

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Closed Captioning of Internet)
Protocol-Delivered Video Programming:)
Implementation of the Twenty-First Century)
Communications and Video Accessibility)
Act of 2010)

MB Docket No. 11-154

COMMENTS



Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
4103 W Street, N.W., Suite 202
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
James N. Moskowitz
Cinnamon Mueller
1333 New Hampshire Ave, N.W.
2nd Floor
Washington, DC 20036
(202) 872-6881

Attorneys for the American Cable
Association

October 18, 2011

I. INTRODUCTION AND OVERVIEW

The American Cable Association (“ACA”) offers the following comments in response to the NPRM in above-captioned proceeding.¹ ACA recognizes the Commission’s obligation to ensure the provision of closed captions with video programming delivered using Internet Protocol (“IP”) that was once published or exhibited on television with captions is implemented in a manner most helpful to consumers and shares its goal in achieving this outcome without creating undue economic burdens for distributors, providers, and owners of online video programming.

Specifically, ACA has an interest in ensuring that the Commission’s implementation of the closed captioning provisions of the Twenty-First Century Video Accessibility Act (“CVAA”)² does not impose conflicting and burdensome obligations on its members who offer video, broadband and voice services in smaller markets and rural areas. ACA has approximately 900 members in 49 states that provide multichannel video programming distributor (“MVPD”) services to more than 7.6 million subscribers. Most ACA members also offer Broadband Internet access services, and voice services, either over Internet Protocol (“VoIP”) or circuit switch technology. Its members range from family-run businesses serving a single town to multiple system operators with small systems in small markets. More than half of ACA’s members serve fewer than 2,000 video subscribers.

ACA members provide video services using a variety of technologies. Some ACA member systems provide all-digital service, including Internet Protocol (“IP”) video service, but most offer hybrid digital/analog service, and some offer analog-only service. A few ACA member companies provide customers with online video programming distribution options in addition to their traditional

¹ *In the Matter of the Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, FCC 11-138 (rel. Sept. 19, 2011) (“NPRM”).

² Pub. L. 111-260, 124 Stat. 2751, § 202(b) (2010). See also Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

MVPD offerings. In the future, ACA anticipates that more of its members' systems will convert from analog to digital and from digital to IP-delivered video services. Importantly, all of ACA's members are currently providing closed captioning, consistent with their obligations under existing rules that have been in place for more than a decade.

To achieve the Commission's goal of creating a balanced implementation program for IP-delivered captioned programming, it is critical that the Commission clarify that the new closed captioning requirements apply to online video programming providers and distributors, and not to MVPDs using IP to deliver MVPD subscription service within their MVPD footprint. As the Video Programming Accessibility Advisory Committee ("VPAAC"), established by the CVAA to advise the Commission on implementation of the new accessibility rules, has recognized, an online distributor may be a file-streamed or download service, a website, or a programming distributor who reformats the content as appropriate for delivery to the end user device over the Internet.³ MVPDs, in contrast, provide service by transmitting signals directly to subscribers over managed video programming distribution networks that they own.⁴

³ See *First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010, Closed Captioning of Video Programming Delivered Using Internet Protocol*, (July 13, 2011) at 10-12, available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf (last visited Oct. 18, 2011) ("VPAAC") (discussing online video programming providers).

⁴ See 47 U.S.C. § 522(13) (defining "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming"); see also 47 U.S.C. § 522(5) (defining "cable operator" as "any person . . . (A) who provides cable service over a cable system and directly through on or more affiliates owns a significant interest in such system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system); 47 U.S.C. § 522(7) (defining "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designated to provide cable service which includes video programming and which is provided to multiple subscribers within a community," provided using public rights of way; 47 U.S.C. § 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.").

In the *Comcast-NBCU Order*, the Commission recognized the critical distinction between video programming that can be distributed online by MVPDs over their managed MVPD networks as part of their MVPD offerings, and programming distributed online by distributors over the Internet or using a third party's transmission path.⁵ Similarly, to avoid confusion and overlap with existing closed captioning obligations, the definition of "video programming distributors" subject to the new captioning obligation, should not only specify that the entity distribute the covered programming via IP and online, but also clarify that the new captioning rules apply only to "online video distributors" as defined under the *Comcast-NBCU Order*.

The result of adopting ACA's interpretation of the statutory mandate will be that only MVPDs that *also* distribute captioned video programming online in an offering separate and apart from the MVPD services they offer within their MVPD footprint—that is solely "via the Internet"—will be subject to the new requirements, and only for the programming made available over the Internet. MVPDs currently covered by existing rules that use IP, but do not also distribute the programming over the Internet outside of their MVPD subscription service, will remain subject only to the existing closed captioning rules, thus avoiding unnecessary confusion and compliance burdens.

MVPDs have a long and successful history of complying with the Commission's current rules, including where their MVPD service is delivered using IP. This has enabled the delivery of closed captioning to consumers who need and have grown to expect these services. The Commission must be careful to avoid disrupting the current successful captioning framework by creating duplicative and potentially conflicting obligations on MVPDs using IP to deliver their services. To accomplish this, the Commission must first specify that traditional MVPDs, *in their capacity as MVPDs*, remain subject solely to the Commission's existing closed captioning obligations and its complaint processes. Next,

⁵ See *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶¶ 4, 60-90 (2011) (describing "Online Video Distributors" as distinct from MVPDs) ("*Comcast-NBCU Order*").

in crafting its new closed captioning rules for video programming subsequently distributed using IP over the Internet, the Commission must take care to steer clear of imposing new closed captioning monitoring mandates on MVPDs, whether intentionally or unintentionally. This will better achieve statutory goals while avoiding the creation of conflicts with the current rules that could cause serious and lasting burdens on ACA's members.

II. ACA MEMBERS PASS THROUGH CLOSED CAPTIONING IN THEIR PROVISION OF MVPD SERVICES AS REQUIRED BY EXISTING CLOSED CAPTIONING RULES REGARDLESS OF DISTRIBUTION TECHNOLOGY

It is important that the Commission recognize that MVPDs of all sizes currently provide their services with required closed captions, including MVPDs that utilize IP distribution technologies, pursuant to existing closed captioning rules that have been in place for more than a decade. These carefully balanced rules have aided video programming consumers without needlessly burdening distributors.

The Commission's current closed captioning rules, first adopted in 1997, require all video programming distributors, "regardless of distribution technology," to pass through to its subscribers all closed captioning data that is made available with programming.⁶ These rules specifically include MVPDs within the definition of "video programming distributors" and these operators have complied with the rules since their inception.⁷ Consequently, the Commission already has rules that have been successful in establishing the closed captioning obligations applicable to MVPDs, including

⁶ *In the Matter of Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd. 3272, ¶ 211 (1997) ("1997 Order"); see also 47 C.F.R. § 79.1(c) ("All video programming distributors shall deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of part 15 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.").

⁷ 47 C.F.R. § 79.1(a)(2) (defining video programming distributors as "any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in Sec. 76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.").

those that employ IP technologies to distribute their signals. These rules have achieved the desired result of making closed captioning widely available to consumers.

The current closed captioning rules operate by requiring MVPDs to pass all closed captioning data received from programming sources through to their subscribers. The MVPDs play no role in creating the closed captioning, except where they produce original programming (subject to certain exemptions).⁸ Rather, MVPDs are required to deliver captions intact and in a manner that can be displayed by captioning decoders.⁹ This includes the obligation to ensure that operator-supplied customer premises equipment, such as set-top boxes, are capable of passing through captions to subscribers.¹⁰ The Commission's current closed captioning rules also contain a mechanism allowing consumers to bring complaints against an MVPD where closed captioning is not available as required.¹¹

Moreover, MVPDs must provide both the Commission and their subscribers with contact information (i) for notifying the MVPD with immediate closed captioning concerns, and (ii) for the

⁸ See 47 C.F.R. § 79.1(d); see also *1997 Order*, ¶ 212 (“We also will require video programming distributors to be responsible for any steps needed to monitor and maintain their equipment and signal transmissions to ensure that the captioning included with the video programming reaches consumers. Programming distributors will be responsible for any corrective measures necessary to ensure that the captioning is consistently included with the video programming delivered to viewers. . . . They may rely on certifications from video programming suppliers that the programming contains captions and will not need to actually review every program before distribution to consumers.”).

⁹ 47 C.F.R. § 79.1(c).

¹⁰ *In the Matter of Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receivers*, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, ¶ 15 (2008) (“*2008 Order*”) (“Finally, we remind MVPDs that provide customer premises equipment (CPE), such as set-top boxes, to their subscribers, that they are responsible for ensuring that this equipment transmits all available captions to the television set, for both analog and digital formatted programs.”).

¹¹ See 47 C.F.R. § 79.1(g).

receipt and handling of consumer complaints about closed captioning issues.¹² The Commission maintains a list of every MVPD and their service areas on its website for this purpose.¹³

III. THE COMMISSION MUST CLEARLY DISTINGUISH THE NEW CAPTIONING OBLIGATIONS OF ONLINE VIDEO PROGRAMMING PROVIDERS AND DISTRIBUTORS FROM THE CURRENT CAPTIONING OBLIGATIONS OF MVPDS USING IP TO DELIVER VIDEO PROGRAMMING

ACA recognizes the Commission's charge of requiring the provision of closed captions with IP-delivered video programming in the manner most helpful to consumers, and share their goal in ensuring that its regulations do not create undue economic burdens for distributors, providers, and owners of online video programming.¹⁴ Such a careful balancing of interests will assure a successful implementation program for the CVAA as envisioned by Congress.¹⁵ Yet, because there is a potential for substantial overlap and conflict with existing closed captioning requirements for MVPDs, the Commission must first clarify the relationship between the new IP closed captioning rules and existing closed captioning rules applicable to all MVPDs. Specifically, the Commission must specify that traditional MVPDs, *in their capacity as MVPDs*, remain subject solely to existing closed captioning obligations and dispute resolution mechanisms. Next, in implementing the new statutory mandate, the Commission must hew closely to the statutory language and impose no more than a simple "rendering" or "pass-through" obligation on online video programming distributors ("VPDs").

¹² 2008 Order, ¶¶ 30-34.

¹³ The Commission interface for this list can be found at, Search VPDs- FCC, <http://esupport.fcc.gov/vpd-search/search.action#scrollThere> (last visited Oct. 18, 2011).

¹⁴ NPRM ¶ 1.

¹⁵ See *Id.* ¶ 9 ("Through the CVAA, Congress sought to 'update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.'). See also S. Rep. No. 111-386, 111th Cong., 2d Sess., at 13-14 ("Senate Report") (directing the Commission to impose appropriate compliance deadlines, refrain from treating *de minimis* failures to comply as violations, and imposing captioning requirements only prospectively and only to programming that is aired on television with captions and also delivered using IP); H.R. Rep. No. 111-563, 111th Cong., 2d Sess., at 19, 30 ("House Report") (refraining from imposing captioning requirements on web-only programming).

a. The New IP-Delivered Closed Captioning Rules Should Apply Solely to Online Video Distributors as Defined in the Comcast-NBCU Order.

The CVAA directs the Commission to promulgate regulations to require the closed captioning of video programming once published or exhibited on television and delivered using Internet protocol.¹⁶ It charges the Commission to define the terms “video programming provider” (“VPP”) and “video programming distributor” (“VPD”) to include “an entity that makes available directly to the end-user video programming through a distribution method that uses Internet protocol.”¹⁷ As an initial matter, the NPRM proposes to treat VPPs and VPDs as having the same meaning for purposes of CVAA Section 202(b).¹⁸ Next, the NPRM proposes to define both a VPP and a VPD as “any entity that makes available directly to the end user video programming through a distribution method that uses IP, . . . in recognition of the broad reach Congress intended for Section 202(b).”¹⁹

ACA respectfully submits that the Commission’s definition of VPD is too broad. All MVPDs are currently obligated to pass through their multichannel video programming signals, including all required closed captioning data, as received from the program network or broadcaster.²⁰ This includes the obligation to ensure that set-top boxes transmit all available captions to TVs (analog and

¹⁶ 47 U.S.C. § 613(b) & (c).

¹⁷ 47 U.S.C. § 613(c)(2)(D)(iii) (the regulations prescribed by the Commission “shall clarify that, for purposes of implementation, of this section, the terms ‘video programming distributors’ and ‘video programming providers’ include an entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol”).

¹⁸ NPRM § 15. The NPRM also proposes not to distinguish the definition of VPP from that of VPD, but rather to define them as including an entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol. *Id.* Accordingly, for ease of reference, ACA refers to VPPs and VPDs as “VPDs” herein. By so doing, ACA takes no position at the current time on the Commission’s assessment that there is no practical benefit to be gained from distinguishing the two for purposes of Section 202(b) of the CVAA.

¹⁹ NPRM § 15.

²⁰ 47 C.F.R. §§ 79.1(a)(2) & (b).

digital).²¹ No distinction has been recognized under the current rules for MVPDs using IP to deliver their video programming to subscribers, and accordingly closed captioning requirements already apply to these MVPDs. ACA therefore suggests that the Commission include in its definition of VPDs subject to the new captioning obligation the qualification that the entity make available directly to the end user covered video programming using IP distribution *online*, that is, *on the Internet*.²²

This distinction is consistent not only with the statutory language and legislative history of the CVAA, but also with the report of the VPAAC.

One of the VPAAC's charges was to develop and submit to the Commission a report concerning *online closed captioning* to help inform it as it implements the captioning requirements of the CVAA in future rulemaking proceedings, including the revision of its regulations to require the provision of closed captioning on certain video programming delivered *via the Internet*.²³

Additionally, ACA notes that in the *Comcast-NBCU Order*, the Commission recognized that video programming can be distributed *online* by either MVPDs in their capacity as MVPDs, or by non-MVPDs (such as Hulu, Netflix, GoogleTV and iTunes).²⁴ In defining the online video distributors ("OVDs") able to benefit from the license conditions imposed, the Commission took pains to distinguish "MVPDs inside their MVPD footprint or an MVPD to the extent it is offering online video

²¹ 2008 Order, ¶ 11.

²² Additional clarification may be required to avoid imposing the IP captioning requirements on broadband Internet access service providers ("ISPs") who provide *access to* rather than *distribute*, the content, services and applications, such as streaming video, available over the Internet. See *In the Matter of Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶ 46 (2010) ("Broadband Internet access service" encompasses services that "provide the capability to transmit data and receive data from all or substantially all Internet endpoints."); *id.* ¶ 141 ("Unlike cable television operators, broadband providers typically are best described not as 'speakers,' but rather as conduits for speech. The broadband Internet access service at issue here does not involve the exercise of editorial discretion that is comparable to cable companies' choice of which stations or programs to include in their service."); see also 47 C.F.R. § 8.11(a).

²³ VPAAC, at 3 (emphasis supplied); *id.* at 10-12 (discussing "Captioning for Internet-Delivered TV" including, for example, video-streaming of long-form content, Adobe Flash support of captions and a Microsoft application framework for running browser plug-ins or other "rich Internet applications").

²⁴ See *supra* note 5.

programming as a component of an MVPD subscription service to customers whose homes are inside its MVPD footprint” from OVDs providing video programming over the Internet or using IP “based on a transmission path provided by” an entity other than the OVD.”²⁵ Under this view, MVPDs that make available video programming over the Internet as part of their MVPD subscription service are not considered “OVDs.”

ACA suggests that, to further avoid confusion and overlap with existing closed captioning obligations, the definition of “video programming distributors” subject to the new captioning obligation should not only specify that the entity distribute the covered programming via IP and online, but also clarify that the new captioning rules apply only to “online video distributors” as defined under the *Comcast-NBCU Order*.

The result of adopting this interpretation of the statutory mandate will be that only MVPDs that *also* distribute captioned video programming online in an offering separate and apart from their MVPD services offered within their MVPD footprint—that is solely “via the Internet”—will be subject to the new requirements, and only for the programming made available over the Internet. MVPDs currently covered by existing rules that use IP, but do not also distribute the programming over the Internet outside of their MVPD subscription service will remain subject only to the existing closed captioning rules, thus avoiding unnecessary confusion and compliance burdens.

Statutory Language. Although the statutory language of CVAA Section 202(b) refers variously to “closed captioning of video programming once published or exhibited on television;” “video programming using Internet Protocol;” and “a distribution method that uses Internet protocol,”

²⁵ *Comcast-NBCU Order*, Appendix A, “Conditions”(defining “OVD” as “any entity that provides Video Programming by means of the (i) the Internet or other IP-based transmission path provided by a Person other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent that it is offering Online Video Programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint;” and defining “On-line Video Programming” as covered programming displayed “by means of the (i) Internet or (ii) other IP-based transmission path provided by a Person other than the OVD.”).

Section 202(b) also states that it applies solely to video programming “once published or exhibited on television with captions”²⁶ Two conclusions should be drawn from this choice of wording: (i) “on television” in the context of the CVAA must refer to video programming first “aired” or shown by broadcasters, cable programming networks and MVPDs today, regardless of the nature of the reception device on which it is viewed; and (ii) that Congress did not intend the new closed captioning requirements to be applicable to video programming distributed via IP by MVPDs over existing systems, but only to subsequent publication or exhibition of covered video programming using IP over the Internet by OVDs as defined in the *Comcast-NBCU Order*. This threshold interpretation is critical. If the new rules do not take into account that MVPDs using IP delivery are already covered by closed captioning obligations that have deadlines and obligations different than those contained in the CVAA, then Commission risks crating conflicting commands on MVPDs that will lead to significant confusion and may well prove unworkable.

Accordingly, ACA submits that the Commission should interpret Congress’s use of “Internet protocol” as shorthand for “the Internet.” This interpretation must be used for the following reasons. First, the Commission must presume that Congress was aware that MVPDs are already required to ensure that first publication or exhibition of video programming on television include closed captioning because that obligation is already embodied in Section 713(a) and (b) of the Act.²⁷ It is an ordinary canon of legislative interpretation that statutes are read to avoid conflicts with existing law.²⁸ The existing requirements in Section 713 and the Commission’s rules already extend to MVPDs regardless of the transmission technology (analog, digital, IP) they employ to distribute covered video

²⁶ 47 U.S.C. § 613 (c)(1), (2)(A), (2)(D)(iii) (emphasis supplied).

²⁷ 47 U.S.C. § 613 (a) & (b). It is also a general rule of interpretation to assume that the legislature in the enactment of a statute was aware of established rules of law applicable to the subject matter of the statute. See, e.g., *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

²⁸ Ordinarily, statutes should be construed, if possible, by reasonable interpretation so as to give full force and effect to each of them. *In Re Colonial Realty Co.*, 980 F.3d 125 (2nd Cir. 1992).

programming to their subscribers. There is nothing in the legislative history that indicates that Congress had any intent to amend these existing requirements. Rather, in the CVAA Congress was simply filling in a gap that was not addressed in the prior law. The Commission must respect the very limited scope of the Congressional mandate here and promulgate rules that are only as broad as necessary to fill the gap in the coverage of the existing law.

A more limited interpretation of the scope of the statutory terms “delivered using Internet protocol” is further supported by CVAA Section 202(c)(2)(D)(v), which charges the Commission with establishing “a mechanism to make available to video programming providers and distributors information on video programming subject to the CVAA on an ongoing basis.”²⁹ Applying such a mechanism to MVPDs using IP-distribution for their video services to their MVPD subscribers is unnecessary because MVPDs are *already* obligated to ensure that the video programming they distribute contain closed captions as required by the Act and the Commission’s Part 79 rules.³⁰ The only “mechanism to make available to video programming providers and distributors information on video programming subject to the CVAA” that Congress could have found was necessary to create is one that applies to video programming distributed online that is not currently subject to the Part 79 Rules.

Legislative Intent. Second, the legislative history supports this statutory interpretation. Both the Senate and House reports accompanying the CVAA demonstrate Congress’s intent to reach programming that is “published or exhibited on television with closed captions after the effective date of the regulations *and also* distributed using Internet protocol.”³¹ Inclusion of the words “and also” suggests that the new requirements were intended to apply in addition to traditional distribution of the

²⁹ NRPM ¶ 34; 47 U.S.C. § 613(c)(2)(D)(v).

³⁰ 47 C.F.R. §§ 79.1(a)(2) & (b).

³¹ Senate Report at 13; House Report at 30.

programming and reach the new means of video programming distribution over the Internet by OVDs as defined in the *Comcast-NBCU Order*, rather than applying to existing distribution systems that happen to use IP to deliver their traditional MVPD services to their MVPD subscribers. The House Report notes that “an increasing amount of video programming is being delivered using Internet protocol only on the Internet and without captioning,” but declined “to apply the captioning requirement to web-only programming.”³²

Congress understood that programming intended for publication or exhibition “on television” – that is, distributed today by existing video programming providers and distributors (broadcast stations, MVPDs, etc.) as defined in the Commission’s rules -- is already subject to closed captioning obligations. The additional captioning requirements of the CVAA could only have been intended to fill the gap existing where such programming is *also* distributed using IP “on the Internet” *and* the distributing entity is an OVD. Only the final type of video programming mentioned in the House Report – “web-only programming” – currently remains exempt from captioning requirements. Section 202(b) amends existing closed captioning mandates, and must be construed to fit within, and to be put into effect in conformity rather than conflict, with the existing captioning system.³³

Similarly, the Senate Report specifically recognizes that “online video distributors that are not multichannel video programming distributors may not be able to readily ascertain whether programs were distributed on television and thus subject to the closed captioning requirement,” and charged the Commission with recognizing good faith efforts to identify video programming subject to the Act.³⁴ As noted above, MVPDs are already charged with passing through video programming requiring captioning when it is first published or exhibited over their systems and the Commission

³² House Report at 30.

³³ *U.S. v. Gordon*, 961 F.2d 426 (3rd Cir.,1992); *U.S. v. Ariz.*, 295 U.S. 174 (1935).

³⁴ Senate Report at 14.

must assume that Congress was aware of this requirement.³⁵ Accordingly, the need to create a new mechanism to inform them of programming subject to captioning makes sense only if the CVAA captioning rules are applied solely to Internet distribution that is separate and apart from the original MVPD distribution using IP, consistent with the definition of an OVD in the *Comcast-NBCU Order*.

Finally, ACA notes that Congress could not have intended the new closed captioning rules to apply to MVPDs that today use IP distribution to serve their subscribers who reside within their MVPD footprint, because doing so would effectively relieve them of any closed captioning requirements for their video services until the new rules became effective. Congress could not possibly have intended such an anomalous result. An MVPD cannot be simultaneously obligated and not obligated to pass-through captioning during the period of time between release of the Order and before the effective date of the rules adopted as a result of this Order. It is therefore incumbent upon the Commission to use its judgment and discretion to interpret its statutory charge under the CVAA in a manner that avoids this outcome. For all of these reasons, the Commission must amend its proposed definition of VPD to specify that the new captioning obligations apply to IP-distribution of covered video programming on the Internet by entities who are OVDs as defined in the *Comcast-NBCU Order*.

b. The Commission Should Impose Solely Pass-Through Obligations on VPDs Distributing Video Programming Online.

Section 202(b) of the CVAA requires the Commission to revise its regulations to require closed captioning of IP-delivered covered video programming after the effective date of the new regulations. Consistent with the statute, the NPRM clearly distinguishes the responsibilities of video programming providers (“VPPs”) or distributors (“VPDs”) and video programming owners (“VPOs”), and proposes to place the primary responsibility on the programming owners to send program files to

³⁵ *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

VPDs with all required captions, while limiting programming distributor obligations to enabling “the rendering or pass-through” of all required captions to the end user.³⁶ That is, the obligation is limited to the following, as explained in the NPRM: “When a VPD/VPP receives a program file with required captions, it would be required to include those captions at the time it makes the program file available to end users.”³⁷ ACA supports this formulation of the responsibility of the MVPD as consistent with the language of the CVAA, legislative intent and the practical realities of the MVPD business, particularly for smaller operators.

For the same reasons, ACA strongly urges that the Commission refrain from imposing any of the additional potential responsibilities on MVPDs discussed in the NPRM.³⁸ All of the additional obligations discussed in the NPRM go well beyond the statutory mandate of enabling “the rendering or pass through” of all required captions to the end user and at the very least would impose significant affirmative monitoring responsibilities on VPDs. There is no indication in either the statutory language or legislative history of the CVAA that Congress intended the Commission’s

³⁶ NPRM ¶ 16.

³⁷ *Id.*

³⁸ *Id.* In addition to the proposed rule requiring “rendering or pass through” of captions, the NPRM seeks comment on a variety of other potential “appropriate responsibilities” of VPDs: (a) whether to require VPDs to provide a mechanism like a button or icon that would allow consumers to easily access captions; (b) the obligations of third parties licensees of VPOs regarding Internet distribution of captions; (c) the extent to which VPDs should be held accountable for a VPO’s failure to provide captions, particularly where VPDs should reasonably have known a program they received was required to include captions but the VPO failed to provide them, including: (i) what obligations VPDs should have to obtain such captions before providing the programming to the end user; (ii) whether the VPD should have an obligation to determine whether the programming is subject to captioning before providing it to the end user; (iii) what liability should the VPD face if it passes through the programming without the required captions; (iv) whether, in such a situation, both the VPO and VPD should be held responsible for the violation; and (d) the general responsibilities that VPDs should have to ensure that video programming has the required captions before they pass it though to viewers, including: (i) the requirement that VPDs include on their websites program listings that indicate whether a particular program is captioned; (ii) the obligations of providers in the middle of the distribution chain in cases where multiple VPDs are involved in making video programming available to end users, for example, would such middlemen be required to enable the rendering or pass through of all required captions. *Id.*

implementation of the IP closed captioning requirement to include such active monitoring responsibilities.

IV. THE COMMISSION MUST RE-THINK ITS PROPOSED MECHANISM FOR MAKING AVAILABLE TO VPDS INFORMATION ON VIDEO PROGRAMMING SUBJECT TO THE IP CAPTIONING REQUIREMENTS

The NPRM seeks comment on how to effectuate the CVAA mandate that the FCC establish a “mechanism” to make information about video programming that is subject to the rules available to VPDS on an ongoing basis.³⁹ As the NPRM notes, the purpose of the mechanism is to ensure that VPDS have a way to find out whether the video programming they intend to make available via IP has been shown on television with captions after the effective date of the new rules.⁴⁰

The main proposal for this mechanism is to require that VPOs providing covered IP video to VPDS must provide each program (i) either with captions, or (ii) with a dated certification stating captions are not required for a reason stated therein.⁴¹ The NPRM also proposes to require VPDS to retain all such VPO certifications for as long as they make the certified programming available to end users “through a distribution method that uses IP and at least one calendar year thereafter.”⁴² Moreover, the NPRM proposes to require (i) that VPOs keep all certifications current and provide VPDS with revised information; and to (ii) not subject VPDS to enforcement actions if they rely in good faith on an erroneous VPO certification that they did not know or have reason to know was flawed.⁴³ In the alternative, the NPRM seeks comment on whether to rely instead on independent third parties

³⁹ *Id.* ¶ 34.

⁴⁰ *Id.*

⁴¹ The NPRM suggests that a program would not need captions if the program is not full-length, is otherwise exempt, or has not been published or exhibited on TV with captions after the rules’ effective date (though as to the latter it is noted that while a program may not be subject to captioning requirements as of the effective date of the new rules, it might later become subject if the program is re-run on television with captions after the effective date). *Id.* ¶ 35.

⁴² *Id.* ¶ 36.

⁴³ *Id.*

to provide databases of information on all video programming shown on TV with captions after the rules' effective date.⁴⁴

ACA notes that current closed captioning regulations applicable to MVPDs entitle MVPDs to “rely upon certifications of compliance *from the various networks they carry*.”⁴⁵ This permits MVPDs to rely on certifications by programming suppliers that their programming contains captioning and relieves them of the obligation to view every individual program before distribution to consumers. ACA submits that this system has worked well, and has resulted in a high level of compliance.⁴⁶ For this reason, ACA cautions the Commission against adopting the mechanism proposed in the NPRM. If adopted, the proposed program-by-program certification mechanism, together with the requirement that certifications be retained by the VPD as long as the programming is made available to end users would impose a highly burdensome and potentially unlimited document retention program for all VPDs. The burdens would disproportionately impact small and medium-sized MVPDs that choose to make an online video programming offering available to subscribers. Internet distribution of programming that originated on television will significantly extend the amount of video programming subject to the rules over time. This will lead to recordkeeping and related compliance burdens on small operators that do not have the personnel to devote to these new recordkeeping tasks. Moreover, for MVPDs that both use IP to deliver their MVPD service and also make the programming available using IP-distribution on the Internet, the certification program is entirely redundant. The proposed rule would therefore result in substantial administrative burdens and costs, without any demonstrable overriding benefit to the public.

⁴⁴ *Id.*

⁴⁵ See 1997 Order, ¶ 212 (emphasis supplied).

⁴⁶ See “*The State of Closed Captioning in the United States*,” Annenberg Public Policy Center, at 31 (2003).

Consistent with its position on the more limited applicability of the new captioning requirements, ACA submits that the Commission must clarify that MVPDs using IP to distribute their services may continue to rely on the existing certification program to ensure compliance with their captioning obligations. ACA urges the Commission to consider the same or a similarly less burdensome approach for VPDs distributing video programming using IP on the Internet.

V. THE COMMISSION MUST AVOID CREATING BURDENSOME ENFORCEMENT AND COMPLAINT PROCEDURES

Complaint Procedures. The NPRM proposes to adopt complaint procedures for alleged violations of the IP-delivered closed captioning rules that are analogous to those used for complaints alleging violations of television-delivered closed captioning obligations.⁴⁷ ACA supports the Commission's approach of looking to established procedures that have not proven unduly burdensome for smaller MVPDs in crafting its enforcement procedures for IP-delivered video programming. Again, as a general matter, ACA urges the Commission to avoid imposing multiple potentially conflicting compliance obligations on MVPDs that deliver their MVPD services using IP today by limiting the application of the new captioning rules solely to VPDs using IP to deliver video programming on the Internet.

De Minimis Failure to Comply. The NPRM seeks comment on how to implement the CVAA requirement that the Commission's rules provide that *de minimis* failures to comply shall not be treated as a violation of the regulations.⁴⁸ Specifically, the NPRM seeks comment on how to define "*de minimis*" in this context, proposing that it should be based on the particular circumstances of the

⁴⁷ NPRM ¶ 43; 47 C.F.R. § 79(1)(g).

⁴⁸ NPRM ¶ 41.

failure to comply, including: (i) the type of failure; (ii) the reasons for it; (iii) whether it was one-time or ongoing, and (iv) how quickly it was remedied.⁴⁹

Consistent with its position on complaint procedures, ACA suggests that the Commission refrain from adopting this definition of a *de minimis* failure of compliance for a VPD, and rely instead on its established approach to *de minimis* failures to comply with existing captioning regulations. Pursuant to Section 79.1(e)(10), in evaluating whether a video programming provider has complied with the captioning requirements, the Commission “will consider showings that any lack of captioning was *de minimis* and reasonable under the circumstances.”⁵⁰ In implementing the closed captioning rules, the FCC provided guidance on what might constitute *de minimis*:

We recognize that there may be times when it will be difficult for a video programming provider to present 100% of its new nonexempt programming with captions. There are a variety of circumstances where captioning may be problematic. Such situations could include, but are not limited to, equipment failures, the inability to obtain captioning resources on short notice or the receipt of programming without the expected captions. We also are aware that local programming distributors, such as television stations, may need to show an occasional program without captions to satisfy communities' demands or may be unable to reformat the captions of captioned programming they edit consistent with community standards. We expect, however, that such situations will be limited, especially as captioned programming becomes the norm and captioning becomes as integral a part of program production as the video and audio. We intend to enforce this requirement in a manner that ensures that we do not penalize video programming distributors that are generally in compliance with the rules except for a *de minimis* amount of uncaptioned programming. In considering whether an alleged violation has occurred, we will consider any evidence provided by the video programming distributor in response to a complaint that demonstrates that the lack of captioning was *de minimis* and reasonable under the circumstances.⁵¹

⁴⁹ *Id.*

⁵⁰ 47 C.F.R. § 79.1(e)(10).

⁵¹ *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*, Order on Reconsideration, 13 FCC Rcd 19973, ¶ 10 (1998).

These same concerns should guide the Commission's implementation of the *de minimis* failure to comply standard under the CVAA. The Commission should therefore take a flexible approach and not attempt to prospectively identify the criteria of a *de minimis* failure to provide or distribute video programming using IP distribution on the Internet, but rather inquire on a case-by-case basis whether the lack of captioning was "*de minimis* and reasonable under the circumstances." This is new terrain for the Commission, and ACA recommends that it tread lightly and observe what some have called the "high tech Hippocratic Oath" – first, do no harm.

VI. CONCLUSION

MVPDs, including smaller operators represented by ACA, have over ten years' of experience complying with the Commission's current video captioning rules. MVPDs that provide covered video services that employ IP technologies are providing closed captioning services today in compliance with the Commission's existing rules. These rules have proved helpful to consumers without needlessly burdening MVPDs. The CVAA closed captioning requirements were intended to apply to new video distribution services delivered over the Internet, which arguably are not covered by the existing closed captioning rules. In implementing the CVAA, the Commission must take guidance from the existing rules that have proven effective and avoid either disrupting this existing successful closed captioning regime, or creating larger burdens on MVPDs through its implementation of the CVAA.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

Barbara S. Esbin
James N. Moskowitz
Cinnamon Mueller
1333 New Hampshire Ave,
2nd Floor
Washington, DC 20036

(202) 872-6881

Attorneys for American Cable Association

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220

(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
4103 W Street, N.W., Suite 202
Washington, DC 20007

(202) 494-5661

October 18, 2011