACA agrees that loud commercial advertisements can be a problem for television viewers and that concern about this problem continued as television service transitioned from analog to

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<sup>6</sup> A few ACA members insert analog commercial advertisements in analog signals, but, as noted in these comments, ATSC A/85 does not apply to analog transmissions.

digital delivery because program producers and MVPDs were unaccustomed to working with the new digital transmission technology, and common practices were not yet established.

Fortunately, on November 4, 2009, the ATSC formally adopted standards regarding digital television audio, vendors have produced equipment compliant with the standards, and producers and providers have developed practices to address loud advertisements. As a result of these improvements and other actions by MVPDs and their vendors, few ACA members receive complaints today about loud advertisements.

The CALM Act's mandates too have evolved as Congress became more familiar with how the industry was directly addressing concerns about loud advertisements. As originally introduced, the legislation was broadly written, directing the Commission to adopt a regulation, "in connection with any video programming that is broadcast or that is distributed by any multichannel video programming distributor" to prohibit loud advertisements.<sup>7</sup> However, as passed by Congress, the legislation is far more limited and focused on the implementation of a single, particular industry standard (and any successor standards), which provides "guidance to broadcasters and creators of audio for ATSC high-definition (HD) or standard-definition (SD) television content."<sup>8</sup> The statute's mandate directs the Commission to incorporate and make mandatory ATSC A/85 "only insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multi-

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<sup>7</sup> H.R. 1084, Commercial Advertisement Loudness Mitigation Act, introduced on Feb. 13, 2009. The legislation specifically directed the Commission to adopt a regulation providing that: "(1) advertisements accompanying such video programming shall not be excessively noisy or strident; (2) such advertisements shall not be presented at modulation levels substantially higher than the program material that such advertisements accompany; and (3) the average maximum loudness of such advertisements shall not be substantially higher than the average maximum loudness of the program material that such advertisements accompany."

<sup>8</sup> ATSC A/85 at 9.

channel video programming distributor.”<sup>9</sup> Thus, the Commission’s charge under the CALM Act is circumscribed, and the obligations on MVPDs stem solely from the explicit directives in ATSC A/85.

Because of the highly specific nature of this legislation, in these comments, ACA analyzes the limited and specific requirement of the CALM Act to incorporate and make mandatory ATSC A/85, especially as the ATSC Recommended Practice applies to MVPDs. As demonstrated herein, it is clear that the obligations placed on MVPDs by ATSC A/85 are much more limited than set forth in the NPRM. That standard, at most, only requires MVPDs to be responsible for the loudness of commercial advertisements when they insert the material and not when they receive it from upstream programmers and merely pass it through. Further, ATSC A/85 applies only to an MVPD’s digital transmissions to subscribers and not to any analog transmissions.

Once the mandates stemming from ATSC A/85 are properly analyzed and determined, ACA next addresses the many issues raised by the Commission in the NPRM about compliance, enforcement, and waivers. In regard to these, ACA submits:<sup>10</sup>

- MVPDs can comply with the statute in multiple ways, including by meeting the statute’s explicit safe harbor requirements of installing, utilizing, and maintaining ATSC A/85 compliant hardware and software.<sup>11</sup> ACA, however, believes that the Commission’s tentative conclusion that these requirements must be met only by the MVPD and not a third-party is too sweeping. Small MVPDs that insert commercial advertisements into digital transmissions often use third-party hardware, software, and human resources to support them, and such action should not be considered a bar to meeting the safe harbor requirements.

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<sup>9</sup> CALM Act § 2(a).

<sup>10</sup> These would apply to MVPDs to a lesser or greater extent depending on whether the Commission agrees with ACA’s analysis of the statute and ATSC A/85 and the limited obligations it imposes on MVPDs.

<sup>11</sup> CALM Act § 2(c).

Also, assuming *arguendo* that ATSC A/85 applies to an MVPD passing through programming with commercial advertisements inserted by a programmer, the Commission should find that an MVPD is in compliance for these transmissions if:

(1) It has deployed equipment that passes through the dialnorm metadata in their digital transmissions from the programmer to the customer premise equipment using the AC-3 system. All ACA members already meet this obligation.

(2) It has some good faith expectation that the programmers are inserting their commercial advertisements in conformance with ATSC A/85.

(3) With respect to its insertion of commercials –

(i) It uses a third-party vendor to insert commercials on its behalf and has a good faith expectation that the vendor is inserting commercial advertisements in conformance with ATSC A/85; or,

(ii) It installs, utilizes, and maintains equipment that would ensure that the commercial advertisements inserted include the appropriate dialnorm metadata.

To be deemed in conformance with ATSC A/85 when inserting commercial advertisements, a small MVPD need not perform this task in real-time but may employ reasonable measures to predict the appropriate dialnorm metadata for the programming feed in which commercial is inserted.

- Because of the subjective nature of loudness, the Commission’s proposed complaint process, which imposes no evidentiary burden on the complainant, is not equitable. Rather, the Commission should not accept complaints and require MVPDs to go to the time and expense to respond, unless the complainant provides information about the date and time when the commercial advertisement was shown, along with the name of the network and a description of the advertisement, including, if possible the extent to which the advertisement was louder than the long form content.

- If a small MVPD is found to violate the statute, penalties should be limited, unless it can be demonstrated there has been pattern of non-compliance.

- To the extent a small MVPD certifies that it needs to install, utilize, and maintain any equipment to ensure compliance with ATSC A/85, it should be given an automatic one year financial hardship waiver because of the material cost involved, even if the Act just covers the insertion of local advertisements. In addition, such continuing financial hardship should be sufficient for the Commission to grant a good cause waiver to a small MVPD.

II. **THE COMMISSION’S ANALYSIS OF THE STATUTE IS FLAWED; THE REQUIREMENTS IMPOSED ON MVPDS BY ATSC A/85 ARE MORE LIMITED THAN THOSE IMPOSED ON TELEVISION BROADCASTERS**

A. Purpose of the CALM Act

Throughout the NPRM, the Commission makes various statements about the purpose of the CALM Act, including:

“The purpose of the statute is to address the problem of loud commercials for all TV consumers, not just those served by stations/MVPDs that use a particular audio system.”<sup>12</sup>

“[P]revent TV broadcast stations, cable, DBS operators, and other MVPDs from transmitting ‘loud commercials’ to consumers.”<sup>13</sup>

ACA respectfully disagrees with those statements. As noted above, the CALM Act legislation as introduced may have sought to prevent loud commercials, but, as enacted, the legislation had a far different and much more limited purpose – to incorporate ATSC A/85 into the Commission’s rules. The reports of both the Senate and House Committees on the CALM Act, which have identical language, make clear that the purpose of the legislation is:

[T]o require the Federal Communications Commission (FCC) **to incorporate into its rules by reference the standard developed by an industry standards-setting body** for moderating the loudness of commercials in comparison to accompanying video programming. (emphasis added)<sup>14</sup>

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<sup>12</sup> *Id.*, ¶ 12.

<sup>13</sup> *Id.*, ¶ 45.

<sup>14</sup> *See*, Senate Commerce, Science, and Transportation Committee Report, Commercial Advertisement Loudness Mitigation Act, S. Rep. 111-340, Sept. 29, 2010; House Energy and Commerce Committee Report, Commercial Advertisement Loudness Mitigation Act, H. Rep. 111-374, Dec. 14, 2009.

Unfortunately, the Commission’s expansive interpretation of the purpose of the CALM Act leads it in the NPRM to overstate the law’s mandates, *e.g.* “limiting regulations to only certain commercials would undermine the statute’s purpose.” As ACA discusses further in this section, ATSC A/85 contains very specific directives, which are much more limited, especially in their application to MVPDs, than a general prohibition against loud commercial advertisements. Those explicit directives alone carry out the purpose of the law.

B. General Scope of the Commission’s Authority

The CALM Act’s mandate is “limited to incorporating by reference and making mandatory” ATSC A/85 but “only insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor.”<sup>15</sup> Because of this circumscribed mandate, ACA agrees with the Commission that the CALM Act “expressly limits” the Commission’s authority to only those specified actions.<sup>16</sup> Accordingly, ACA supports the Commission’s tentative conclusion “that the Commission may not modify the technical standard or adopt other actions inconsistent with the statute’s express limitations.”<sup>17</sup> Further, because the statute’s mandate is direct and limited, it is critical that the Commission parse each of the directives in ATSC A/85 carefully to determine the specific responsibilities imposed on MVPDs. ACA undertakes that task in the following sections.

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<sup>15</sup> CALM Act § 2(a).

<sup>16</sup> NPRM, ¶ 8.

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

C. Directives of ATSC A/85

1. Digital versus Analog Transmissions

The overall work of the ATSC and the specific work on ATSC A/85 is by definition applicable to digital – and not to analog -- television transmissions.<sup>18</sup> The Commission confirms that conclusion in the NPRM: ATSC A/85 RP “was developed to offer guidance to the TV industry...about DTV audio loudness management,”<sup>19</sup> and “A key goal of the ATSC A/85 RP was to develop a system that would enable industry to control the variations in loudness of digital programming.”<sup>20</sup> ATSC A/85’s loudness management system – by use of the dialnorm technique – is built around actions beginning with programming producers incorporating (encoding) the proper dialnorm setting and associated metadata and ending with chipsets in the viewer’s digital television or other customer premises equipment decoding the audio in the digital transmission.<sup>21</sup> The ATSC A/85 system in no way involves analog transmissions, and, for that reason, ATSC A/85 does not apply to analog transmissions to subscribers by MVPDs. Any

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<sup>18</sup> ACA notes that ATSC A/85 is a particular digital television standard, and MVPDs may transmit video using a different digital technology or standard.

<sup>19</sup> NPRM, ¶ 4.

<sup>20</sup> NPRM, n. 15.

<sup>21</sup> A full description of the AC-3 system can be found in numerous ATSC documents. *See*, ATSC A/85 at 15, 16 (“The AC-3 Multichannel Audio System”) which states, “The ATSC AC-3 audio system is intended to deliver a reproduction of the original (unprocessed) content at the output of the AC-3 decoder in a receiver, normalized to a uniform loudness. It provides the ability for broadcasters to allow each listener the freedom to exert some control over the degree of dynamic range reduction, if any, that best suits their listening conditions...If the dialnorm parameter accurately reflects the overall loudness of the content, then listeners will be able to set their ‘volume’ controls to their preferred listening (loudness) level and will not have to change the volume when the audio changes from program to advertisement and back again.” Also, *see, e.g.* ATSC A/53 at 6, which described the ITU-R digital terrestrial television broadcasting model, including source encoding and compression, service multiplex and transport, RF/transmission system, and receiver (television) characteristics.

Commission regulation implementing the CALM Act thus should expressly provide that it does not apply to analog transmissions.<sup>22</sup>

2. ATSC A/53 and the Mandate Regarding AC-3 Systems and the Dialnorm Technique

ATSC A/85 “focuses on audio measurement, production, and postproduction monitoring techniques, and methods to effectively control loudness for content delivery and exchange.”<sup>23</sup>

To implement these techniques and methods, it relies on the AC-3 audio system and the dialnorm technique.<sup>24</sup> However, ATSC A/85 does not mandate use of that system or technique. Rather that directive is contained in another ATSC standard, A/53,<sup>25</sup> which is not part of the CALM Act’s mandate.<sup>26</sup> The Commission has incorporated the ATSC A/53 standard into its regulations but only insofar as it applies to television broadcast stations.<sup>27</sup> MVPDs are not required to use AC-3 systems or the dialnorm technique. For that reason, ACA submits that the CALM Act does not require an MVPD to install AC-3 systems or use the dialnorm technique. As explained more fully below, this effectively means that MVPDs are not mandated to follow ATSC A/85

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<sup>22</sup> If an operator has a hybrid digital/analog system, ACA acknowledges that the CALM Act’s mandate would apply to the digital transmissions of the system, but, as discussed herein, it would not apply to the system’s analog transmissions.

<sup>23</sup> ATSC A/85, at 9.

<sup>24</sup> See, ATSC A/85, at 25 (“AC-3 incorporates the necessary technology to mitigate variations in loudness during the program-to-interstitial transitions.”).

<sup>25</sup> See, ATSC A/85, at 10 (“ATSC document A/53 Part 5:2010 mandates the carriage of dialnorm and correctly set dialnorm values); at 17 (“The ATSC Digital Television Standard, A/53, mandates that a properly set value for dialnorm be present in the AC-3 elementary stream,” and, at 19 (“Carriage of and correct setting of the value of dialnorm is mandatory for DTV broadcasting in the U.S., see ATSC A/53 Part 5:2010 Section 5.5, ‘Dialogue Level’.”).

<sup>26</sup> In the NPRM (n. 27), the Commission provides a quote from Section 7.1. of ATSC A/85 that may appear to provide support for the conclusion that ATSC A/85 includes the dialnorm mandate. However, the Commission’s quote does not include the reference to ATSC A/53. In addition, the quote is truncated, omitting the phrase at the end “for DTV broadcasting in the U.S.”

<sup>27</sup> See, NPRM, n. 53 (“We note that broadcast TV stations are required to use AC-3 audio systems by Section 73.682 of our rules, which incorporates by reference the ATSC A/53 standard.”)

loudness management techniques and methods. Rather, that is a preferred course of action, including when MVPDs insert commercial advertisements.

### 3. Mandated v. Preferred Directives

The CALM Act requires the Commission to incorporate and make mandatory ATSC A/85. ACA interprets this language to mean that entities must follow the directives in the standard. ATSC A/85's directives, however, vary in the obligations placed on entities. Some directives are "vital," meaning they are to be "followed strictly (no deviation is permitted)."<sup>28</sup> In other instances, entities "should" follow them, that is, "a certain course of action is preferred but not necessarily required."<sup>29</sup> As discussed below, it is crucial that the Commission make these distinctions in determining the nature and extent of obligations placed on MVPDs.

### 4. Directives for Television Broadcasters

The ATSC standards as a whole clearly apply to television broadcasters. In testifying on the CALM Act before the House Subcommittee on Communications, Technology, and the Internet, Jim Starzynski, Chairman of ATSC A/85, stated, "The ATSC is the technical standards organization for over-the-air digital television and in that capacity developed the standard that ultimately was adopted by the Federal Communications Commission (FCC) for over-the-air digital television transmission in the United States...ATSC standards generally apply only to over-the-air broadcasting."<sup>30</sup> The Commission turns the ATSC Recommended Practices into requirements when it includes them in its regulations, which, as discussed above, it has done for ATSC A/53. The CALM Act requires the same for ATSC A/85, which "provides guidance to

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<sup>28</sup> ATSC A/85, at 13 (3.1 Compliance Notation).

<sup>29</sup> *Id.*

<sup>30</sup> Testimony of Jim Starzynski on H.R. 1084, the Commercial Advertisement Loudness Mitigation Act, before the Subcommittee on Communications, Technology, and the Internet of the Committee on Energy and Commerce, U.S. House of Representatives, June 11, 2009. ("Starzynski Testimony")

broadcasters and creators of audio content for ATSC high-definition (HD) and standard-definition (SD) television content.”<sup>31</sup> In sum, television broadcasters and creators of their content must use the AC-3 system and dialnorm techniques to comply with the loudness management requirements of ATSC A/85.

5. Directives for MVPDs

a. General Application

While ATSC Recommended Practices, including A/85, apply to television broadcasters, they have not generally applied to MVPDs and are drafted accordingly. As noted by Mr. Starzynski, “standards and technologies used by cable, satellite and telco operators are closely related.”<sup>32</sup> David Donovan, then-President of MSTV,<sup>33</sup> in his testimony before the House Subcommittee on Communications, Technology, and the Internet on the CALM Act, made a similar point: “ATSC’s Recommended Practice...will provide guidance for closely-related standards and technologies that are currently used by cable and satellite systems.”<sup>34</sup> Thus, while ATSC directives generally apply to television broadcasters, they generally do not apply to MVPDs, and any application of these directives to MVPDs must be expressly stated. The Commission should make this distinction in interpreting what directives apply to MVPDs and how they apply as it incorporates ATSC A/85.

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<sup>31</sup> ATSC A/85, at 9.

<sup>32</sup> Starzynski Testimony.

<sup>33</sup> MSTV was a broadcast trade association. It has recently merged with the National Association of Broadcasters

<sup>34</sup> Testimony of David Donovan, Broadcasters’ Efforts to Prevent Loud Commercials, before the Subcommittee on Communications, Technology, and the Internet of the Committee on Energy and Commerce, U.S. House of Representatives, June 11, 2009.

b. Section 8

Section 8 of ATSC A/85 describes the methods that are to be followed “to effectively control program-to-interstitial loudness.”<sup>35</sup> As noted above, the technology required to carry out this task is the AC-3 digital television audio system, and this is only required of television broadcasters, not MVPDs. Thus, the methods set forth in Effective Solutions (8.1), which rely on use of the AC-3 system, are not applicable to (or at least mandatory for) MVPDs.<sup>36</sup> Rather, the directives for MVPDs are more circumscribed. These are set forth in the Summary Recommendations (8.3) and direct an MVPD to “create awareness with the content supplier concerning the potential overuse of dynamic range and the possibility for listener complaints concerning transitions with large loudness variation.”<sup>37</sup> In addition, for “MVPD Local Ad Insertion” (8.4), “the operator **should** ensure that the Dialog Level of the local insertion matches the dialnorm setting of the inserted audio stream.”<sup>38</sup> As indicated above, compliance with this directive, which only concerns the insertion of commercial advertisements by an MVPD, is a preferred course of action but not mandatory. This is consistent with the fact that the AC-3 system is not mandatory for MVPDs. Finally, 8.4 also directs an MVPD that modifies a programmer’s transmission (by decoding and re-encoding) to measure the loudness of the decoded audio and ensure the re-encoded dialnorm value matches the measured loudness. This

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<sup>35</sup> ATSC A/85, at 25.

<sup>36</sup> *Id.*, at 25-26.

<sup>37</sup> *Id.*, at 26.

<sup>38</sup> *Id.*, at 27 (emphasis added). ACA notes that, even if an MVPD complies with this guidance, it will not necessary ensure that the volume of the commercial advertisement will match the network volume, since the programmer may not correctly match the Dialog Level and dialnorm setting.

directive does not apply when an MVPD simply passes through a programmer's feed, including the commercial advertisements.

c. Annex H

Annex H “summarizes the recommendations in the RP [Section 7, Metadata Management Considerations Impacting Audio Loudness] and provides guidance to broadcasters and other video program distributors on controlling and maintaining consistent audio loudness of their TV stations and channels.”<sup>39</sup> It focuses on the Fixed metadata mode of managing loudness, which is one of three management modes that may be employed.<sup>40</sup> The key directives regarding methods to control “program-to-interstitial loudness” are:

H.9 Affiliate dialnorm Setting: “An operator (affiliate, station, MVPD, etc.) receiving content that is delivered at a fixed loudness, where there is no gain adjustment or processing after the receiver, **should** set the value of the dialnorm in the operator's AC-3 encoder to match the network originator's specified Dialog Level...If the loudness processing is applied to the originator's audio, the processor's Target Loudness value **should** match the operator's AC-3 encoder's dialnorm value.” (emphasis added)<sup>41</sup>

H.10 TV Station or MVPD Content Insertion: “In the case of TV station or MVPD insertion of local commercials or segments, the operator **should** ensure that the Dialog Level of the local insertion matches the dialnorm setting of the inserted audio stream.” (emphasis added)<sup>42</sup>

In both instances, these directives are preferred courses of action by an MVPD. Thus, while an MVPD should follow the guidance, ATSC A/85 does not make it mandatory.

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<sup>39</sup> ATSC A/85, Annex H, at 63.

<sup>40</sup> The other two other metadata management modes are Preset and Agile. The use of any mode is at the discretion of the video distributor. The Preset Metadata mode's implementation is similar to the Fixed (ATSC A/85, p. 22). The Agile Metadata mode's implementation is more complex and hence the directives are more rigorous (ATSC A/85, p. 22-24).

<sup>41</sup> ATSC A/85, Annex H, at 66.

<sup>42</sup> *Id.* See also, ACA's comment in n. 41.

d. Annex J

On May 25, 2011, the ATSC approved Annex J to ATSC A/85, which is “based on other sections” of the Recommended Practice and contains “all the courses of action necessary to perform effective loudness control of digital television commercial advertising.”<sup>43</sup>

Annex J has two directives for MVPDs:

“The Operator **should**, whenever possible, present the content to the audience with the most accurate and highest quality sound, free of any type of audio artifacts not contained within the original content as delivered by the content supplier.”<sup>44</sup>

“In the case of insert of short-form content (e.g., commercial advertising), it is **vital** that the loudness...of the inserted short-form content match the dialnorm setting of this inserted AC-3 audio stream.”<sup>45</sup>

The first directive is a preferred course of action for MVPDs and is particularly directed to any action an MVPD may take to alter the audio content of a programmer’s transmission. It thus is not relevant when an MVPD just passes through programming, including commercial advertisements, without altering the transmission. The second directive deals with the same issue as 8.4, the insertion of commercial advertisements by an MVPD, but here the requirement is mandatory (vital), thus potentially conflicting with the fact 8.4 and Annex H directives are only preferred courses of action. ACA submits that regardless of which directive is followed, the directive only applies if an MVPD is inserting commercial advertisements using an AC-3 system.

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<sup>43</sup> ATSC A/85, Annex J.1, at 73

<sup>44</sup> *Id.*, Annex J.2, at 73.

<sup>45</sup> *Id.*, Annex J.5, at 73.

#### D. Summary of MVPD Obligations under the CALM Act

From the forgoing analysis, it is clear that ATSC A/85 is a digital transmission standard and does not address (and therefore provide any obligations on) audio of commercial advertisements on MVPD analog transmissions. In addition, because AC-3 techniques and systems (discussed and mandated in ATSC A/53), which are at the heart of ATSC A/85's loudness management scheme, are not mandated for MVPDs – and the language in the scope of the standard specifically refers only to television broadcasters and creators of audio – ACA does not believe the standard applies to MVPDs. Assuming *arguendo* that it does, then ATSC A/85 only encourages (prefers) MVPDs to follow its loudness management scheme when they insert commercial advertisements into digital transmissions and not when they pass through commercial advertisements inserted by television broadcasters or other programmers.

### III. REQUIREMENTS OF THE ACT

#### A. Commission Action on Successor ATSC A/85 Standards

The CALM Act's mandate extends to the current version of ATSC A/85 and “any successor thereto.”<sup>46</sup> On that basis the Commission tentatively concludes that “no notice or comments will be necessary to incorporate successor documents into our rules” and that “any successors to ATSC A/85 RP will take effect when the Commission has obtained approval from the Director of the Federal Register to incorporate by reference such successors into our rules and publishes a technical amendment in the Federal Register to codify the successors into the Commission's rules.”<sup>47</sup> While ACA understands that the Commission is obligated by the statute to incorporate any successor to ATSC A/85, it disagrees with the tentative conclusion that a

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<sup>46</sup> CALM Act at § 2(a).

<sup>47</sup> NPRM, ¶ 13.

successor be adopted without notice and comment. In fact, in this NPRM, the Commission is examining how to interpret a “successor” to ATSC A/85, the version of the standard adopted on May 25, 2011, including by seeking comment on provisions such as Annex J, which were amended or adopted after the date of enactment of the CALM Act.

By eschewing a notice and comment process, the Commission will fail to fully and properly analyze and interpret the obligations placed by any “successor” ATSC A/85 Recommended Practice on MVPDs and programmers. In addition, the Commission will avoid making crucial determinations about whether the successor conflicts with any statute or Commission regulations and provide guidance on how to handle that conflict.

Moreover, as explained below, ACA believes it is essential that prior to adopting a rule incorporating a successor to ATSC A/85, the Commission first issue a notice with its analysis of the obligations in the successor standard, permit comment, and then adopt an order setting forth these obligations, as well as any methods by which an MVPD could comply with these obligations. This step is critical to ensure the legality of any subsequent rules adopted by the Commission.

#### B. Successor Provision as Improper Delegation

The requirement in the statute that the Commission incorporate into its regulations any successor to A/85 approved by the ATSC without exercising any review or discretion raises the issue of whether Congress can properly delegate such unfettered lawmaking authority to a non-governmental entity. The jurisprudence of Congressional delegation of power is lengthy and intricate; however, core principles of due process are upheld. In *Carter Coal*, the Supreme Court described the delegation of authority to a subset of the mining industry to set minimum wages and maximum hours of labor as “delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons

whose interests may be and often are adverse to the interests of others in the same business.”<sup>48</sup>

Declaring that “in the very nature of things, one person may not be entrusted with the power to regulate the business of another and especially of a competitor,” the Court distinguished clearly between private activity and governmental functions. Years later, Justice Scalia dissented from a majority decision to uphold the constitutionality of the Sentencing Guidelines “not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.”<sup>49</sup>

Moreover, the CALM Act utterly fails to provide any guidance either to the ATSC or the Commission in reviewing actions of the ATSC in regard to the adoption of successor standards to ATSC A/85. (The Act does not expressly delegate authority to ATSC, while dictating to the Commission that it shall adopt as regulation whatever the ATSC determines is an appropriate standard.) Yet, courts have concluded repeatedly that the validity of Congressional delegations requires such a degree of attention and directive:

Accordingly, we look to the statute to see . . . whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.<sup>50</sup>

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<sup>48</sup> *Carter v. Carter Coal*, 298 U.S. 238, 311 (1936).

<sup>49</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

<sup>50</sup> *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S. 495, 530 (1935) (rejecting the legislated delegation for lack of “standards,” and “prescribe[d] rules of conduct to be applied to particular states of fact . . .”). *See, also, Mistretta* (discussing the need for provision of an “intelligible principle” in a delegation of power as well as delineation of “the boundaries of this delegated authority” and citing *Yakus v. United States*, 321 U.S. 414 (1944) for the conclusion that a significant “absence of standards for the guidance of the Administrator’s action” would provide basis to invalidate a Congressional delegation of authority).

The CALM Act provides no guidance for the setting of ATSC's standards, no requirements for representative participation by industry members in that process, and no scope or limitation as to the content of the emerging standards (except for the restriction of their application to the "transmission of commercial advertisements"). The proposed arrangement is, to quote Justice Cardozo's concurrence in *Schechter*, "delegation running riot."

While Congress certainly has the ability to codify a known industry standard, successor standards may vary greatly from the original and may incorporate requirements that Congress could not have legally codified in the first instance, *e.g.* provisions that inhibit interstate commerce or infringe on free speech.

The delegation problem could be cured if the Commission held ultimate authority to determine the requirements contained in the regulation which the statute requires it to adopt.<sup>51</sup> *De jure*, however, the FCC does not hold final decision-making authority pursuant to the CALM Act. Instead, the Commission's hands are expressly tied. In effect, the statute's requirement authorizes ATSC to dictate the content of federal regulations to the Commission, which is unquestionably an impermissible delegation of Congressional power.

The question then turns to whether this infirmity renders just the clause "and any successor thereto" null and void or whether that clause is so intertwined with the entire provision that the entire mandate should be found to be null and void. ACA submits the latter is the case since Congress clearly considered this clause an essential part of the statutory mandate. At the

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<sup>51</sup> See, *e.g.*, *Sunshine Anthracite Coal Co., v. Adkins*, 310 U.S. 381, 399 (1940) (citations omitted) ("The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid."); *Noblecraft Industries, Inc. v. Secretary of Labor*, 614 F.2d 199, 203 (9<sup>th</sup> Cir. 1980) ("We do not find an undue delegation of power. . . . OSHA in practice did not surrender to ANSI all its standard-making function. As was the case here, it selected among the ANSI standards with apparent discrimination.").

very least, the most recent version of ATSC A/85, which was adopted on May 25, 2011, after the enactment of the CALM Act (and which includes a new Annex J), and is thus by definition a successor agreement, cannot be employed by the Commission.

#### IV. COMPLIANCE

At the outset, ACA notes that compliance must be linked to the requirements of ATSC A/85. As discussed in Section II of these comments, ACA submits that ATSC A/85 imposes only limited requirements on MVPDs. That is, ATSC A/85 applies only to an MVPD's digital transmissions when it inserts commercial advertisements using an AC-3 system, and it does not extend to an MVPD's analog transmissions to subscribers. That said, ACA in this section addresses compliance issues using both its analysis of ATSC A/85 and that proposed by the Commission in the NPRM.

Section 2(c) of the CALM Act provides a safe harbor for compliance with the statutory mandate. However, the statute does not provide that this is the exclusive means by which a MVPD can comply, and ACA agrees with the Commission's suggestion "that there may be alternative means of complying and demonstrating compliance with the regulations."<sup>52</sup> In addition, ACA supports the Commission's intention "to take into consideration challenges that stations/MVPDs may face in complying with ATSC A/85 RP, and how those challenges may vary depending upon the technology the entity uses, as well as its size and market power."<sup>53</sup> In discussing its proposals on compliance, ACA incorporates these concepts.

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<sup>52</sup> NPRM, ¶ 14.

<sup>53</sup> *Id.*

A. Compliance for Small MVPDs<sup>54</sup>

1. Background on Small MVPD Adoption of Dialnorm Technique and the Insertion of Commercial Advertisements

As discussed earlier in these comments, ATSC A/53 mandates that for digital television, the audio compression system used by television broadcasters “shall conform with the Digital Audio Compression (AC-3) Standard,”<sup>55</sup> which requires “the carriage of dialnorm and correctly set dialnorm values.”<sup>56</sup> While the standard is not mandatory for MVPDs (at least arguably when they do not insert their own commercial advertisements in digital transmissions), ACA members offering digital channels generally have installed AC-3 compliant equipment to pass through digital video content from television broadcasters or other programmers. This enables the subscriber’s digital television set and other customer premises equipment to receive the dialnorm metadata inserted by the programmer and automatically set the loudness level for its transmission, including commercial advertisements inserted upstream from the MVPD.<sup>57</sup>

ACA members do not as a rule monitor transmissions from programmers in which they do not insert commercial advertisements to ensure a programmer complies with ATSC A/85 and does not transmit loud commercial advertisements. There are many reasons for this practice. First, at least today, an MVPD cannot “correct” an audio problem in real-time. To do this, the MVPD would need to install equipment capable of almost instantaneously (within seconds)

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<sup>54</sup> The Commission inquires (§ 25) about appropriate compliance methods for small MVPDs, and the discussion in these sections responds to the questions posed in this paragraph.

<sup>55</sup> ATSC A/53 at 7 (Section 5, Specification).

<sup>56</sup> ATSC A/85 at 10.

<sup>57</sup> The use of the dialnorm technique does not address variability in sound among programming networks. Thus, a listener switching among networks will find that the audio on one channel is louder or softer than another.

decoding, measuring loudness levels, and re-encoding the “loud” commercial advertisement of a programmer. To the best of ACA’s knowledge, while equipment that performs some of these functions or even approximates the entire process is on the market, AC-3 compliant equipment that would monitor, decode, and re-encode in real-time both long form content and commercial advertisements each in accordance with ATSC A/85 does not exist.<sup>58</sup>

Second, ACA members do not have rights from programmers to alter their transmissions, even to deal with loud commercial advertisements. Instead, they are obligated through their programming contracts to pass the content through without degrading or altering the transmission in any way. The Commission will have to deal with this barrier by abrogating these provisions in existing contracts if it wishes to interpret the CALM Act to make MVPDs responsible for correcting loud commercial advertisements not originated by the MVPD.

ACA members that insert local commercial advertisements either do so themselves at their headends, use a third-party vendor to make the insertions,<sup>59</sup> or engage in a combination of these two options. ACA members that only rely on third-party vendors to insert advertisements generally do not deploy equipment that monitors the audio feed from the programmer, and then decodes and re-encodes the advertisement in conformance with the ATSC A/85 recommended practice. The role of these MVPDs is limited to deploying equipment the vendor requires to

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<sup>58</sup> There is a further complication to real-time correction of loud advertisements. The ATSC A/85 recommended practice for measuring the loudness of long form and short form content is different, thus any AC-3 compliant equipment that would decode and re-encode in real time in accordance with ATSC A/85 would need to be able to distinguish between the two types of content with the programmer’s transmission so that the appropriate measurement of loudness would be applied. To ACA’s knowledge, programmers today do not include in their programming transmission any detectable signal that would allow the two types of content to be distinguished.

<sup>59</sup> See, e.g. Viamedia, <http://www.viamediatv.com/home/splash.shtml>. ACA members that use a third party vendor generally rely on that vendor to perform all or virtually all functions related to the insertion of the commercial advertisement.

facilitate the insertion of the advertisement, while the vendor ensures that the ATSC A/85 directive is met.

Only ACA members that insert commercial advertisements themselves deploy equipment to monitor transmissions from programmers and decode and re-encode the advertisements. To insert an advertisement, the MVPD would initially monitor the audio on transmissions from programmers to determine the average loudness, and then decode and re-encode the advertisements that will be inserted with the appropriate dialnorm information in accordance with the ATSC A/85 recommended practice to ensure that advertisement is not too loud relative to the long form programming.

ACA members do not continuously monitor the audio on transmissions from programmers. Although some, after doing so initially, may monitor the transmissions periodically. Even with AC-3 compliant equipment, the MVPD today does not have the ability in real-time to determine the dialnorm for the incoming programming and then to encode the commercial advertisement nearly instantaneously (within seconds) to the same setting. As a result, the MVPD encodes the commercial advertisement in advance by predicting the dialnorm for the programming after examining a sample of the programming content. The advertisement is then placed in an “ad server” and spliced into the feed at the proper time.<sup>60</sup> Generally, this process works. However, in some cases, programmers or advertisement producers may supply incorrect dialnorm metadata, or equipment inserting the commercial advertisements can malfunction. If, as a result of these errors, a loud commercial is initially aired, the MVPD or the third-party vendor would monitor and assess the loudness of the programming network and

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<sup>60</sup> Splicers used by MVPDs to insert commercials do nothing more than insert pre-encoded commercials into the programmer’s feed.

review the loudness of the local advertisement, and then either notify the programmer of the problem or re-encode the local advertisement to ensure the sound is consistent for future uses.

As stated in the introduction, because of the implementation of ATSC A/85 and the practices ACA members have developed, today small MVPDs rarely receive complaints about loud commercial advertisements. Consequently, they do not expend time or resources to monitor in real-time the audio from programmers who insert commercial advertisements. Further, they do not keep logs with audio records of the programming aired, including for commercial advertisements they insert.<sup>61</sup> Thus, in the rare instance a complaint is received, they cannot look back to determine whether a commercial advertisement, either inserted upstream or locally, was in fact loud. Today, all a cable operator can do for commercial advertisements inserted by a programmer is examine a channel's current dialnorm metadata prospectively, assuming they own monitoring equipment, to ensure it is accurate and that it does not vary for commercial advertisements currently inserted. However, such an examination would be performed manually and would be of no value in determining past performance. If the MVPD receives a complaint about an advertisement inserted by a programmer and finds there is a problem, the standard practice is to inform the programmer and ask that the problem be remedied. For locally inserted advertisements, an MVPD can examine whether the current version of the advertisement contains the proper dialnorm metadata for the channel in which it is inserted and can re-encode the commercial if necessary.

Given these capabilities and practices of small MVPDs, it is clear that the method by which they will comply – and should be deemed by the Commission to comply -- with the CALM Act will vary. This will be discussed in the following sections.

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<sup>61</sup> It is particularly expensive to store data for audio from hundreds of channels in secure facilities.

2. Section 2(c) Safe Harbor

a. Meaning of “Install, Utilize, and Maintain in a Commercially Reasonable Manner”

As just discussed, today small MVPDs for digital service use the AC-3 audio system to pass through the digital feeds of programmers. These MVPDs rely on their programmers to provide the programs with accurate average dialogue level and matching dialnorm metadata and to insert commercial advertisements in compliance with ATSC A/85. These MVPDs do not have equipment to automatically monitor and adjust the audio content in real-time and only investigate on a case-by-case basis as complaints are received. ACA submits that these MVPDs are utilizing AC-3 compliant equipment, which is the basis for the directives in ATSC A/85, in a commercially reasonable manner since this is the industry-wide practice at least among small MVPDs. Their practices also serve the public interest as demonstrated by the few complaints about loud commercial advertisements that these ACA members receive. ACA thus disagrees with the Commission’s expansive interpretation that MVPDs do not fall within the safe harbor unless they “properly measure the loudness of content...and ensure the dialnorm metadata is encoded correctly before transmitting the content.”<sup>62</sup>

In addition, some small MVPDs have deployed additional AC-3 compliant equipment for the insertion of local commercial advertisements. As discussed herein, these MVPDs use this equipment either directly themselves or by having a third-party vendor to insert the commercial advertisement. Further, for these MVPDs, there is no equipment available enabling them in real-time to detect dialnorm data in the incoming programming and automatically set the dialnorm of the commercial advertisement to the proper level. However, these MVPDs have deployed and use equipment that monitors the audio of programming feeds and encodes and re-encodes

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<sup>62</sup> NPRM, ¶ 20.

commercial advertisements to match loudness levels. As such, ACA submits that the Commission should find small MVPDs are utilizing AC-3 compliant equipment in a commercially reasonable manner in conformance with ATSC A/85 whenever they make good faith efforts to use the equipment to match the loudness levels of the commercial advertisement and the programming.

b. Use of a Third-party to Meet the Safe Harbor

The Commission tentatively concludes that “the Section 2(c) safe harbor provision requires that a station/MVPD must, itself, install, utilize, and maintain the necessary equipment” and “not action by a third-party.”<sup>63</sup> ACA believes this tentative conclusion as it applies to small MVPDs is too sweeping. Because they lack economies of scale or operational expertise, small MVPDs generally utilize third parties to assist in the operation of their network, including by inserting commercial advertisements. For instance, as noted above, many ACA members use a third-party to insert local commercial advertisements in cable network programming. ACA submits that use of third parties that assert they comply with relevant ATSC A/85 directives to perform these tasks is consistent with the purpose of the safe harbor provision because it increases the chances that small MVPD will use ATSC A/85 compliant equipment. It also meets the letter of safe harbor provision, that is, a small MVPD would be utilizing compliant equipment in a “commercially reasonable manner.”

3. Compliance when an MVPD Inserts Commercial Advertisements in Digital Transmissions

ACA does not contest that the CALM Act’s incorporation of ATSC A/85 requires MVPDs that insert commercial advertisements in digital transmissions at their headend to do so

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<sup>63</sup> *Id.*, ¶ 16.

in compliance with the standard.<sup>64</sup> The only issue for small MVPDs is the timing of their compliance, and ACA will discuss this issue in the waiver section below.

4. Compliance when a Non-Television Broadcast Programmer Inserts Commercial Advertisements and an MVPD Passes Them Through to Subscribers

The Commission believes “it is consistent with the ATSC A/85 RP for a station/MVPD to ‘ensure’ that the dialnorm matches the loudness of the content by incorporating the ATSC A/85 RP requirements into its contracts with content providers.”<sup>65</sup> Assuming *arguendo* that the Commission’s expansive interpretation of ATSC A/85 holds, for ensuring compliance for non-television broadcast programming, ACA agrees. While the CALM Act may be interpreted to hold MVPDs responsible even when they do not produce the material, by permitting compliance through a contractual approach with non-broadcast programmers, the Commission will align responsibilities with capabilities. In the end, this approach is more likely to ensure loud commercial advertisements are not aired.

The Commission notes, however, that even if contracts between MVPDs and content providers incorporate ATSC A/85 requirements, MVPD would still be ultimately responsible and thus may seek to “negotiate for indemnification clauses.”<sup>66</sup> ACA submits that it would be unreasonable for the Commission to expect that small MVPDs can on their own, or through the National Cable Television Cooperative, their programming purchasing organization, negotiate indemnification clauses with non-broadcast programmers. First, because of the potential liability, programmers will not voluntarily indemnify small MVPDs. Thus, small MVPDs will

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<sup>64</sup> See, ATSC A/85, Annex J.5: “In the case of insertion of short-form content (e.g. commercial advertising), it is vital that the loudness...of the inserted short-form content match the dialnorm setting of this inserted AC-3 audio stream.”

<sup>65</sup> NPRM, ¶ 23.

<sup>66</sup> *Id.*, ¶ 24.

have to bargain for this protection, but, as demonstrated by the fact that their programming costs are substantially above those of the large cable multiple system operators, they clearly lack leverage. Based on their experience, small MVPDs do not expect to be able to receive indemnification from *any* programmers. Thus, while small MVPDs may be ultimately responsible, as discussed below, ACA believes the Commission should not impose penalties on them (or at most minimal penalties) if they have a good faith belief that a non-broadcast programmer meets the ATSC A/85 requirements.

5. Compliance when a Television Broadcaster Inserts Commercial Advertisements and an MVPD Passes Them Through to Subscribers

The Commission inquires about “whether special considerations apply to MVPD carriage of broadcast stations.”<sup>67</sup> ACA believes carriage of broadcast stations by MVPDs should be treated differently than carriage of non-broadcast stations because the ATSC standards in general are mandatory for television broadcasters and the CALM Act’s incorporation of ATSC A/85 standard specifically makes the commercial advertisement loudness requirements mandatory for them. Moreover, Commission regulations prohibit MVPDs from altering the signal of a television station that it carries.<sup>68</sup> Thus, ACA submits that an MVPD should be deemed in compliance merely by passing through the television broadcast signal without making any changes in the content. If there is a complaint, the broadcaster should be – and is – responsible.

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<sup>67</sup> *Id.*, ¶ 30.

<sup>68</sup> 47 C.F.R. § 76.62.

## V. COMPLAINT PROCESS

The Commission proposes a consumer driven complaint process because it “is the most practical means to monitor industry compliance with” the proposed rules.<sup>69</sup> The Commission then proposes that a consumer’s complaint only needs to contain allegations of the problem without more specific evidence<sup>70</sup> and that the MVPD should be expected to provide “sufficient records and documentation to demonstrate compliance” if it maintains it complies with the regulations.<sup>71</sup> While ACA agrees that the complaint process should be consumer driven, it disagrees strenuously that a complaint should proceed by mere allegation and that a small MVPD should maintain records and documentation to demonstrate compliance. Such process would place undue burdens on small MVPDs.

Instead of the process proposed by the Commission, ACA submits the following are reasonable measures for any complaint process, which will forward the purpose of the statute:

1. Prior to filing any complaint with the Commission, the complainant, who must be a subscriber to the MVPD at the time the commercial advertisement was shown, must first contact the MVPD and seek resolution of the issue within a brief time (within 15 days).<sup>72</sup>

As part of this process, the complainant should tell the MVPD if he/she has filed a complaint regarding the same or similar commercial advertisement and programming network so the source of the problem can be better determined and a common resolution can be found. If the commercial advertisement that is the subject of the complaint is

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<sup>69</sup> *Id.*, ¶ 33.

<sup>70</sup> *Id.*, ¶ 35.

<sup>71</sup> *Id.*, ¶ 36.

<sup>72</sup> An MVPD should maintain a log of all complaints.

inserted by the MVPD and continues to be aired, the MVPD should check to ensure the loudness of the commercial advertisement complies with ATSC A/85.

2. If the complainant is not satisfied with the MVPD's response or if there is no response, he/she may file a complaint with the Commission. Any complaint must be filed in a timely fashion.

3. The Commission should bundle all complaints about the airing of a particular commercial advertisement on a particular programming network into a single complaint.

4. Because loudness is subjective, responding to complaints is burdensome for small MVPDs, and commercial advertisements are aired numerous times, the complaint should include, at a minimum, the date and time when the commercial advertisement was shown along with the name of the network and a description of the advertisement, including, if possible, the extent to which the advertisement was louder than the long form content.

The complainant should certify that this evidence is accurate.

5. Prior to asking a small MVPD to respond to a complaint, the Commission should determine first (1) whether the MVPD inserted the commercial advertisement into a digital transmission and thus has an obligation to comply with ATSC A/85 or (2) whether the MVPD meets any of the safe harbors.

6. If a complaint provides the required certified proof of the commercial advertisement – and the MVPD is obligated to comply with ATSC A/85 and does not meet any of the safe harbors – a small MVPD shall bear the burden of demonstrating the commercial advertisement met the ATSC A/85 standard.

## VI. ENFORCEMENT

The Commission intends to apply the general forfeiture provisions for non-compliance with regulations adopted to implement the CALM Act and inquires “whether there are any general situations that may warrant special consideration” and “whether we should establish a base forfeiture amount.”<sup>73</sup> Because small MVPDs have limited financial resources, ACA submits a small MVPD should be subject to limited forfeiture amounts unless it can be demonstrated that there is a pattern of non-compliance.<sup>74</sup>

## VII. WAIVERS

The CALM Act provides for two types of waivers: financial hardship, which are limited in time,<sup>75</sup> and general (good cause) waivers.<sup>76</sup> ACA agrees with the Commission’s interpretation of the legislation that financial hardship should be interpreted broadly and that smaller cable systems may face greater challenges in having the financial resources to purchase compliant equipment.<sup>77</sup> Because of this Congressional intent, the Commission inquires whether it should establish a streamlined “financial hardship waiver approach” for small MVPDs.<sup>78</sup> ACA believes such a streamlined approach is warranted. As discussed at the beginning of this section, only

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<sup>73</sup> *Id.*, ¶ 37.

<sup>74</sup> In the previous section ACA proposes that all complaints filed against a MVPD dealing with the same commercial advertisement transmitted on a network be bundled as a single complaint. If the Commission finds that for such a bundled complaint the MVPDs are not in compliance, any forfeitures should be imposed as if only a single complaint was filed and the amount should be allocated equitably among the MVPDs.

<sup>75</sup> CALM Act § 2(b)(2).

<sup>76</sup> *Id.* § 2(b)(3); 47 C.F.R. § 1.3.

<sup>77</sup> NPRM, ¶ 38.

<sup>78</sup> *Id.*, ¶ 40.

some ACA members (small MVPDs) have installed AC-3 equipment that is used for the insertion of their own commercial advertisements,<sup>79</sup> and the expense of doing so is substantial, especially when calculated on a per subscriber basis. This burden will increase materially if they are required to comply with the CALM Act under the Commission's interpretation, which would require constant monitoring of commercial advertisements inserted by programmers and recordkeeping of such activities. In addition, MVPDs in general and small MVPDs in particular insert a small fraction of the commercial advertisements viewed on television. By ACA's calculations, its members insert less than 4% of the total commercial advertisements.<sup>80</sup> In light of the burdens of compliance and the fact that actions by small MVPDs represent such a small percentage of the market, ACA submits the Commission should grant a blanket financial hardship waiver for small MVPDs for a one-year period and that the Commission should seek comment and consider extending that blanket waiver for an additional year.<sup>81</sup> If the Commission chooses not to adopt a blanket waiver, it should be sufficient for a small MVPD to receive and renew a financial hardship waiver by certifying to the Commission that (1) it has contacted vendors about obtaining the necessary equipment and has received price quotes for such equipment, and (2) that, because of the substantial cost to obtain and install such equipment, it would be a financial hardship to make such purchase at this time.

As for use of the Commission's general waiver authority, it is important for the Commission to understand that, despite industry standards and guidance, small MVPDs employ

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<sup>79</sup> As discussed earlier, ACA members do not match dialnorms of the long form and short form content in real-time.

<sup>80</sup> ACA also notes that often the short form content its members insert consists of local public service announcements or advertisements for local merchants, both of which are important to residents and businesses in these members' communities. If the Commission does not provide small MVPDs waivers, many of them may choose to forgo inserting this material rather than go to the expense of purchasing compliant equipment.

<sup>81</sup> The Commission inquires about blanket waivers in the NPRM, ¶ 42.

a wide variety of technologies and that they usually wait for products to evolve to meet their needs and prices to drop before purchasing and installing new equipment. The Commission, as it suggests in the NPRM, should use its general waiver authority to account for the “technology lag” of these small MVPDs.<sup>82</sup> ACA also agrees that it is relevant for the Commission in its consideration of a general waiver petition to inquire about the efforts of a small MVPD to prevent loud commercial advertisements. It therefore should favor a grant of a general waiver if there have been few complaints about the MVPD airing loud commercial advertisements.

## VIII. CONCLUSION

ACA members have a great interest in the Commission’s implementation of the CALM Act. As discussed herein, ACA believes the mandate to incorporate and make mandatory ATSC A/85 as it applies to MVPDs is limited at most to commercial advertisements they insert into digital television transmissions. Even if the Commission disagrees and decides to require MVPDs to comply with all aspects of that standard, ACA submits that the Commission should

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<sup>82</sup> NPRM, ¶ 41.

provide blanket financial hardship waivers for small MVPDs. ACA looks forward to working with the Commission on these issues as it seeks to adopt regulations pursuant to the new statute.

Respectfully submitted,



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