

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 CENTURYLINK**

CenturyLink submits these reply comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

CenturyLink has a long history in the telecommunications industry, but is a newer entrant in the video distribution industry. As a multi-channel video programming distributor (MVPD), CenturyLink currently offers its video services to customers using different wireline distribution technologies in various locations around the country. CenturyLink uses an AC-3 audio system for some of its video distribution systems and non-AC-3 audio systems for others.

CenturyLink agrees with other commenters that in implementing the CALM Act the Commission should not impose liability on MVPDs for the loudness of all commercial advertising that they transmit, but should limit MVPD liability for loud commercial advertising to only that commercial advertising that they insert into digital programming. Neither ATSC A/85 nor the CALM Act requires that MVPDs be liable for the loudness of all commercial advertising they transmit. And, where the majority of commercial advertising that a MVPD transmits is received from upstream programmers and passed through, placing liability on the

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<sup>1</sup> *In the Matter of Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Notice of Proposed Rulemaking (rel. May 27, 2011); 76 Fed. Reg. 32116 (June 3, 2011); Order, DA 11-1157 (rel. June 30, 2011); Order, DA 11-1205 (rel. July 18, 2011).

MVPD for the loudness of such advertising unfairly imposes a significant additional burden on the MVPD to fix a problem that it did not create.

The equipment necessary to comply with the CALM Act is only the equipment that is necessary to insert commercial advertising in accord with the requirements of ATSC A/85. Equipment that would enable MVPDs to monitor and correct received loud commercials in real time is neither required by the CALM Act nor practical.

ATSC A/85's new Annex K requirements for measuring commercial advertising loudness and using that measurement for commercial advertising insertion on non AC-3 audio systems are appropriate. The requirements also retain the limited liability for MVPDs for commercial advertising loudness to commercial advertising that they insert.

Finally, if the Commission proceeds with its expanded view of MVPD liability under the CALM Act it should (1) permit compliance through contractual terms requiring upstream programmers to comply with ATSC A/85 in measuring and inserting commercial content; (2) permit waivers until compliant equipment is commercially available and can be installed, used, and maintained in a commercially reasonable manner; (3) permit waivers for financial hardship in obtaining equipment necessary to comply; (4) hold off in designing a complaint process or creating specific fines or penalties for CALM Act violations; and (5) not adopt successor documents to ATSC A/85 without an opportunity for public notice and comment.

**II. UNDER THE CALM ACT AND ATSC A/85 MVPDS SHOULD ONLY BE LIABLE FOR THE LOUDNESS OF COMMERCIAL ADVERTISING THAT THEY INSERT INTO DIGITAL PROGRAMMING.**

Contrary to the Commission's proposal that MVPDs be liable for the relative loudness of *all* commercials that they *transmit*, MVPD liability for loud commercials should be limited to commercials that MVPDs *insert* into programming. CenturyLink agrees with other commenters that the Commission's authority under the CALM Act is limited.<sup>2</sup> The CALM Act instructs the Commission to adopt and make mandatory ATSC Recommended Practice A/85: Techniques for Establishing and Maintaining Audio Loudness for Digital Television (ATSC A/85), but only to the extent that the recommended practice addresses the transmission of commercial advertisements by a television broadcast station, cable operator, or other MVPD.<sup>3</sup>

In turn, ATSC A/85, among other recommendations regarding audio loudness for digital television, both mandates certain requirements and offers techniques for managing loudness of commercial advertising relative to surrounding programming. Annex J of ATSC A/85 specifically instructs (1) how to measure the loudness of commercial advertising (*see* J.4) and (2) how to use that measurement to *insert* the commercial advertising loudness correctly into the AC-3 audio stream by matching the measured loudness of the commercial advertising to the dialnorm setting of the AC-3 audio stream (*see* J.5). At the same time, in Section 8 and Annex H, the ATSC A/85 also offers techniques for MVPDs and others to manage loudness variations

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<sup>2</sup> *See, e.g.*, AT&T Comments at 3-6; ACA Comments at 5, 8; NAB Comments at 3-6; NCTA Comments at 3-7; Verizon Comments at 7-14.

<sup>3</sup> Sec. 2(a) of The Commercial Advertisement Loudness Mitigation (CALM) Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010).

between programming and interstitial content but does not mandate any technique.<sup>4</sup> It offers what could be done, but not even what should be done.<sup>5</sup> Thus, in Annex J ATSC A/85 *mandates* how to measure loudness of commercial advertising and how to use that measurement when inserting commercial programming.<sup>6</sup> But in Section 8 and Annex H ATSC A/85 only *suggests* how MVPDs could use that measurement to manage the loudness of commercial advertising that they receive from upstream programmers or how MVPDs could otherwise manage the loudness of such programming. As others have recognized, ATSC A/85 only requires MVPDs to be responsible for loudness of commercials when MVPDs insert the commercials and not when they receive them from upstream programmers and pass them through with the surrounding programming.<sup>7</sup>

Given the limited authority provided to the Commission under the CALM Act, and the absence of compliance obligations in the ATSC A/85 for MVPDs in managing loudness of commercials other than when MVPDs are inserting those commercials, the Commission should not extend MVPDs' liability for commercial loudness beyond the commercials they insert. For the Commission to interpret that the CALM Act requires that MVPDs be liable for the loudness of *all* commercials they *transmit*, is to go well beyond what the ATSC/85 requires, and in turn

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<sup>4</sup> See Advanced Television Systems Committee, Inc. ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television, Document A/85:2011, 25 July 2011, Section 8.

<sup>5</sup> In fact, the absence of the use of ATSC A/85's defined "compliance terms" of "vital" or "should" in Section 8 and Annex H suggests that ATSC is not expressing a preferred course of action, but only offering possible solutions for effective management of commercial loudness relative to surrounding programming. See ATSC A/85 at Sections 3.1, 8.1, 8.3 & H.8. In defining the compliance terms for purposes of ATSC A/85, it is explained that "vital" "indicates a course of action to be followed strictly (no deviation is permitted)" and "should" "indicates that a certain course of action is preferred but not necessarily required." ATSC A/85 at Section 3.1.

<sup>6</sup> In both J.4 and J.5 ATSC A/85 uses the compliance term "vital" in describing the requirement.

<sup>7</sup> See AT&T Comments at 4-5; Verizon Comments at 7-14; ACA Comments at 15.

well beyond the Commission's limited authority to incorporate ATSC A/85 under the CALM Act.

Additionally, CenturyLink agrees with other commenters for the reasons that they have already expressed that (1) MVPDs should not be liable for commercials they transmit that are passed through by broadcast stations as broadcast stations are directly responsible under the CALM Act and A/85 for the commercials that they insert;<sup>8</sup> (2) the CALM Act only addresses commercial advertisements, and thus does not reach other interstitial or short-form programming such as political endorsements and public service announcements, nor does it reach leased access or PEG programming;<sup>9</sup> and (3) because ATSC A/85 only applies to digital programming, the CALM Act does not apply to analog programming.<sup>10</sup> In turn, MVPD liability for loud commercial advertisements under the CALM Act only applies to commercial advertising that the MVPD inserts into digital programming.

Additionally, making MVPDs liable for loud commercial advertising that they only pass through unfairly places responsibility and potentially punishment on a party who did not create the problem. This burden is especially onerous where the vast majority of commercial advertising that an MVPD transmits on its video systems is received from upstream programmers along with the surrounding programming which the MVPD passes through unaltered to its video customers.<sup>11</sup> Placing liability on MVPDs for the loudness of received

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<sup>8</sup> See AT&T Comments at 5; DIRECTV Comments at 15-16; ACA Comments at 28; NCTA Comments at 12-13.

<sup>9</sup> See AT&T Comments at 6; Hubbard Broadcasting Comments at 4-5.

<sup>10</sup> See ACA Comments at 9-10; NCTA Comments at 18.

<sup>11</sup> Currently CenturyLink does not insert any commercial advertising into the programming it transmits, but anticipates that it will do so in the future. Even then, however, the commercial

commercial advertising unfairly imposes a significant additional burden on MVPDs who insert very few commercials to fix a problem that they did not cause.

### **III. COMPLIANT EQUIPMENT IS THE EQUIPMENT NECESSARY TO INSERT COMMERCIAL ADVERTISING IN ACCORD WITH THE REQUIREMENTS OF ATSC A/85.**

Section 2(c) of the CALM Act states that “[a]ny 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.”<sup>12</sup> For broadcast television operators, cable operators or other MVPDs, this provision will be satisfied when they install, use, and maintain the equipment necessary to insert commercials in accord with the requirements of ATSC A/85. With respect to transmission of commercial advertising – the limited scope of the CALM Act – ATSC A/85 only *mandates* use of the proper loudness measurement during commercial advertising *insertion*. In turn, only the equipment necessary to insert commercial advertising in accord with this requirement is necessary to effect compliance with the CALM Act.

Furthermore, CenturyLink agrees with other commenters that it is impractical at this time to require MVPDs to obtain equipment that would enable them to monitor and fix in real-time any commercials that were overly loud relative to their surrounding programming. Unlike broadcasters, who might only need the equipment for the one or few channels of programming that each provides, MVPDs would need such equipment for each channel they provide which

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advertising that CenturyLink will insert will be very little compared to the commercial advertising that CenturyLink passes through on its video systems.

<sup>12</sup> Section 2(c), Calm Act, 124 Stat. at 3294-95.

could easily be a few hundred channels. Additionally, as others have noted, at this time, no such equipment exists, making it impossible for any MVPD to comply with such a requirement.<sup>13</sup>

Still further, assuming such equipment would exist in the future, it is likely to be expensive, and commercially unreasonable for some time to come for MVPDs to install, use and maintain such equipment for hundreds of channels.

Still further, the fact that the CALM Act and ATSC A/85 do not require MVPDs to monitor and correct loud commercial advertising that they receive from upstream programmers and pass through does not mean that MVPDs do not take such steps anyway. Currently, CenturyLink monitors its channels to make sure that the video and audio programming is being properly transmitted. If an issue with audio volume is noticed, the issue is investigated and either CenturyLink is able to resolve the situation or it contacts the upstream programmer and alerts them to the problem and the need for them to fix it. Further, CenturyLink has received few complaints from customers about audio problems and generally those complaints have not been about loud commercial advertising but that the programming volume (including commercial advertising volume) was too low. Given this, it makes little sense to require MVPDs such as CenturyLink to purchase additional expensive equipment to be able to monitor and fix in real-time any loud commercial advertising that they receive from upstream programmers.

**IV. ANNEX K'S REQUIREMENTS FOR ADDRESSING COMMERCIAL ADVERTISING LOUDNESS WITH NON-AC-3 AUDIO SYSTEMS ARE APPROPRIATE.**

With respect to Annex K of A/85, just adopted by ATSC on July 25, 2011, CenturyLink views that it operates in the same manner as Annex J, but it provides the requirements for

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<sup>13</sup> See ACA Comments at 21-22; DIRECTV Comments at 6-8, 10; NCTA Comments at 8; see also AT&T Comments at 10-11 (noting that appropriate equipment and software that AT&T could use for its audio systems to enable real-time audio correction are still under development and that it likely will be at least two years before feasible MVPD deployment).

measuring commercial advertising loudness when not using AC-3 audio encoders and decoders. CenturyLink views that the measurement for commercial advertising loudness proposed in K.4 is reasonable and that the methodology of matching that measured commercial advertising loudness to the delivery channel's loudness target value in K.5 is appropriate. Like Annex J, Annex K only mandates the proper measurement for loudness of commercial advertising and how to use that measurement when inserting commercial advertising, but it does so for non AC-3 audio systems. Thus, the new annex does not alter CenturyLink's view that an MVPD's liability for commercial loudness under the CALM Act and ATSC A/85 is only when the MVPD is inserting the commercial advertising.

**V. CENTURYLINK AGREES WITH COMMENTERS ON SEVERAL OTHER ISSUES.**

To the extent that the Commission proceeds with its view that MVPDs should be liable for all commercials that they transmit, CenturyLink agrees with others that the Commission should (1) permit compliance through contractual terms requiring upstream programmers to comply with ATSC A/85 in measuring and inserting commercial content;<sup>14</sup> (2) permit waivers until compliant equipment is commercially available and can be installed, used, and maintained in a commercially reasonable manner;<sup>15</sup> and (3) permit waivers for financial hardship in obtaining equipment necessary to comply.<sup>16</sup> CenturyLink also agrees with Verizon that it is premature to design a new complaint process just for CALM Act complaints and to create specific fines or penalties for CALM Act violations.<sup>17</sup> Neither is required by the CALM Act.

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<sup>14</sup> See AT&T Comments at 11-14; ACA Comments at 27.

<sup>15</sup> See AT&T Comments at 11.

<sup>16</sup> See OPASTCO, NTCA, WTA Comments at 2-5.

<sup>17</sup> Verizon Comments at 16.

Finally, CenturyLink agrees with several of the commenters that successor documents to ATSC A/85 should not be adopted by the Commission without an opportunity for public notice and comment.<sup>18</sup>

Respectfully submitted,

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<sup>18</sup> See AT&T Comments at 14-15; DIRECTV Comments at 16-17; NAB Comments at 14-15.