

**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 THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments in the above-captioned proceeding.

DISCUSSION

The Commission has a very specific mission under the CALM Act. The initial comments showed that Congress intentionally narrowed the focus of the agency’s role. Rather than providing the Commission general authority to regulate loud commercials,¹ the CALM Act limited the Commission to incorporating by reference the industry-developed approach to mitigating loudness contained in the ATSC A/85 Recommended Practice and only insofar as the Recommended Practice deals with the transmission of commercials by cable operators, other multichannel video programming distributors (MVPDs) or television broadcast stations.

As NCTA’s initial comments demonstrated, the ATSC A/85 Recommended Practice² referenced in the CALM Act makes cable operators responsible for the compliance of commercials that operators insert into network programming. But operators are not responsible

¹ As ACA explained, earlier versions of the CALM Act would have provided the Commission with broader authority in the area of loud commercials. However, “the CALM Act’s mandates ... evolved as Congress became more familiar with how the industry was directly addressing concerns about loud advertisements.” ACA at 4. *See also* Verizon at 4-7 (CALM Act legislative history demonstrates limited FCC’s charge).

² Hammet & Edison (at 2-3) raised concerns about the possible linkage of the ATSC Recommended Practice to a European standard. However, as Qualis Audio correctly pointed out, this concern is misplaced and the United States has led the way in developing these standards. Qualis Audio at 1-2 (filed July 6, 2011).

under the Recommended Practice for compliance by program networks for commercials the networks insert, nor are they required to adjust the dialnorm value of network-supplied material.³ NCTA and several commenters thus disagreed with the legal reasoning underlying the Notice's proposal to hold cable operators or other MVPDs responsible for monitoring and correcting the loudness of network-provided commercials.⁴ Commenters expressed concern about the unnecessary burdens⁵ and significant costs,⁶ among other things, that would result from such a mistaken reading of the FCC's mandate.

³ See Verizon at 8 (describing limited role of MVPDs under Recommended Practice); AT&T at 4-5 ("Insofar as ATSC A/85 itself assigns different roles to different links in the content distribution chain, and the CALM [Act] limits the Commission's authority to incorporate A/85 'only insofar as' it concerns transmission of commercial advertisements by a station/MVPD, that provision should be read to require content distributors to perform only those practices specifically assigned to them by A/85. Thus, content distributors should be responsible for measuring the loudness of any commercial advertising content they insert into programming and transmitting accurate dialnorm metadata for such content, and for having equipment and systems in place to accurately forward any dialnorm metadata it receives from an upstream content provider. It should not, however, be responsible for correcting (and thus liable for) any inaccurate dialnorm metadata transmitted by content suppliers."). NCTA also explained that programming contracts often prohibit an operator from modifying the audio contained in a network feed. NCTA at 8.

⁴ NCTA also made clear that while we expect NCTA programmer members to comply with the ATSC A/85 Recommended Practice, the CALM Act does not provide the Commission authority to regulate cable program networks. *Id.* at 6.

⁵ DIRECTV at 8 ("while ... monitoring allows DIRECTV personnel to conduct reviews and make adjustments after-the-fact, it does not give DIRECTV the ability to screen programming in real time for differences in volume within any of the myriad feeds DIRECTV is constantly transmitting to its subscribers. As a practical matter, there is no way that DIRECTV can monitor any programming in real time, much less verify the volume settings within each programming stream and make corrections as necessary. The equipment to automate that task simply does not exist."); ACA at 21-22 ("[a]t least today, an MVPD cannot 'correct' an audio problem in real-time. To do this, the MVPD would need to install equipment capable of almost instantaneously (within seconds) decoding, measuring loudness levels, and re-encoding the 'loud' commercial advertisement of a programmer. To the best of ACA's knowledge, while equipment that performs some of these functions or even approximates the entire process is on the market, AC-3 compliant equipment that would monitor, decode, and re-encode in real-time both long form content and commercial advertisements each in accordance with ATSC A/85 does not exist.").

An equipment vendor, Harris Corporation/ DTS, Inc., filed comments claiming that equipment it sells can "monitor, log and adjust the loudness of commercials to be within the loudness range set forth by the ATSC A/85 RP." Harris at 1-2. It is not clear from the description whether that equipment must be placed on each channel and whether it can operate automatically. Harris does not explain how its equipment would be able to detect when a network-embedded commercial begins and ends. Nor does it specify the costs of any such equipment.

⁶ Verizon at 12 ("for a provider like Verizon that offers hundreds of different digital channels to its consumers, the equipment costs alone could reach tens of millions of dollars for a particular provider – approximately the amount that the Congressional Budget Office estimated as the potential costs to the entire industry for implementation of the CALM Act.... Congress did not intend, and the Commission should not require, any such steps.").

If the Commission nonetheless were to make cable operators liable for distribution of commercials contained in cable network programming, the Commission should not require operators to purchase expensive equipment to demonstrate compliance.⁷ Instead, relying on certifications from program suppliers that attest to the program networks' compliance with the ATSC A/85 Recommended Practice should be sufficient for these purposes. As NCTA's initial comments showed, the Commission incorporated a similar approach in the analogous situations where the programmer, rather than the operator, is better positioned to address certain activities for which the operator is ultimately responsible under the rules.⁸ With respect to captioning, the Commission noted "Congress' recognition that it is most efficient to caption programming at the production stage, and the assumption that owners and producers will be involved in the captioning process."⁹ It expected that "the parties will negotiate for an efficient allocation of captioning responsibilities."¹⁰ And it protected operators in cases of unwitting reliance on false certifications.

The record shows that there is every reason to follow a similar approach here if the Commission were to impose liability on operators for the enormous volume of commercials embedded in program network feeds. Allowing operators to rely on contractual certifications from program networks in this instance will result in an efficient allocation of responsibilities. And it will ensure that all entities in the chain will follow practices that comply with the so-

⁷ Harris at 6 (arguing that "a contractual approach by itself would be insufficient to meet the intent of the CALM Act, to control the loudness of commercials" and urging the Commission to express a preference for "equipment within the broadcast, MVPD, or remote facility that can monitor, log and modify non-complying audio content").

⁸ NCTA at 11-12 (citing children's television and captioning requirements that allow operators to rely on network certifications).

⁹ *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 ¶¶ 28-29 (1997).

¹⁰ *Id.*

called “golden rule” established in the ATSC A/85 Recommended Practice while lessening the administrative burdens on operators.¹¹

CONCLUSION

For the foregoing reasons and for the reasons stated in NCTA’s initial comments, the Commission should adopt rules that implement the specific directives of the CALM Act without imposing unnecessary burdens on cable operators.

Respectfully submitted,

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August 1, 2011

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¹¹ See, e.g., ACA at 27 (“[b]y 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.”); DIRECTV at 14 (arguing that there is “no valid legal or policy reason to treat contractual compliance under the CALM Act differently [than compliance under the Children’s Television Act and closed captioning rules regarding reliance on programmer certifications]”).