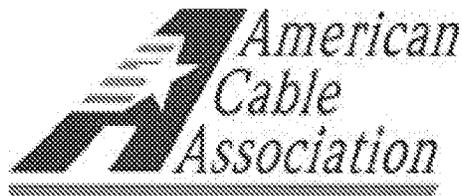


**Before the
Federal Communications Commission
Washington, DC 20554**

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

REPLY COMMENTS OF THE



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SUMMARY

The comments filed on July 11, 2011 in the NPRM (MB Docket No. 11-42) showed a remarkable degree of consensus on how the Commission should interpret the Commercial Advertisement Loudness Mitigation (“CALM”) Act and incorporate and mandate ATSC A/85 (“A/85”). In general, commenters raised serious concerns about the Commission’s overly broad interpretation of the requirements imposed on multichannel video programming distributors (“MVPDs”) by A/85 and its cramped interpretation of how MVPDs could comply with the Act, including by using the safe harbor. More specifically, American Cable Association, building upon in its July 11th comments, submit in these comments that:

1. The Act’s mandate is circumscribed as follows: (1) it does not apply to analog transmissions by MVPDs; (2) it places only a limited obligation on MVPDs to pass through the dialnorm metadata in commercial advertisements inserted upstream by programmers and “create awareness with the content supplier” if the audio produces “loud” advertisements; and, (3) it only requires that MVPDs comply with A/85’s mandates when they insert, either directly or by using a third party, commercial advertisements.
2. An MVPD should be found to be in compliance if:
 - (1) With respect to passing through commercial advertisements inserted upstream by a programmer –
 - (i) For local television broadcast programming, 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; and,
 - (ii) For other programming networks, 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, and it has a good faith expectation that the programmers are inserting their commercial advertisements in conformance with ATSC A/85.
 - (2) With respect to the insertion of commercial advertisements on its system –
 - (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.

3. In regard to addressing complaints:

- A complainant should be filed in a timely fashion and must demonstrate more than a mere belief that a commercial advertisement is loud.
- A complaint proceeding should only be triggered when there is pattern of non-compliance and not by a claim that a single commercial advertisement is loud.
- MVPDs should not be liable for loud commercial advertisements on programming over which they have no responsibility (such as PEG and leased access channels).
- MVPDs should have flexibility in providing documentation to support compliance and should not be required to collect and store large amounts of data.
- There should be no or at most minimal fines and forfeitures unless there is a pattern of willful non-compliance.

4. Because smaller cable systems may face greater challenges in having the financial resources to purchase compliant equipment, 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. 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. Finally, a hardship waiver is warranted where the small MVPD intends in the near future to interconnect a system, close a system, or sell a system that would be ultimately interconnected to another system.

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**REPLY COMMENTS OF
THE AMERICAN CABLE ASSOCIATION**

The American Cable Association (ACA), by its attorneys, respectfully submits these Reply Comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding,¹ which seeks to implement the Commercial Advertisement Loudness Mitigation (“CALM”) Act.² The CALM Act incorporates and makes mandatory subject to waivers 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 advertisement by a television station, cable operator, or other multichannel video programming distributor.”³

I. THE CALM ACT’S MANDATE IS CIRCUMSCRIBED

In its comments,⁴ ACA carefully parsed ATSC A/85 (“A/85”) to determine the specific directives that apply to multichannel video programming distributors (“MVPDs”) and the nature of those directives as they apply to ensuring that audio of commercial advertisements matches

¹ *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).

² P.L. 111-311.

³ *Id.*, § 2(a).

⁴ Comments of American Cable Association, MB Docket No. 11-93, July 8, 2011 (“ACA Comments”).

that of the long form content.⁵ ACA demonstrated that, contrary to the interpretation set forth by the Commission in the NPRM: (1) A/85 does not apply to analog transmissions by MVPDs; (2) MVPDs have only a limited obligation to pass through the dialnorm metadata in commercial advertisements inserted upstream by programmers and “create awareness with the content supplier” if the audio produces “loud” advertisements;⁶ and, (3) MVPDs need only comply with A/85’s mandates when they insert, either directly or by using a third party, commercial advertisements.⁷ Many other commenters also reviewed the A/85 directives in detail and reached conclusions similar to that of ACA about the circumscribed nature of A/85, submitting:

National Association of Broadcasters (“NAB”) – Annex J of ATSC A/85, by its terms, does not require stations to measure the loudness of every single commercial that they transmit or to prescreen commercials obtained from network or syndicators...The FCC’s proposed interpretation...goes beyond the Commission’s statutory authority.⁸

National Cable & Telecommunications Association (“NCTA”) – 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...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.⁹

AT&T – ATSC A/85 is predicated on all links in the content distribution chain (from content creator to distributor to consumer) performing their part to control loudness, by properly measuring and matching content loudness to dialnorm

⁵ *Id.* at 7-16.

⁶ A/85 § 8.3.

⁷ *Id.*, Annex J.5.

⁸ Comments of the National Association of Broadcasters, MB Docket No. 11-93, July 8, 2011, at i-ii, 5 (“NAB Comments”).

⁹ Comments of the National Cable & Telecommunications Association, MB Docket No. 11-93, July 8, 2011, at 4,6 (“NCTA Comments”).

metadata... content distributors [should] perform only those practices specifically assigned to them by A/85.¹⁰

Verizon – Recognizing that A/85 is a recommended practice that speaks to a wide range of entities in the video creation and distribution chain, Congress indicated that only a portion of the practice would be relevant directly to broadcasters and video distributors and should be incorporated into the regulatory mandate... [The] limitation clause [in the statute] – “only insofar as” – is the only place in the CALM Act with the language to which the NPRM attaches significance in expanding the scope of the proposed regulation, but the language within that clause cannot be fairly read to expand the A/85 Recommended Practice itself or any regulation incorporating the Recommended Practice.¹¹

Only Harris Corporation and DTS, Inc. in their joint comments, which discuss various methods of compliance, imply that A/85 imposes far-reaching requirements on MVPDs, but they do not support such an expansive interpretation by examining and discussing in detail the specifics of this standard.¹² Thus, no commenter that carefully analyzed A/85 reached a different conclusion from ACA about its limited application to MVPDs and thus agreed with the Commission’s overly broad interpretation of the statute and A/85.

There also was general agreement among the commenters about the nature of the limited specific obligations MVPDs would need to undertake to comply with A/85 (and therefore the CALM Act), all echoing ACA’s comments:

- A/85 does not apply to analog transmissions of MVPDs:

NCTA – “As a threshold matter, [A/85] only applies to cable systems to the extent they provide *digital* cable networks.”¹³

¹⁰ Comments of AT&T, MB Docket No.11-93, July 8, 2011, at 3-4 (“AT&T Comments”).

¹¹ Comments of Verizon, MB Docket No. 11-93, July 8, 2011, at 5, 10 (“Verizon Comments”).

¹² Comments of Harris Corporation and DTS, Inc., MB Docket No. 11-93, July 8, 2011, at 1-2 (“Any demonstration of compliance...will require the implementation of equipment by broadcasters and MVPDs that can monitor, log and adjust the loudness of commercials to be within the loudness range set forth by ATSC A/85 RP.”) (“Harris/DTS Comments”).

¹³ NCTA Comments at 18.

- A/85 does not require MVPDs to monitor the loudness of commercial advertisements inserted upstream by programmers and then decode and re-encode advertisements that are louder than the long form content:

Verizon – “At no point does A/85 envision or require that video distributors actively monitor and correct the loudness settings for all content passing through their systems, nor could a provider reasonably do so...the A/85 Recommended Practice recognizes that the primary role for video distributors is to pass along the correct metadata concerning loudness.”¹⁴

NCTA – “The Notice proposes to make cable operators responsible for ‘all [commercial advertisements transmitted] by stations/MVPDs,’ including commercials that are inserted by program networks. But neither the ATSC A/85 Recommended Practice nor Annex J imposes such responsibility on cable operators.”¹⁵

- A/85 applies when an MVPD, itself or by using a third-party vendor, inserts commercial advertisements in digital programming:

Verizon – “The primary role for video distributors is...to, themselves, set appropriate loudness levels to the extent that they are inserting content (e.g., commercials) or are encoding or re-encoding any programming.”¹⁶

DirecTV – “We agree that an MVPD should be accountable for accurately calibrating the loudness of the commercials that it actually inserts into its transmissions.”¹⁷

NCTA – The “Recommended Practice does not mandate cable operator responsibility for advertisements other than those the operator itself inserts.”¹⁸

In addition to discussing the application of A/85 to these types of transmissions and programming, several commenters made the important point, which ACA supports, that the CALM Act only applies to commercial advertisements and not to any other short

¹⁴ Verizon Comments at 4,8.

¹⁵ NCTA Comments at 5.

¹⁶ Verizon Comments at 8.

¹⁷ Comments of DirecTV, Inc., MB Docket No. 11-93, at 2, July 8, 2011 (“DirecTV Comments”).

¹⁸ NCTA Comments at 7.

form content or to programming over which distributors have no legal responsibility, such as Leased Access channels and Public, Educational, and Government (“PEG”) Access channels.¹⁹

In sum, commenters have submitted cogent and well-reasoned analyses of A/85 demonstrating the standard’s limited applicability to MVPDs: these program distributors need to ensure commercial advertisements they insert into digital transmissions are not “loud,” and they should make programmers aware when advertisements upstream are “loud.”

II. THE CALM ACT PERMITS MVPDS TO COMPLY WITH ITS REQUIREMENTS IN MULTIPLE WAYS

The CALM Act provides multiple ways for MVPDs to comply, including by using section 2(c) the safe harbor provision.²⁰ The Commission in the NPRM agrees with this conclusion,²¹ although its interpretation of certain specific compliance mechanisms is overly cramped. Most commenters agree as well that the statute enables MVPDs to comply using different methods, and they agree that the Commission’s interpretation is at times far too

¹⁹ See e.g., AT&T Comments at 6 (“Consistent with the plain language and express limitations of the CALM Act, the Commission should find that any interstitial/short form content that is not a paid announcement and/or does not relate to the sale of goods or services is beyond the scope of the Act and its implementing rules. Thus, for example, public service announcements and political advertising, as well as PEG and leased access programming, are outside the scope of the CALM Act.”); NCTA Comments, n. 11 (“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.”).

²⁰ For purposes of discussing compliance in these reply comments, ACA will assume the Commission’s overly expansive interpretation of A/85 is adopted. If the proper, narrow interpretation of A/85 discussed in almost all comments were instead adopted by the Commission, MVPDs would only need to comply when they insert commercial advertisements and not when they simply pass them through.

²¹ NPRM, ¶ 14 (“We recognize that there may be alternative means of complying and demonstrating compliance with the regulations required under the CALM Act.”).

restrictive, especially as it seeks to limit use of the safe harbor. The consensus position of the commenters is perhaps best characterized in the comments of AT&T and NCTA:

AT&T – “The Commission should ensure that any rules it adopts in this proceeding...provide distributors flexibility to use the methods and equipment that best suits their network architecture and operational practices to achieve the goals of the CALM Act...The Commission should broadly construe the safe harbor.”²²

NCTA – “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...So long as operators have practices in place that are commercially reasonable to ensure that their own commercials are not loud, they should fall within the safe harbor.”²³

In its comments,²⁴ ACA sets forth specific mechanisms by which its members, small MVPDs,²⁵ could comply depending on whether they were passing through commercial advertisements or inserting them:

²² AT&T Comments at 7, 9.

²³ NCTA Comments at 7, 9. *See also*, Verizon Comments (at 15), “the NPRM also suggests an impermissibly narrow view of the statutory safe harbor;” and, NAB Comments (at 6), “The FCC’s proposed interpretation essentially would impose strict liability on stations for upstream errors, and is inconsistent with the Commission’s stated goal of adopting rules that ‘are easy to enforce and, at the same time, pose minimal administrative burdens.’ Broadcast television stations currently do not measure every commercial that is transmitted, and such an approach would not be practical from a technical, administrative, and financial standpoint.”

²⁴ ACA Comments at iii-iv.

²⁵ The only party to comment on the definition of a small MVPD was NCTA (at 19), which supported the definition adopted by the Commission previously. As discussed in its comments (n. 4), ACA believes this definition is not appropriate in the context of the CALM Act. ACA noted that 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). This equipment also is costly. In addition, smaller MVPDs are unable to effectively negotiate with programmers to ensure they comply with A/85. ACA therefore proposed that the Commission should define a small MVPD as it did in the “bargaining agent” condition in the Comcast-NBC Universal proceeding. (*See*, 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).)

ACA Position:

(A) An MVPD should be found to be in compliance if:

(1) With respect to passing through commercial advertisements inserted upstream by a programmer –

- (i) For local television broadcast programming, 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;²⁶ and,
- (ii) For other programming networks, 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, and it has a good faith expectation that the programmers are inserting their commercial advertisements in conformance with ATSC A/85.²⁷

(2) With respect to the insertion of commercial advertisements on its system –

- (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.²⁸

²⁶ In its comments (at 27-28), ACA argued in support of this position, “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.”

²⁷ In its comments (at 26-27), ACA argued in support of this position, “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...[In addition,] 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, to negotiate indemnification clauses with non-broadcast programmers. First, because of the potential liability, programmers will not voluntarily indemnify small MVPDs. Thus, small MVPDs will 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.”

²⁸ In its comments (at 25), ACA argued in support of this position, “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

Again, other commenters largely supported ACA's positions. For instance, in discussing compliance by an MVPD with A/85 when passing through local television broadcast signals, NCTA stated,

With respect to broadcast stations, which independently are subject to the Act, the Commission cannot and should not hold operators responsible. Analogous rules in the closed captioning context do not impose liability on operators for the broadcasters' actions, and the FCC must adopt the same approach here.²⁹

Numerous other commenters agree that local broadcasters are required to comply with A/85 when they insert commercial advertisements and that the obligation of an MVPD is merely to pass through the feed without altering it.³⁰

As for compliance by MVPDs when transmitting the feeds of other network programming, it is important to note first that there was a consensus among the commenters that the safe harbor applies both when MVPDs insert commercial advertisements and when they pass

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 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."

²⁹ NCTA Comments at 13.

³⁰ *See e.g.*, AT&T Comments (at 5), "Insofar as a television broadcast station is expressly subject to the requirements of the CALM Act, and MVPDs are prohibited by the Commission's signal carriage rule from materially altering or otherwise degrading the signals of broadcast stations that they transmit, the Commission should not hold a MVPD liable for any failure on the part of a broadcast station to comply with the requirements of the CALM Act;" Comments of Qualis Audio, MB Docket No. 11-93, at 6, July 8, 2011, "In the case of cable providers carrying local OTA signals it seems counter-intuitive to hold the cable provider responsible for errors which would otherwise be the local stations responsibility had the consumer merely connected an antenna;" DirecTV Comments (at ii), "MVPDs should not be responsible for loudness issues in broadcast programming they passively retransmit. Broadcasters themselves are subject to the CALM Act's requirements, and are in the best position to comply with them."

through advertisements inserted upstream by programmers. DirecTV, in its comments, summed up this position, “It is not rational to presume that Congress created a safe harbor for those inserting commercials but did not intend it to flow through to downstream entities unless they independently re-verify loudness settings and correct any errors before passing the programming stream along.”³¹ In addition, there was a consensus that an MVPD could comply by using its AC-3 equipment properly to just pass through commercial advertisements inserted upstream – and not by having to monitor each and every transmission constantly and then decode and re-encode “unmatched” advertisements in real-time – and by making programmers aware of their obligation. In its comments, NCTA provided a basis for this conclusion:

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 of that network advertisement so that it followed the “golden rule.”³²

³¹ DirecTV Comments at 12.

³² NCTA Comments at 8. The lack of equipment on the market to monitor, decode, and re-encode the audio of commercial advertisements inserted upstream also was raised by DirecTV (at i), “No equipment now exists that can identify commercials among other content, measure the loudness of such commercials, and adjust the loudness level in real time before the programming is transmitted to viewers.” *See also*, AT&T Comments (at 10), an MVPD “should not be found to be out-of-compliance or held liable for the failure of an up-stream link to perform accurately its functions (such as by transmitting incorrect dialnorm metadata),” and (at 11), “The Commission should consider an MVPD to have satisfied the safe harbor...if it installs, uses and maintains equipment that...accurately preserves the relationship between the measured content loudness and dialnorm metadata of commercials inserted by upstream content suppliers.”

NCTA also persuasively set forth the absurdity – not to mention sheer economic deadweight loss -- of having every MVPD in the country deploy costly equipment to monitor the exact same transmissions for commercial advertisements inserted by a select number of programmers.³³

Finally, many MVPDs commented that they should be found in compliance if their upstream programmers agree to comply with A/85.³⁴ They also note that the Commission should recognize that it will take time to reach agreement with programmers, and it should therefore provide sufficient leeway in compliance for an interim period.³⁵ ACA agrees in general that an agreement by a programmer to comply with A/85 should be viewed as compliance by an MVPD. However, small MVPDs do not have the resources, let alone the bargaining leverage, to obtain such agreement (and certification).³⁶ Instead, consistent with the directive in A/85 that MVPDs

³³ See NCTA Comments at 9, “It would be unnecessary and wasteful to require all 7,500 cable systems to acquire redundant equipment to check the identical network program feed.” ACA notes the contrary position taken by Harris/DTS in its comments (at 2) that compliance can only be achieved by nothing less than complete deployment of monitoring, logging, decoding and re-encoding equipment throughout the entire MVPD industry. But, the Commission should not permit such self-interest to trump the actual requirements of A/85, the economic inefficiency of such an approach, and the tremendous burdens it would impose on MVPDs, particularly small MVPDs – all without achieving any material reduction in loud advertisements.

³⁴ See e.g., AT&T Comments (at 11-12), “To the extent the Commission concludes (wrongly, in AT&T’s view) that a MVPD is liable for commercial advertising content that is in programming that it receives from content creators and transmits (or retransmits) to viewers, it should permit that MVPD to rely on contracts that require upstream content providers to properly measure content loudness and transmit dialnorm metadata matching the loudness of such content to demonstrate compliance with A/85, and allow such MVPDs a reasonable amount of time to negotiate such contracts with content providers;” and, NCTA Comments (at 11), “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’... This approach is consistent with other areas where the Commission holds operators responsible for the conduct of programmers.” In its comments (at 7), the NAB also agrees with the contractual compliance approach.

³⁵ See e.g., Comments of NCTA (at 12), “The Commission should recognize that certification and indemnification will not be instantaneously achieved, and should protect operators against liability for acts they cannot control...during this interim period.”

³⁶ This position is supported by Verizon in its comments (at 13), “Content providers may or may not be willing to agree to such obligations. To the extent they do, they may well

should make programmers aware of loudness problems, the Commission should enable smaller MVPDs to demonstrate compliance if they make good faith efforts to get programmers to conform to A/85.

III. COMPLAINTS AND ENFORCEMENT SHOULD TARGET ENTITIES WITH A PATTERN OF NON-COMPLIANCE

In the NPRM, the Commission discussed a “consumer driven”³⁷ complaint process and provided details on a complaint procedure.³⁸ ACA in its comments³⁹ disagreed with aspects of

demand something in return, particularly when they are negotiating with smaller or newer players in the video marketplace with less negotiating leverage than large incumbent cable operators.”

³⁷ NPRM, ¶ 33.

³⁸ *Id.*, ¶ 35.

³⁹ ACA Comments at 28-30. ACA proposed the following process:

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).³⁹ 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 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

the Commission's process and proposed a series of refinements, which would ensure that complaints had a proper basis and limit burdens on small MVPDs. Numerous commenters also criticized the Commission's approach, and there was agreement among many of them on key parts of any complaint procedures the Commission should adopt. ACA agrees with these commenters on the following procedures and practices for addressing complaints:

- A complainant should be filed in a timely fashion and must demonstrate more than a mere belief that a commercial advertisement is loud.⁴⁰
- A complaint proceeding should only be triggered when there is pattern of non-compliance and not by a claim that a single commercial advertisement is loud.⁴¹
- MVPDs should not be liable for loud commercial advertisements on programming over which they have no responsibility (such as PEG and leased access channels).⁴²

harbors – a small MVPD shall bear the burden of demonstrating the commercial advertisement met the ATSC A/85 standard.

⁴⁰ See e.g., NCTA Comments (at 14), “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.”

⁴¹ See e.g., NAB Comments (at 13), stations “should not have to demonstrate compliance on a per channel basis;” and NCTA Comments (at 15), “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...the Commission should not require operators to respond to individual complaints and instead should require a response only where the volume of complaints suggests a possible rule violation has occurred.”

⁴² See e.g., NCTA Comments (at 16), “Operators should not be expected to address complaints regarding those channels over which they have no legal responsibility.”

- MVPDs should have flexibility in providing documentation to support compliance and should not be required to collect and store large amounts of data.⁴³
- MVPDs should not have to designate a contact person or maintain a public file.⁴⁴
- There should be no or at most minimal fines and forfeitures unless there is a pattern of willful non-compliance.⁴⁵

ACA urges the Commission to adopt each of the measures in addition to those proposed in its comments.

IV. A STREAMLINED WAIVER PROCESS SHOULD BE ADOPTED

The CALM Act provides for two types of waivers: financial hardship, which are limited in time,⁴⁶ and general (good cause) waivers.⁴⁷ Because smaller cable systems may face greater challenges in having the financial resources to purchase compliant equipment, in its comments,⁴⁸

⁴³ See e.g., NCTA Comments (at 16), “Operators should have flexibility to determine the records sufficient to show compliance with respect to commercials they insert. 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.”

⁴⁴ See e.g., Verizon Comments (at 16), “Existing consumer complaint processes should suffice to identify potential loudness concerns...Particularly given the number of issues flagged in the NPRM concerning how a provider can or should comply with the regulations proposed by the Commission, it is too soon to know whether a separate complaint process is necessary, or whether there would be any need for fines, penalties, or any additional administrative obligations;” and, NCTA Comments (at 17), “The Commission should refrain from requiring operators to designate a CALM Act contact person...A public file requirement in this instance would impose a significant new burden on cable operators, with no appreciable public benefit.”

⁴⁵ See e.g., Verizon Comments (at 16), “The Commission should reserve fines and penalties for bad actors that ignore obligations or fail to act in a commercially reasonable manner – not providers that are acting in good faith but that may have programming delivered over their systems with inaccurately set audio levels;” and, NCTA Comments (at 16), “Fines and forfeitures should only be assessed in cases of a pattern and practice of willful and repeated rule violations.”

⁴⁶ CALM Act § 2(b)(2).

⁴⁷ *Id.* § 2(b)(3); 47 C.F.R. § 1.3.

⁴⁸ ACA Comments at 30-32.

ACA proposed that 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. ACA also submitted that, 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. Finally, ACA believes a hardship waiver is warranted where the small MVPD intends in the near future to interconnect a system, close a system, or sell a system that would be ultimately interconnected to another system. Other commenters also supported waivers for small MVPDs.⁴⁹ Notably, associations representing small, rural telephone companies proposed a streamlined waiver process:

Small providers utilizing older equipment or alternative technologies such as IPTV should be granted an automatic waiver upon a showing that compliance with ATSC A/85 RP would be financially burdensome. More specifically, a small MVPD should be granted a waiver upon filing a certification with the Commission indicating that: 1) it uses non-compliant IPTV equipment or cable equipment that is more than five years old; and 2) that any upgrades would be financially burdensome...Small MVPDs that would not otherwise qualify for a waiver under this certification process should be permitted to avail themselves of a streamlined waiver provision. The streamlined waiver should require small MVPDs to describe the equipment purchases needed to comply with the ATSC A/85 RP and an estimate of the costs associated with the purchase, installation and maintenance of the equipment. No superfluous financial statements, supporting documentation or detailed explanations should be required.⁵⁰

⁴⁹ See e.g., NCTA Comments (at 19), “We agree with the Commission that it would be appropriate to provide special treatment to ‘small MVPD systems.’”

⁵⁰ Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, and the Western Telecommunications Alliance, MB Docket No. 11-93, at 4, July 8, 2011.

While ACA does not agree that this streamlined process should be limited to systems with older equipment, it does support other aspects of this proposal and urges the Commission to adopt a process that recognizes the compliance burdens on small MVPDs⁵¹ and the need to adopt a process that will facilitate waivers.

V. CONCLUSION

Comments filed in this proceeding are largely in agreement that the Commission’s proposed interpretation of the CALM Act’s purpose and requirements is overly broad. As discussed herein, these commenters, along with ACA, submit their more limited proposals properly implement the statute’s mandate and will address concerns about loud commercials. ACA looks forward to working with the Commission to incorporate these proposals in rules it adopts.

Respectfully submitted,



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⁵¹ See Verizon Comments (at 12) as evidence of the compliance burdens, “The process of reprocessing and re-encoding content in this manner is burdensome and expensive, with those expenses passed on to consumers. The equipment required is generally required for each of the channels that is being re-encoded.”

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