

**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)

REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. (“TWC”) hereby submits these reply comments in response to the opening comments filed in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

TWC appreciates the Commission’s efforts to protect consumers from excessively loud commercial advertisements. As the nation’s second largest cable operator serving more than 14 million customers in 28 different states, TWC is well aware of the anger and frustration cable subscribers experience as a result of blaring commercials. TWC is eager to address this problem and believes that the A/85 Recommended Practice¹ developed by the industry through the Advanced Television Systems Committee (“ATSC”) provides an appropriate solution.

Unfortunately, the NPRM² misconstrues the A/85 Recommended Practice and, in so doing, steps beyond the bounds of the authority granted to it by Congress in the CALM Act. In particular, assigning responsibility—and accompanying liability—to MVPDs to monitor and

¹ Advanced Television Systems Committee, Inc., Inc., ATSC RECOMMENDED PRACTICE: TECHNIQUES FOR ESTABLISHING AND MAINTAINING AUDIO LOUDNESS FOR DIGITAL TELEVISION, Document A/85:2011 (May 25, 2011), http://www.atsc.org/cms/standards/a_85-2011.pdf (“A/85 Recommended Practice”).

² *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Notice of Proposed Rulemaking, MB Docket No. 11-93, FCC 11-84 (rel. May 27, 2011) (“NPRM”).

control the loudness of all commercials carried on their systems, as the NPRM proposes to do,³ is *not* part of the A/85 standard. To the contrary, the A/85 Recommended Practice primarily applies to creators, editors, and other parties that exercise control over commercial advertisements at or before the point of their insertion into the programming stream.⁴ MVPDs, in their role as distributors, merely pass through these commercials, which already are embedded in the programming stream.

Under the clear terms of the CALM Act, the Commission’s authority is limited to adopting the A/85 Recommended Practice to the extent the standard is applicable to broadcasters and MVPDs. The legislative history confirms as much, adopting a light regulatory touch based on Congress’s judgment that industry already had developed the solution to the loudness problem and was in the process of implementing it. Accordingly, TWC agrees with those comments that urge the Commission to correct course. The rules the Commission promulgates in this proceeding should be limited to adopting that portion of the A/85 Recommended Practice that applies to broadcasters and MVPDs—in particular, Annexes J and K. In addition, any MVPD that installs, utilizes, and reasonably maintains appropriate equipment and software

³ *Id.* ¶¶ 10, 37.

⁴ A/85 Recommended Practice, Annex J.5 at 73 (explaining that, “*at the point of insertion,*” “it is vital that the loudness ... of the inserted short-form content match the dialnorm setting of this inserted AC-3 audio stream”) (emphasis supplied) (internal citations omitted); *id.*, Annex K.5 at 75. *See also* Comments of Verizon on the CALM Act, MB Docket No. 11-93, at 4 (filed July 8, 2011) (“Verizon Comments”) (“Much of the focus of A/85 is on the practices of the ‘production community,’ where loudness levels are generally monitored and set for programming.”) (internal citations omitted); Comments of AT&T, MB Docket No. 11-93, at 4 (filed July 8, 2011) (“AT&T Comments”) (stating that the A/85 Recommended practice “provides that content loudness should be measured during production and that content *producers* should transmit dialnorm metadata reflecting such loudness measurements downstream to content *distributors*”) (emphasis supplied) (internal citations omitted); Comments of the American Cable Association, MB Docket No. 11-93, at 9 (filed July 8, 2011) (“ACA Comments”).

necessary to ensure appropriate audio levels for the commercials it inserts should be deemed compliant with the Commission's rules.

DISCUSSION

I. THE OPENING COMMENTS DEMONSTRATE THAT THE PROPOSED RULES WOULD EXCEED THE SCOPE OF CONGRESS'S LIMITED GRANT OF AUTHORITY

A. The A/85 Standard Imposes Limited Obligations on MVPDs

As a number of commenters explain, “the A/85 [standard] is predicated on all links in the content distribution chain ... performing their part to control loudness, by properly measuring and matching content loudness to dialnorm metadata.”⁵ Indeed, the NPRM acknowledges that the A/85 Recommended Practice “was developed to offer guidance to the TV industry – from the content creators to distributors to consumers – about DTV audio loudness management.”⁶ Although MVPDs are one link in the “chain” that develops and delivers advertising content to consumers, they are not the primary link. To the contrary, only a limited portion of the A/85 standard applies to MVPDs. In particular, the A/85 Recommended Practice “recognizes that the primary role for [MVPDs] is to pass along the correct metadata concerning loudness and to, themselves, set appropriate loudness levels to the extent they are inserting content (e.g., commercials) or are encoding or re-encoding any programming.”⁷

⁵ AT&T Comments at 3. *See also* Comments of DIRECTV, Inc., MB Docket No. 11-93, at 4 (filed July 8, 2011) (“DIRECTV Comments”) (“One necessary assumption underlying RP A/85 is that the dialnorm value will be encoded accurately and carried with the AC-3 audio content.”) (citing A/85 Recommended Practice § 7.1 at 17); Comments of the National Cable & Telecommunications Association, MB Docket No. 11-93, at 4-5 (filed July 8, 2011) (“NCTA Comments”); Verizon Comments at 4.

⁶ NPRM ¶ 4 & n.15 (“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.”) (emphasis supplied).

⁷ Verizon Comments at 8; *see also* ACA Comments at 15-16; NCTA Comments at 4.

Critically, the A/85 Recommended Practice does not assign to MVPDs a blanket duty to control the loudness of every single commercial carried on their systems.⁸ Rather, the limited portion of the A/85 standard that applies to MVPDs, as set forth in Annexes J and K, *presupposes* broader industry compliance by upstream content creators, owners, and editors—those entities responsible for placing the vast majority of commercials into the programming stream carried by MVPDs like TWC.

B. The Scope of Commission Authority Is Narrow

It is against this backdrop that Congress enacted the CALM Act. As opening commenters pointed out, the text of the CALM Act circumscribes the Commission’s authority to adopt a new regulatory solution to address the issue of loud TV commercials.⁹ The Commission is permitted only to adopt “a regulation that is *limited to* incorporating” the A/85 Recommended Practice, and “*only insofar as* such [R]ecommended [P]ractice concerns the transmission of commercial advertisements by [broadcast stations and MVPDs].”¹⁰ The NPRM thus acknowledges that the CALM Act “expressly limits [its] authority” and that “the Commission may not modify the technical standard or adopt other actions inconsistent with the statute’s express limitations.”¹¹

In light of the A/85 standard’s limited directives to MVPDs, as discussed above, TWC agrees with other commenters that the CALM Act “should be read to require content distributors

⁸ See Comments of the National Association of Broadcasters, MB Docket No. 11-93, at 5 (filed July 8, 2011) (“NAB Comments”) (“ATSC A/85’s Annex J, which contains all of the courses of action necessary to perform effective loudness control of digital television commercial advertising, does not require *stations [or MVPDs]* to measure the loudness of every single commercial that they transmit or to prescreen commercials obtained from networks or syndicators.”) (internal quotation marks omitted); NCTA Comments at 5.

⁹ See, e.g., Verizon Comments at 3; NCTA Comments at 3; ACA Comments at 8.

¹⁰ 47 U.S.C. § 621(a) (emphasis supplied).

¹¹ NPRM ¶ 8.

to perform only those practices specifically assigned to them by A/85.”¹² In particular, MVPDs should not “be responsible for correcting (and thus liable for) any inaccurate dialnorm metadata transmitted by content suppliers.”¹³ Such a requirement, quite simply, would be beyond the scope of the Commission’s authority.

The legislative history of the CALM Act further confirms that Commission authority is limited to adopting that portion of the A/85 Recommended Practice that applies to broadcasters and MVPDs. Far from indicating that Congress intended to broaden MVPDs’ obligations under the A/85 Recommended Practice to include responsibility for *all* commercials carried on their platforms, the legislative history of the CALM Act makes clear that, due to industry consensus in developing the A/85 standard, only limited regulatory intervention was needed. Indeed, the legislative history includes repeated confirmations that Congress intended for the Commission to adopt the relevant standard—no more, no less.¹⁴

The NPRM seems to acknowledge that, by codifying the A/85 Recommended Practice, Congress intended for MVPDs to leverage *existing* technology and industry knowledge to

¹² AT&T Comments at 4.

¹³ *Id.* at 5; *see also* NCTA Comments at 6.

¹⁴ *See, e.g.*, 156 CONG. REC. H7720 (Nov. 30, 2010) (statement of Rep. Eshoo) (“The bill directs the FCC to adopt the engineering standards [developed by ATSC] ... as mandatory rules within 1 year.”); *id.* (Nov. 30, 2010) (statement of Rep. Terry) (“[T]his bill has been amended in the Senate to codify that standard that has been developed by the experts.”); 155 CONG. REC. S12711 (Dec. 8, 2009) (statement of Sen. Whitehouse) (“The television industry has been deeply involved in the drafting of this legislation, and the standards it adopts are practicable, affordable, and effective.”); 155 CONG. REC. H14909 (Dec. 15, 2009) (statement of Rep. Eshoo) (“The Advanced Television Systems Committee, or the ATSC, a body that sets technical standards for digital television, has developed a solution to the problem of the varied volume between commercials and programming, with one stream that keeps the volume uniform.”); 155 CONG. REC. H14909 (Dec. 15, 2009) (statement of Rep. Stearns) (explaining that the CALM Act “let[s] industry solve the problem and let[s] the FCC adopt what they’ve come up with”).

address the issue of excessively loud commercials.¹⁵ But MVPD commenters explained that their existing equipment limits their ability to monitor and adjust the volume of commercials placed in the programming stream by third parties.¹⁶ The NPRM’s proposed interpretation of the CALM Act thus would turn congressional intent on its head.

Moreover, there was no expectation that MVPDs would be required to invest unknowable amounts of time and money—with no assurance of success—to develop new equipment not contemplated under the A/85 standard. Rather, Congress was concerned about the potential costs associated with complying with the CALM Act,¹⁷ and it intended to “adopt[] [standards that] are practicable, affordable, and effective.”¹⁸ As a result, it would be arbitrary and capricious to impose sweeping new obligations on MVPDs for a goal that may not be attainable, and at the very least would entail costs far exceeding the intended benefits.¹⁹

While the Commission is correct that Congress also intended the CALM Act to address the issue of loud commercials as a general matter,²⁰ such a broad purpose is not inconsistent with the narrow means employed by the statute. The final bill passed by the House and the Senate—in contrast to the legislation first proposed by Rep. Eshoo, which would have given the

¹⁵ See NPRM ¶ 4 & n.17 (explaining that the A/85 Recommended Practice “also offers guidance” to MVPDs that “use the AC-3 digital audio system”).

¹⁶ DIRECTV Comments at 10 (explaining that the “AC-3 equipment used by MVPDs to process third-party programming ... does not independently identify or correct errors in that metadata”); see also NCTA Comments at 8; ACA Comments at i (explaining that AC-3 equipment “does not work in real-time to monitor, decode, and re-encode commercial advertisements inserted by programmers in digital transmissions”).

¹⁷ 47 U.S.C. § 621(c) (requiring MVPDs and broadcasters to comply with the A/85 Recommended Practice only “in a commercially reasonable manner”); *id.* § 621(b)(2) (allowing the Commission to grant waivers based on “financial hardship”).

¹⁸ 155 CONG. REC. S12711 (Dec. 8, 2009) (statement of Sen. Whitehouse).

¹⁹ See, e.g., *API v. EPA*, 216 F.3d 50, 57-58 (D.C. Cir. 2000) (failure to conduct cost-benefit analysis is arbitrary and capricious).

²⁰ NPRM ¶¶ 10, 12.

Commission broader authority to adopt its own standards for compliance—reflects Congress’s judgment that industry would resolve the issue of loud commercials simply by complying with the A/85 standard. Rep. Eshoo stated that she expected “voluntary and immediate adoption” of the A/85 Recommended Practice by the industry.²¹ In fact, TWC, like many other MVPDs,²² already has taken steps to address the issue of loud commercials carried in its programming.

To the extent that broader enforcement of the A/85 Recommended Practice is needed, the Commission should consider ways to require upstream providers of commercial advertisements to comply with applicable provisions of the A/85 Recommended Practice. But, whatever broad aims Congress may have had in mind when it passed the CALM Act, the Commission may not impose requirements on MVPDs beyond those allowed by the statutory text. Again, the plain language of the CALM Act limits the Commission to incorporating by reference that portion of the A/85 Recommended Practice that is specifically applicable to broadcasters and MVPDs—in particular, Annexes J and K.²³

II. LIKewise, THE NPRM’S APPROACH TO THE CALM ACT’S SAFE HARBOR IS UNDULY NARROW

The NPRM states that an MVPD would fall within the safe harbor only “with respect to the commercial[s] it inserts into the programming stream, but not with respect to the commercials for which it does not utilize the equipment.”²⁴ But as DIRECTV explains, such

²¹ 155 CONG. REC. 14909 (Dec. 15, 2009) (statement of Rep. Eshoo). *See also* 156 CONG. REC. H 7720 (Nov. 30, 2010) (statement of Rep. Terry) (“The industry will move to solve the purported concerns by simply moving to comply with that consensus standard.”).

²² *See, e.g.*, AT&T Comments at 2; DIRECTV Comments at 7-9, 16; ACA Comments at 4 (stating that “producers and providers have developed practices to address loud advertisements”).

²³ *See* 47 U.S.C. § 621(a).

²⁴ NPRM ¶ 17.

limited application of the safe harbor “would essentially render [it] a dead letter,”²⁵ as MVPDs do not insert the vast majority of the commercials carried on their platforms. There is no reason to believe that Congress intended such a cramped reading.

To the contrary, the CALM Act’s safe harbor provision is clear and unequivocal. If an MVPD “installs, utilizes, and maintains in a commercially reasonable manner” equipment and software necessary to carry out its obligations under the Commission’s regulations—that is, the practices recommended for MVPDs under the A/85 standard—such a provider “shall be deemed to be in compliance with such regulations.”²⁶ Moreover, the House and the Senate indicated that the safe harbor would apply broadly, stating that the “FCC should presume that an entity is in compliance with its rule where the entity can demonstrate that it has properly installed and is properly maintaining all needed equipment.”²⁷

To the extent the Commission believes (incorrectly) that Congress intended that an MVPD would be responsible for controlling the volume of *all* commercials it carries, it simply makes no sense to then limit the protection afforded under the safe harbor to those commercials inserted by an MVPD, as the NPRM seeks to do. As Verizon’s comments explain, such a backwards interpretation only underscores the NPRM’s mistaken understanding, in the first instance, of the scope of the CALM Act.²⁸ Likewise, the NPRM’s proposed limitation to the safe harbor would lead to irrational results. In particular, NAB pointed out that the NPRM “essentially would impose strict liability on stations [and MVPDs] for upstream errors” in

²⁵ DIRECTV Comments at i, 10-11.

²⁶ 47 U.S.C. § 621(c).

²⁷ H.R. REP. NO. 111-374, at 6 (2009); S. REP. NO. 111-340, at 4 (2010).

²⁸ Verizon Comments at 15 (explaining that a “narrow view of the safe harbor [is] inconsistent with the NPRM’s (impermissibly broad) interpretation of the regulatory obligations authorized by the CALM Act”).

carrying out the directives of the A/85 Recommended Practice.²⁹ The Commission thus should determine, in keeping with the limited scope of the CALM Act, that an MVPD that “installs, utilizes, and maintains in a commercially reasonable manner” the appropriate equipment and software to control the volume of commercials it inserts will be safe from liability under the statute.³⁰

Should the Commission nevertheless determine that an MVPD’s obligations under the CALM Act are broader, it follows that the Commission should interpret the safe harbor in a consistent manner. In particular, TWC agrees with AT&T, DIRECTV, and others that the Commission should allow MVPDs to demonstrate compliance by obtaining certifications from the programming providers that the provider follows the techniques prescribed by the A/85 Recommended Practice.³¹ Moreover, the Commission should impose no obligations or liability on MVPDs for commercials carried on broadcast stations. As the NPRM recognizes, MVPDs could face liability for copyright infringement for “altering the content (including commercials) of retransmitted broadcast channels.”³² Congress could not have intended such a result—providing still further evidence that it did not intend the CALM Act to be interpreted in the sweeping manner the NPRM proposes—and the Commission should act accordingly.

CONCLUSION

Recognizing that the industry was well on its way to addressing the issue of excessively loud commercials, Congress took a measured approach in the CALM Act and granted only

²⁹ NAB Comments at 6. *See also* DIRECTV Comments at 12 (explaining that, under the NPRM’s interpretation of the safe harbor, “MVPDs, through no fault of their own, would be subject to liability even though their equipment performed as designed”).

³⁰ 47 U.S.C. § 621(c).

³¹ *See* AT&T Comments at 11-14; DIRECTV Comments at 13-14; NCTA Comments at 11.

³² NPRM ¶ 30 n.92.

limited and very specific authority to the Commission to carry out the statute's goals. Specifically, the text and legislative history of the CALM Act require that the Commission go no further than to incorporate by reference Annexes J and K of the A/85 Recommended Practice into its rules. Pursuant to the clear language of the statute's safe harbor provision, the Commission also should make clear that MVPDs will be protected from liability under the statute if they install, utilize, and maintain the equipment and other means necessary to control the loudness of commercials they insert into the programming stream.

Respectfully submitted,

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