

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.²

INTRODUCTION AND SUMMARY

The Federal Communications Commission (“Commission” or “FCC”) has a very specific mandate under the Commercial Advertisement Loudness Mitigation (“CALM”) Act³ -- “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.”⁴ This standard, the Advanced Television System Committee’s (“ATSC”)

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² *In re Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Notice of Proposed Rulemaking, MB Docket No. 11-93 (May 27, 2011) (“Notice”).

³ The Commercial Advertisement Loudness Mitigation (“CALM”) Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621).

⁴ S. Rep. No. 111-340, 111th Cong. 2d Sess. 1 (2010); H.R. Rep. No. 111-374, 111th Cong. 1st Sess. 2 (2009) (same).

Recommended Practice A/85 (“ATSC A/85 Recommended Practice”), provides techniques to control and measure the loudness of commercials in digital programming.

The Notice proposes a variety of measures to implement this provision that in some respects appear to exceed the CALM Act’s limited scope. Moreover, the reality is that cable operators are able to exert only minimal control over the *millions of commercials* they transmit on the digital non-broadcast program channels they carry *every day*. Given this large volume of commercials and consistent with the Commission’s goal of mitigating loud commercials, the Commission should adopt rules that are readily enforceable and impose minimal administrative burdens.

The entire scheme for controlling audio loudness presupposes that each entity in the chain will do its part to follow recommended practices with respect to content that it inserts or controls. We expect these entities to work cooperatively to ensure successful implementation of the Recommended Practice. Cable operators should be responsible for compliance for the content they create and insert, but should not be liable for commercials that they simply receive at the headend embedded in the network programming they carry and send to their customers. Congress provided operators a means to ensure compliance with the Act by satisfying the safe harbor provision. The Commission must create a broad safe harbor if it broadly expands liability. Further, operators at the very least should be able to rely on a straightforward mechanism – such as certifications from programmers or other contractual provisions – to ensure that content created upstream is compliant with the Recommended Practice. Enforcement should focus on patterns and practices that evidence a willful disregard of the Recommended Practice. Given the inherently subjective nature of many loudness complaints, a threshold is necessary to protect cable operators against being overwhelmed by meritless

complaints. Finally, the agency should categorically waive the rules for smaller systems and those systems that do not insert local advertising.

DISCUSSION

I. The Commission Has a Very Specific Mandate under the CALM Act

The Act requires the Commission to prescribe “a regulation that is limited to incorporating by reference and making mandatory (subject to any waivers the Commission may grant) the ‘Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television’ (A/85), and any successor thereto, approved by the Advanced Television Systems Committee, 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.”⁵ Because the ATSC A/85 Recommended Practice covers a range of areas unrelated to loud commercials, the Notice seeks to identify and make mandatory those practices that fall within the “transmission of commercial advertisements” aspects of the ATSC A/85 RP.⁶ In that regard, the Commission points to the recently adopted Annex J to the A/85 Recommended Practice, which describes “Requirements for Establishing and Maintaining Audio Loudness of Commercial Advertising in Digital Television When Using AC-3 Codecs.”⁷ Annex J distills certain recommendations from other sections of the ATSC A/85 RP and “contains all the courses of action necessary to perform effective loudness control

⁵ The ATSC A/85 Recommended Practice contains suggested techniques that the cable, broadcast and MVPD industries can follow to mitigate problems with commercial loudness in digital programming. The basic technique requires the content producer to measure and assign a numerical value to the perceived loudness level of the program content and encode that value into the audio content as metadata (the “dialnorm”).

⁶ Notice at ¶ 9.

⁷ *Id.* at ¶ 10.

of digital television commercial advertising.”⁸ Therefore, the recommended practices in Annex J should be incorporated by reference into the Commission’s rules.⁹

An understanding of the technical mechanism and intent of the ATSC A/85 Recommended Practice is necessary to an understanding of the CALM Act. The main premise of the entire regime is that it relies not on a single entity to control the audio loudness, but rather on an entire “ecosystem” of all participants to ensure that correct audio levels are maintained – ranging from when an advertisement is created through display in a consumer’s home. The key to the approach is that program audio loudness, when measured properly, should match its dialnorm value (the so-called “golden rule”). Once the program is sent downstream, the audio loudness need not be further adjusted. This preserves the director’s intent in controlling the dynamic aspects of the audio, which was an important goal of the Recommended Practice and the CALM Act.

According to the ATSC A/85 Recommended Practice, program networks must ensure that audio levels of their program streams are set correctly when they send them downstream. This may require that advertisements the program networks receive from advertising agencies be supplied with the correct audio levels. If correct audio levels and matching dialnorm are not supplied, then the program networks must adjust the audio levels or its dialnorm value before inserting the commercials into their program stream. But, once that content is sent downstream, the content is not changed. Cable operators similarly are responsible for the audio loudness of commercials that they insert into a program stream.

⁸ A/85, Annex J.1 (Introduction and Scope).

⁹ Annex J.4 and J.5 contain the appropriate recommended practices for cable operators to follow when they measure loudness and assign dialnorm values to that commercial content.

The *Notice* asks how to define “commercial advertising.” *Notice* at ¶ 11. Annex J is intended to apply to “short form content.” Thus, only short form advertising is covered by the Act, and not material such as program-length commercials.

Once the content reaches the subscriber's set-top box, the dialnorm value is used by the AC-3 decoder circuitry within the set-top box to automatically adjust its audio output to the correct loudness level.¹⁰ Thus, the entire "ecosystem" of program and commercial producers, broadcast and non-broadcast networks and cable operators and other MVPDs must work in concert to properly measure audio levels, attach accurate dialnorm metadata, and properly install, operate and maintain equipment. The failure by any link in that chain can result in inappropriate loudness despite the best efforts of other entities. The ATSC A/85 Recommended Practice contains guidance for all these participants in the "ecosystem" on practices that can be used to effectively control audio loudness for content delivery.¹¹

The Notice, however, appears to go beyond merely incorporating by reference those relevant parts of the ATSC's A/85 Recommended Practice, and Annex J in particular, as they relate to cable operators' local advertising that operators insert into network programming. Specifically, the Notice proposes to make cable operators responsible for "all [commercial advertisements transmitted] by stations/MVPDs,"¹² including commercials that are inserted by program networks.¹³ But neither the ATSC A/85 Recommended Practice nor Annex J imposes such responsibility on cable operators. Annex J applies the "golden rule" "at the point of [commercial advertising] insertion," where "it is vital that the loudness [appropriately measured] of the inserted short-form content match the dialnorm setting of this inserted AC-3 audio

¹⁰ ATSC television sets, digital cable ready devices and home theater receivers can also perform dialnorm normalization.

¹¹ The CALM Act permits the Commission to incorporate and make mandatory only those aspects of the Recommended Practice that relate to the transmission of commercials by a television broadcast station, cable operator, or other MVPD. The CALM Act does not give the FCC authority to make mandatory those aspects of the Recommended Practice that address audio in content other than commercials or that apply to other entities in the chain.

¹² Notice at ¶ 10 (emphasis supplied).

¹³ *Id.*

stream...”¹⁴ Thus, the Commission would exceed its very specific mandate to incorporate the ATSC A/85 Recommended Practice if it were to impose responsibilities on cable operators not included in that Recommended Practice.¹⁵

This is not to say that the ATSC A/85 Recommended Practice does not address programming content and commercials *supplied* to cable operators.¹⁶ To the contrary, as described above, the Recommended Practice contains guidance for *all* creators of program content.¹⁷ We expect NCTA program network members to implement the guidance included in ATSC A/85 Recommended Practice. The CALM Act, however, does not impose liability on networks or permit the Commission to regulate them directly. It applies to transmission of commercials “by a television broadcast station, cable operator, or other multichannel video programming distributor.”¹⁸

The Notice points to this “transmission” provision of the CALM Act language as authority for imposing liability on cable operators for compliance with *all* commercials they transmit. But nothing in that language – “*only insofar as such recommended practice concerns the transmission of commercial advertisements by ... a cable operator...*” – indicates anything other than an effort by Congress to separate the transmission of commercials from those aspects of the ATSC A/85 Recommended Practice, such as audio mixing, room acoustics and loudspeaker placement, that do not affect the ultimate distribution of the commercial to the

¹⁴ Annex J.5.

¹⁵ Annex J.2 provides that it is the “Operator’s goal” to present consistent audio loudness across programs and commercials, among other things. But an “Operator” for these purposes is not limited to a cable operator. Its definition includes other entities that are part of the “ecosystem”: “a television network, broadcast station, DBS service, local cable system, cable multiple system operator (MSO), or other multichannel video program distributor (MVPD).”

¹⁶ Annex J applies to all “commercial advertising at the point of insertion”. Annex J.5.

¹⁷ See, e.g., ATSC A/85 Recommended Practice at 7 (Metadata Management Considerations Impacting Audio Loudness); 8 (Methods to Effectively Control Program-to-Interstitial Loudness)

¹⁸ CALM Act, Sec. 2 (a); *id.*, Sec. 2 (d)(2) (“cable operator” defined under Section 602 of the Communications Act.)

home. Moreover, Section 2(c) of the CALM Act makes clear that Congress intended compliance to be readily achieved through the installation of equipment or software that complies with the Recommended Practice. Nothing in the CALM Act suggests that operators would be required to do more – such as through monitoring or correcting the network feed – to effect compliance. And there is nothing in the CALM Act that says that equipment downstream should be able to manipulate the content from upstream content providers.

In short, since the CALM Act limits the Commission to making mandatory certain aspects of the ATSC A/85 Recommended Practice, and that Recommended Practice does not mandate cable operator responsibility for advertisements other than those the operator itself inserts, the plain language of the CALM Act does not support the *Notice*'s interpretation that operators are responsible for *all* commercials they transmit.

II. The FCC Should Adopt Reasonable Compliance and Enforcement Measures

We agree that the Commission should “adopt rules that achieve the goals of the statute, are easy to enforce and, at the same time, pose minimal administrative burdens.”¹⁹ However, several of the proposals in the *Notice* would not achieve this balance. They would impose significant new burdens on the cable industry that Congress did not intend in adopting the CALM Act.

A. Cable Operators Must Be Deemed in Compliance under the Safe Harbor if they Maintain The Appropriate Loudness Measurement Devices, Software or Other Equipment

¹⁹ *Notice* at ¶ 15.

The typical cable system inserts local advertising into approximately 60 channels of advertiser-supported high definition or standard definition digital channels²⁰ – and some operators may carry (and insert local advertising on) nearly twice as many advertiser-supported digital channels as the typical system. Advertiser-supported cable programming networks usually include about 2 minutes (or 4 separate advertisements) of local cable advertisements each hour. And some operators of large cable systems insert different local advertisements to serve different geographic areas; in fact, one large MSO inserts more than 4 million commercials every day. The cable networks themselves generally provide 7 times as many advertisements each hour as the cable operator– meaning *each* program network received by the cable system already contains hundreds of commercials every day. Consequently, a cable system may carry *millions of commercials* (both local and national) each week or even each day.

Given the number of channels and volume of commercials, it would be impossible for cable operators to actively monitor all of those channels to ensure that each of the commercials contained on those channels has properly followed the A/85 “golden rule.” With respect to commercials that the program network inserts, operators do not have equipment that identifies when those commercials begin and end. Moreover, even if an operator could identify when a non-compliant network commercial aired, operators do not have equipment that could modify the audio on that network advertisement so that it followed the “golden rule.” In addition to the impossibility of installing monitoring and measuring equipment, programming contracts often prohibit an operator from adjusting the audio in the digital network’s feed. Under these

²⁰ NCTA estimate based on channel carriage from FCC’s Price Survey (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-284A1.pdf) and Cabletelevision Advertising Bureau data on local cable availability (<http://www.thecab.tv/main/cablenetworks/localavailtimes/index.shtml>).

circumstances, operators cannot be expected to monitor for compliance²¹ each digital network they carry or somehow correct non-compliant commercials on those networks. Even if they could, it would make no sense to require them to do so. It would be unnecessary and wasteful to require all 7,500 cable systems²² to acquire redundant equipment to check the identical network program feed.

Active monitoring of commercials is not required by the CALM Act or the Recommended Practice. Congress included a “safe harbor” in the CALM Act by which operators can show compliance: “any broadcast television operator, cable operator, or other multichannel video programming distributor that installs, utilizes, and maintains in a commercially reasonable manner the equipment and associated software in compliance with the regulations issued by the Federal Communications Commission in accordance with subsection (a) shall be deemed to be in compliance with such regulations.”²³ The Notice points out that operators under the A/85 Recommended Practice “may rely on loudness measurement devices and/or software, file based scaling devices, or real time loudness processing devices depending on the method chosen to control loudness.”²⁴ So long as operators have practices in place that are commercially reasonable to ensure that their own commercials are not loud, they should fall under the safe harbor. In addition to those specifically mentioned in the Recommended Practice, these practices could include contracts with advertisers that specifically call for inclusion of the appropriate dialnorm metadata in locally-inserted advertisements, test equipment or other

²¹ See Notice at ¶24 (asking “what, if any, quality control measures [operators] should take to monitor the content delivered to them for transmission to consumers”).

²² As of December 2010 (Nielsen Focus database).

²³ CALM Act, Sec. 2(C).

²⁴ Notice at ¶ 19.

commercially reasonable practices. If an operator uses any one of these methods on its system,²⁵ then the Commission should find that the operator is acting in a “commercially reasonable” manner and that the safe harbor applies.²⁶

Merely providing a safe harbor for the operator’s own use of equipment, software or other loudness control measures is not enough, though, if the FCC also imposes responsibility on operators for network commercials and does not interpret the safe harbor to cover those commercials, too. The Notice, however, tentatively concludes that there is no safe harbor upon which operators can rely for the commercials that they receive from a network.²⁷ But if, contrary to the ATSC A/85 Recommended Practice, the Commission broadly imposes liability on operators for all commercials including commercials an operator receives from a network, the Commission must not adopt an overly narrow interpretation of the safe harbor provision.

As a practical matter, it makes sense to broadly interpret the safe harbor to cover a program network’s commercials. Commercials transmitted within a network signal do not lose their metadata when received at the operator’s headend and distributed to the set-top box. Therefore, if a network has the necessary equipment or practices in place to ensure that it follows the A/85 Recommended Practice “golden rule” with respect to its commercials, and the operator follows the A/85 Recommended Practice “golden rule” with respect to its locally-inserted content, a customer should benefit from the loudness mitigation techniques employed upstream at the network level and at the local level by the operator. The Commission thus should interpret

²⁵ The Order should make clear that operators need not install equipment on *each* of the channels on which they insert local advertisements in order to avail themselves of the safe harbor. Rather, if an operator has the necessary equipment to follow the Recommended Practice, that is all that is needed to fall within the safe harbor.

²⁶ The Commission should refrain from micromanaging the industry through establishing rules governing quality control testing, recordkeeping regarding equipment maintenance and the like. *See Notice* at ¶ 21.

²⁷ *Id.* at ¶¶ 16 and 17.

the safe harbor to encompass operators' provision of network commercials as well as locally-inserted commercials.

B. If the Commission Finds that the Safe Harbor Does Not Apply, Operators Should be Able to Show Compliance Through A Variety of Alternate Means

The *Notice* asks whether there are other ways for operators to demonstrate compliance in response to a complaint alleging a loud commercial if the safe harbor does not apply.²⁸ If the Commission concludes that the CALM Act holds cable operators responsible for the compliance of the digital program networks they carry, the Commission must allow operators to rely on certifications from those networks that the networks are providing commercials to the operator that follow the “golden rule.” In this instance, where operators cannot control the level of commercial loudness in the network commercials in the numerous channels covered by the rule, operators' ability to rely on network certifications is critical to adopting workable rules, whether considered part of the “safe harbor” or another means of readily demonstrating compliance.

This approach is consistent with other areas where the Commission holds operators responsible for the conduct of programmers. For example, in the regulation of children's television – where, unlike here, only a handful of networks were affected by the rule – the Commission understood the importance of permitting operators to rely on programmer certifications to ensure that the commercial limits were not violated.²⁹ The Commission adopted

²⁸ *Id.* at ¶ 22.

²⁹ *In the Matter of Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Memorandum Opinion and Order, 6 FCC Rcd 5093 at n. 11 (1991) (allowing operators to “reasonably rely on information provided by network to substantiate compliance, thus ameliorating some of the administrative burden monitoring network compliance might otherwise entail.”) *See also id.* at ¶ 22 (explaining operators can rely on “certified documentation that the station and/or network/syndicator, as a standard practice, formats and airs identified children's program(s) within the statutory limit of commercials, together with a detailed listing of any overages.”) That administrative burden would be increased many-fold under the CALM Act, since operators would be responsible for the commercials shown by all advertiser-supported digital channels, 24/7.

a similar approach in closed captioning, allowing “distributors to demonstrate compliance with these rules by relying on certifications from program sources, such as producers, networks or syndicators, that expressly state that the programming” complies with the rules.³⁰ The Commission also protected operators in situations “where a program source falsely certifies that the programming delivered to the distributor meets [the FCC’s requirements] if the distributor is unaware that the certification is false.”³¹ The FCC should adopt the same approach here.³² Operators also should be able to obtain indemnifications or other contractual protections from program networks against any liability for violation of the CALM Act rules.

Obtaining certifications and indemnifications will take time. Programming contracts run for a period of years. It would be impractical and poor public policy to require the industry to engage in the burdensome task of renegotiating dozens of programming agreements to address CALM Act compliance. Thus, the Commission should recognize that certification and indemnification will not be instantaneously achieved, and should protect operators against liability for acts they cannot control – and for which they have no contractual protection -- during this interim period.

C. Cable Operators Cannot Be Responsible for Complaints Regarding Access or Broadcast Programming

³⁰ *In the Matter of Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272 at ¶ 28 (1997) (“*Closed Captioning Order*”); Order on Reconsideration, 13 FCC Rcd 19973 (1998) (“*Closed Captioning Reconsideration Order*”).

³¹ *Id.*

³² The *Notice* suggests that the closed captioning precedent may be inapposite, because the Communications Act there, unlike here, referred to “program owners.” But that is a distinction without a difference. To the extent the Commission interprets the CALM Act to apply to program networks’ commercials, the same considerations justify allowing reliance on certifications. In both cases, it is “most efficient” – and, in fact, the only plausible way – to comply with the obligations at the production stage. *See id.* at ¶ 28. Moreover, while the Children’s Television Act does not refer to program owners, either, the Commission permitted operators to rely on certifications from programmers in those rules, too.

The Notice also asks about operator compliance for non-cable programming that they provide. With respect to broadcast stations,³³ which independently are subject to the Act, the Commission cannot and should not hold operators responsible. Cable operators merely retransmit broadcast stations and, in contrast to non-broadcast programming, by law cannot delete the stations' advertisements or insert their own local advertisements.³⁴ Analogous rules in the closed captioning context do not impose liability on operators for the broadcasters' actions,³⁵ and the FCC must adopt the same approach here.

Similarly, cable operators are legally barred from exercising any editorial control over PEG access programming, leased access programming and political advertising.³⁶ For this reason, the Commission has also exempted operators from responsibility for compliance with certain rules by these entities when the operator simply distributes PEG or leased access programming.³⁷ The same considerations should apply here and operators should not be responsible for compliance where they are legally prohibited from exercising editorial control over the content.³⁸

³³ Notice at ¶¶ 30, 32.

³⁴ 17 U.S.C. §111(c)(3). See also Notice at n. 92 (recognizing that the “Commission exempts MVPDs from liability under the closed captioning and children’s television commercial limits for broadcast content they passively carry, because the Copyright Act of 1976 bars MVPDs from altering the content (including commercials) of retransmitted broadcast channels.”). Re-encoding broadcast stations – which operators might do to make an SD version of an HD signal – does not affect the loudness of commercials relative to the program content. In cases where a cable operator receives an AC-3 audio stream from the broadcaster that complies with the ATSC A/85 Recommended Practice and the operator alters the audio in the stream, the operator would be responsible for ensuring that its outgoing audio stream is consistent with the ATSC A/85 Recommended Practices.

³⁵ See *Closed Captioning Order* at ¶ 29 (exempting cable operators and other distributors from responsibility for broadcasters' compliance with captioning rules where retransmitted pursuant to Section 111 of the Copyright Act).

³⁶ Notice at ¶ 31.

³⁷ *Closed Captioning Order* at ¶ 29 (explaining “in some instances, a program distributor is prohibited by law from exercising editorial control over certain types of programming it offers, such as public, educational and governmental (PEG) or leased access. In these situations, the distributor shall be exempt from captioning such programming.”)

³⁸ In any event, PEG programming is typically commercial-free.

III. The Complaint and Enforcement Process Must Be Designed to Minimize Unnecessary Burdens

The *Notice* proposes to rely on customer complaints to enforce compliance.³⁹ The Commission should make clear that a customer's simple belief that a commercial is loud is insufficient to find a violation of the rule or to trigger a process of investigation. The FCC should establish a threshold that has to be met before the FCC sends a complaint to a cable operator for a formal response.

A commercial may appear louder than the program content that precedes it for reasons that have nothing to do with the purpose of the Act. For example, a commercial that is fully compliant with the rule may sound louder than the programming content simply because the commercial break may occur at a particularly quiet part of a program. Conversely, the content may sound louder than a subsequent commercial simply because of the action in the program sequence immediately preceding the advertisement. The very subjective nature of individual customer's perceptions makes the complaint process here potentially much more burdensome than in other regulated areas.

Moreover, determining whether a complaint is valid based on excessive loudness is also more difficult than determining compliance in other complaint-driven areas -- such as objectively determining whether commercial limits under the children's television rules were exceeded in a particular case. Cable operators may not have the information on hand to easily resolve these questions, and if past complaints about commercial loudness are any indication, these types of complaints often come with insufficient information to even investigate. Under these circumstances, the complaint process must be tailored to appropriately minimize what otherwise

³⁹ *Notice* at ¶ 33.

could be significant administrative burdens on operators. This is particularly true because, as the *Notice* relates, since January 2008 – long before the CALM Act became law -- the Commission already received thousands of inquiries from consumers about “loud commercials.”⁴⁰

Several measures to minimize potential burdens are warranted. First, the *Notice*⁴¹ sets out specific information that we agree must be provided so operators can properly investigate any claim. Complaints that fail to provide the requisite information should not be forwarded to operators.

Second, the rules should focus any enforcement efforts on entities that evince a pattern and practice of non-compliance, rather than on those who might inadvertently air a loud commercial. A pattern and practice of perceived loudness may indicate that the program network or operator has consciously chosen not to comply with the A/85 Recommended Practice. Therefore, the Commission should not require operators to respond to individual complaints and instead should require a response only where the volume of complaints suggests that a possible rule violation has occurred.

This would be similar in concept to the exception for “*de minimis*” violations of the closed captioning rules. Given the sheer number of commercials aired every day, even the most diligent operator could inadvertently include advertisements that, due to human error, do not follow the “golden rule.” As with captioning, the Commission should “not penalize video programming distributors that are generally in compliance with the rules except for a *de minimis* amount of [non-compliant] programming. In considering whether an alleged violation has occurred, we will consider any evidence provided by the video programming distributor in

⁴⁰ *Notice* at n.8. See also *id.* at ¶ 2 (“Indeed, loud commercials have been a leading source of complaints to the Commission since the FCC Consumer Call Center began reporting the top consumer complaints in 2002.”)

⁴¹ *Notice* at ¶ 35.

response to a complaint that demonstrates that the [non-compliance] was *de minimis* and reasonable under the circumstances.”⁴² Fines and forfeitures should only be assessed in cases of a pattern and practice of willful and repeated rule violations.⁴³

Third, operators should not be expected to address complaints regarding those channels over which they have no legal responsibility. As is the case with captioning complaints under the FCC’s rules,⁴⁴ operators should be permitted to either forward complaints about broadcast stations they carry to the station or instruct the complaining customer to contact the station directly. A similar approach is warranted for PEG and leased access channels.

Fourth, in response to complaints about a network into which an operator inserts commercials, an operator should be able to demonstrate either that it has complied with the safe harbor through installation of equipment, contract provisions regarding its locally-inserted commercials or other commercially reasonable practices, or that its practices with respect to the commercial at issue complied with the A/85 “golden rule.” For complaints regarding network-supplied commercials, an operator should be able to rely on certifications that the network is following the “golden rule.”⁴⁵

Given the enormous volume of advertisements that air every day, any recordkeeping requirement would be significantly burdensome.⁴⁶ Operators should have flexibility to determine the records sufficient to show compliance with respect to commercials they insert.

⁴² *Closed Captioning Reconsideration Order* at ¶ 10.

⁴³ For the reasons mentioned, *supra*, operators should be provided sufficient opportunity to obtain indemnifications against liability.

⁴⁴ 47 C.F.R. §79.1(g)(3).

⁴⁵ See *Closed Captioning Order* at ¶ 244 (permitting “MVPDs to rely upon certifications of compliance from the various networks they carry.”)

⁴⁶ See *Notice* at ¶ 36.

Operators cannot be expected to store or archive the voluminous data that would be needed to determine after the fact whether a “loud” commercial aired.

Fifth, cable systems already maintain customer service operations, and have systems in place to address day-to-day customer concerns. The Commission should refrain from requiring operators to designate a CALM Act contact person, as the *Notice* suggests.⁴⁷ Instead, the Commission should rely on existing customer service processes to most effectively address these customer concerns.

Similarly, the Notice provides no justification for adopting a new public file requirement for CALM Act complaints.⁴⁸ Whatever the reason for requiring a broadcaster to include such a complaint in its public files has no bearing on whether it is justifiable for multichannel providers. As noted, unlike single-channel broadcasters, cable operators typically provide 60 or more advertiser-supported digital channels that might be subject to a complaint. Moreover, multiple system operators may show the same commercial in multiple locations. A public file requirement in this instance would impose a significant new burden on cable operators, with no appreciable public interest benefit. The Commission rejected a public file requirement for captioning complaints, recognizing that “maintain[ing] public files recording [the systems] compliance...would be burdensome and administratively cumbersome.”⁴⁹ A similar practical approach is warranted here.

IV. The ATSC A/85 RP Only Covers Digital Channels that Use the AC-3 Audio System

While the Notice assumes that the Act “expressly applies to each ‘television broadcast station, cable operator, or other multichannel video programming distributor,’” the Act’s

⁴⁷ *Notice* at ¶ 36.

⁴⁸ *Id.*

⁴⁹ *Closed Captioning Order* at ¶ 244.

directive – to adopt the ATSC A/85 Recommended Practice -- is much more limited. The A/85 Recommended Practice only establishes techniques for maintaining “Audio Loudness for *Digital Television*” and even then, only for those cable operators that use the AC-3 audio system.

The Notice therefore is overly broad where it states that “the statute... expressly applies to all stations/MVPDs regardless of the audio system they currently use.”⁵⁰ As a threshold matter, it only applies to cable systems to the extent they provide *digital* cable networks.⁵¹ As described earlier, the use of dialnorm to represent the loudness of program audio does not work unless the digital AC-3 decoder circuitry is present within the receiving device. More than 1300 cable systems provide *no* digital service at all to their customers.⁵² Since the ATSC recommended practice encompasses “Techniques for Establishing and Maintaining Audio Loudness for *Digital Television*,” those systems would not be covered by the Recommended Practice and cannot be expected to comply with these requirements. Likewise, most cable systems today provide a mix of analog and digital channels. The analog channels provided on those hybrid systems would also fall outside the CALM Act’s coverage.

Finally, the Notice’s tentative conclusion that the CALM Act “defines the scope and application of the new technical loudness standard as mandatory for all stations/MVPDs and not only those using the AC-3 audio systems”⁵³ is not supported by the Act, which requires only that the Commission adopt the ATSC A/85 Recommended Practice and does not impose liability beyond that. Nonetheless, as the Notice points out, the ATSC has already begun addressing

⁵⁰ Notice at ¶12.

⁵¹ Since the problem of excessively loud commercials in part results from the dynamic range in digital audio, audio loudness for those analog channels does not raise similar concerns in any event.

⁵² Analog-only systems typically are smaller systems. In total, these 1330 headends serve only 623,000 subscribers.

⁵³ Notice at ¶12.

recommended practices for non-AC-3 digital audio systems.⁵⁴ The Commission should provide notice and an opportunity to comment about this proposal or any successor regulation to the A/85 Recommended Practice.⁵⁵ Allowing for comment, among other things, will enable interested parties to give needed input into which aspect of any successors to the A/85 Recommended Practice are relevant to the transmission of commercials, as opposed to other aspects of providing high quality digital audio covered by the ATSC A/85 Recommended Practice.⁵⁶

V. Waivers Should be Granted to Smaller Systems

In adopting the CALM Act, Congress expressly provided for waivers of the effective date of the rules implementing the Act. The Act provides both for time-limited waivers in the case of financial hardship and for “good cause” waivers that could be granted to a class of affected entities.⁵⁷

We agree with the Commission that it would be appropriate to provide special treatment to “small MVPD systems” – those with fewer than 15,000 subscribers and not affiliated with a cable operator serving more than 10 percent of all MVPD subscribers.⁵⁸ The Commission should also exempt those systems that do not insert any local advertising. Systems that serve

⁵⁴ ATSC Letter, *cited in Notice* at n. 56 (“ATSC has also started work on the development of a new ‘Annex K’ that addresses loudness management for commercial advertising when using non-AC-3 audio systems.”)

⁵⁵ We thus take issue with the Notice’s tentative conclusion that “no notice and comment will be necessary to incorporate successor documents into our rules.” *See Notice* at ¶13. Cable operators and other interested parties should have the opportunity to provide input into changes that would affect their ability to comply with the commercial loudness rules.

⁵⁶ The CALM Act was not intended to require cable systems to use the proprietary AC-3 audio system. Therefore, the Commission should make clear from the outset that to the extent it believes non-AC-3 audio systems are not covered by the Act, it will grant blanket waivers to any non-AC-3 audio techniques for which the ATSC has not developed a Recommended Practice for loudness techniques for commercial advertising at the point of insertion. *See CALM Act, Sec. 2(b)(3)* (FCC authorized to waive any rule required by the Act, for good cause shown, to a cable operator or to a “class of such... operators....”) The Act was in no way intended to interfere with technical advancements in the industry. To the extent operators develop new audio systems, they should be free to do so without the need for prior FCC approval or through prosecuting individual waiver requests.

⁵⁷ CALM Act, Sec. 2 (b)(3).

⁵⁸ Notice at ¶ 40.

few customers simply do not have the financial wherewithal to incur additional costs at this time. As a general rule, these systems have a small base against which to spread new costs and these price-sensitive customers would face a disproportionately higher impact from any new regulations. Furthermore, many of these smaller systems typically do not insert any local advertising and therefore exercise no control over commercial audio levels.

Under these circumstances, it would be unfair to impose on these operators the costs of prosecuting an individual waiver request at the FCC. Accordingly, the Commission for good cause should waive the application of the rules to these smaller systems as a class.

CONCLUSION

For the above-stated reasons, the Commission should adopt rules that implement the specific directives of the CALM Act without imposing unnecessary burdens on cable operators.

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