

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Closed Captioning of Internet Protocol-) MB Docket No. 11-154
Delivered Video Programming:)
Implementation of the Twenty-First Century)
Communications and Video Accessibility Act)
of 2010)

REPLY COMMENTS OF CBS CORPORATION

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SUMMARY

CBS long has been a leader in the provision of high quality closed captions to television audiences, and is committed to providing similarly high quality captioning to online viewers. Ensuring quality captioning online is extremely complicated, as numerous entities including content owners, providers, and distributors may be involved before captions reach the end user. The Commission should take this reality into account in implementing the online captioning provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010.

The Commission's rules relating to television closed captioning provide the most appropriate model for online caption rules. As in those rules, regulatory responsibility for ensuring online captioning should rest with the entity that makes the programming directly available to the end user. Under the Act, that entity is either the video programming distributor ("VPD") or video programming provider ("VPP"), not the video programming owner ("VPO"), unless the VPO is the direct provider to the end user.

As under the television rules, arrangements for the delivery of captions to VPDs and VPPs from upstream providers should be left to negotiation between the relevant parties, and the "mechanism" called for under the Act for supplying caption information to VPDs and VPPs should be reliance on private arrangements between the parties. Under no circumstance should a VPO be subject to enforcement action if it provides captions to a downstream distributor, even if the VPD or VPP fails provide captions to the end user.

Complaint procedures for online captions similarly should follow the Commission's television captioning rules. Complaints should be directed to VPDs and VPPs, who have the direct relationship with end users, and not to VPOs. The Commission should revise its form for disability access complaints to require complainants to provide information necessary to identify

the programming, the direct provider and the software and device used, and the Commission should decline to consider complaints that do not contain this information.

The Commission's proposal to require retroactive captioning of programming already residing on the web without captions is contrary to the plain language of the Act and to congressional intent. The marketplace, rather than an extraordinarily burdensome and impractical retroactive regulatory scheme, is the proper avenue for addressing the continued existence of uncaptioned programming placed on the web before the effective date of the regulations.

The Commission should adopt SMPTE-TT as the interchange format for distribution of closed captioning data, as recommended by the Video Programming and Emergency Access Advisory Committee (VPAAC), the entity statutorily charged to advise the Commission on technical matters relating to online captioning. If the Commission declines to adopt the SMPTE-TT standard, it must provide a safe harbor for entities using this format

As required by the Act and specified in its legislative history, the obligation to caption must apply only to full-length programs that are posted online as one continuous file or in segments that comprise the entirety of the program. "Video clips," which under the Act are exempt from online captioning requirements, should be defined as "an excerpt of a full-length program."

The Act does not give the Commission authority to adopt "quality" standards for online closed captioning. For good reasons, the Commission has refrained from adopting such standards in its television captioning rules, and it would be anomalous to introduce them for online captions, where the very requirement is triggered by what has been captioned on television.

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CBS Corporation (“CBS”) hereby submits its reply comments in response to the *Notice* in the above-referenced proceeding, in which the Commission is implementing the Twenty-First Century Communications and Video Accessibility Act of 2010, specifically the sections relating to closed captioning of certain video programming delivered via the Internet.¹ CBS generally supports the positions taken in the initial comments filed by the National Association of Broadcasters² and National Cable Television Association,³ and, except as stated in these comments, incorporates herein by reference those comments in their entirety.⁴ CBS submits these reply comments in order to explain its views on certain specific issues, to raise certain additional points and to respond to other comments that have been filed.

¹ *In re 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, FCC No. 11-138, Notice of Proposed Rulemaking (rel. Sept. 19, 2011) (“*Notice*”).

² *Comments of the National Association of Broadcasters* (Oct. 18, 2011) (“*NCTA Comments*”).

³ *Comments of the National Cable Television Association* (Oct. 18, 2011) (“*NAB Comments*”).

⁴ To the extent the views of those organizations diverge, we have indicated CBS’s views in these comments.

INTRODUCTION

For many years, CBS has been a leader in the provision of closed captions. Even before passage of the Telecommunications Act of 1996, the CBS Television Network closed captioned its network programming in a manner that was fully compliant with the final captioning benchmarks that went into effect some ten years later, in 2006. Currently the CBS Television Network and the CBS Owned and Operated television stations are fully compliant with the broadcast captioning regulations, employing top-of-the-line technology and high quality captioning services to serve deaf and hard of hearing viewers.

On a voluntary basis, the CBS Television Network already has begun providing closed captions on CBS broadcast programming that is made available online. CBS currently provides closed captions for all of the CBS Television Network prime time entertainment programs that it supplies directly to online users on cbs.com and other CBS websites. Over the next several months, before the new online rules take effect, CBS will be making its daytime and late night entertainment programming directly available to online users with closed captions. CBS also is currently planning the online captioning of the following full CBS News programs: CBS Evening News, Face the Nation, 48 Hours, and 60 Minutes.

CBS's Showtime Networks Inc. ("Showtime Networks") similarly provides closed captions for 100% of its new non-exempt programming on its owned and partly-owned cable networks,⁵ using one of the same high quality captioning companies used by the CBS Television Network. Showtime is currently working with a third party distributor to start making closed captioned versions of Showtime's programs available to users who buy them on an electronic sell-through basis.

⁵ Showtime Networks also greatly exceeds the 75% benchmark for its pre-rule non-exempt programming.

Notwithstanding the ongoing efforts of CBS and others to provide online captions, the mandate to provide closed captions on broadcast programs delivered via the Internet raises a host of difficult challenges and questions. CBS, for example, not only distributes its broadcast and Showtime programming on line through its own outlets, but also licenses a variety of downstream distributors to make it available to online users.

Depending on what obligations it chooses to impose and on the choice of parties on whom it imposes them, the Commission risks exceeding its statutory mandate, and placing unwarranted and legally unjustifiable burdens on content producers who make their programming available online through other parties. By submitting these comments, CBS hopes to assist the Commission in allocating captioning responsibilities appropriately and avoiding the adoption of regulations that may go beyond the Commission's statutory mandate or raise constitutional issues.

I. REGULATORY RESPONSIBILITY FOR ENSURING ONLINE PROGRAMMING IS CAPTIONED MUST REST WITH THE ENTITY THAT MAKES THE PROGRAMMING AVAILABLE DIRECTLY TO THE END USER, AND ARRANGEMENTS FOR THE DELIVERY OF CAPTIONS TO SUCH ENTITIES FROM UPSTREAM PROGRAM PROVIDERS SHOULD BE LEFT TO NEGOTIATION BETWEEN THE RELEVANT PARTIES

A. Entities Supplying Internet-Delivered Programming Directly to End Users Should Bear the Regulatory Responsibility for Compliance

Under the Act, the Commission is required to “describe the responsibilities of video programming providers or distributors and video programming owners.”⁶ The Act provides clear guidance for defining these entities' respective responsibilities: the Commission is directed

⁶ 47 U.S.C. §613(c)(2)(D)(iv). Following the Notice, CBS herein refers to these entities as “VPPs,” “VPDs” and “VPOs,” respectively.

to “clarify that, for the purposes of implementation of this subsection, 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.”⁷ The Act’s focus on the entities that make programming directly available to the end user is significant. Such an entity is the only party that can ensure that captions reach the end user, and, for that reason, is the appropriate party to hold responsible for a failure to provide captions.

There is direct precedent for holding the direct distributor of programming to the end user responsible for ensuring the inclusion of captions: this is the allocation of responsibility set out in the Commission’s regulations requiring closed captions in television programming. Under those regulations, the obligation to provide captions is imposed on the “video programming distributor,” which is defined as any broadcast station, MVPD “and any other distributor of video programming for residential reception that delivers such programming directly to the home....”⁸ Under that analogous regulatory scheme, it is left to the video programming distributor to privately arrange to receive programming with captions from its upstream providers in order to ensure that it can provide captions to the home. Broadcast television stations and multichannel video programming distributors have successfully met their captioning obligations by themselves captioning (or contracting for the captioning of content that they originate) and by ensuring by contract or other private arrangement that their program suppliers provide captions. Cognizant of this successful regulatory scheme for enforcement of television captioning obligations, Congress intended a similar framework for on line captions when it singled out entities that make available programming “directly to the end user.”

⁷ 47 U.S.C. §613(c)(2)(D)(iii) (Emphasis added).

⁸ 47 C.F.R. §79.1(a)(2).

The methods for delivery of programming by Internet protocol are far more varied and in some cases more complicated than the methods for delivery of television broadcast programming,⁹ but the same principle applies: only the entity that provides the programming “directly to the end user” has the ability to ensure captions are delivered and therefore should be the only party subject to regulatory action for failure to caption Internet protocol-delivered programming. In addition to the fact that VPOs have no ability to control what a VPD or VPP directly delivers to its end user, in some cases the VPD or VPP will be several steps removed from the VPO. The VPO cannot ensure that intermediate entities will pass through captions that the VPO may have created and supplied to the first entity down its chain of distribution.

The problem is compounded by the fact that, as discussed below, the Commission has proposed that it refrain from adopting the Society of Motion Picture and Television Engineers Timed Text (SMPTE-TT) standard as the required standard interchange format to be used by content providers to encode closed captions into programming. The lack of a uniform interchange standard is likely to result in loss of captions and caption features down the distribution chain. Loss of captioning for an end user because a downstream distributor failed or refused to use the SMPTE-TT standard used by the content provider should not subject the content provider to any enforcement action.

By endorsing the adoption of a regulatory scheme similar to that for television captions, CBS is in no way shielding itself from responsibility for providing Internet captions where it is appropriate. As described above, in many circumstances CBS provides its programming directly to online end users, as when it makes it available on its own websites such as cbs.com and the websites of its owned television stations. In such cases, the obligation to ensure captions to the

⁹ See *NAB Comments at 7-10*.

end user should fall on CBS. But where CBS is the supplier of programming, it should not be held responsible if a downstream distributor fails in its obligations to its end users.

B. The “Mechanism” for Informing VPDs and VPPs of Information on Video Programming Subject to the Act Should be Reliance on Private Contractual Arrangements between the Relevant Parties

The Act requires the Commission to establish “a mechanism to make available to video programming providers and distributors information on video programming subject to the Act on an ongoing basis.”¹⁰ Following the model of the television captioning regulations, the Commission should adopt the most effective and least intrusive mechanism available: letting entities that make programming directly available to end users contract or otherwise arrange with VPOs to let them know whether the programming they are supplying must be captioned online.

The Commission proposes to require VPOs to provide a dated certification in every instance in which programming they supply to VPDs and VPPs does not need to be captioned and to state the reason why that programming does not need to be captioned.¹¹ This proposal is entirely unnecessary and highly burdensome.¹² Whether such a requirement could survive scrutiny under the Paperwork Reduction Act¹³ is highly doubtful, particularly when the communication of information between VPOs and VPDs/VPPs regarding the necessity of captioning programming can so easily and reasonably be left to private contractual arrangements

¹⁰ 47 U.S.C. §613(c)(2)(D)(v).

¹¹ *Notice at ¶35.*

¹² CBS notes that advocates for the deaf and hard of hearing agree that the Commission should not “micromanage the relationships between VPOs and VPPs/VPDs,” stating that “the Commission should simply hold VPD/VPPs accountable for videos that are displayed without captions, while leaving the VPDs/VPPs to privately negotiate efficient arrangements with all relevant entities in the distribution chain to ensure that videos are properly captioned.” *Comments of Telecommunications for the Deaf and Hard of Hearing, Inc. and allied organizations at 9 (October 18, 2011) (“TDI Comments”).*

¹³ 44 U.S.C. §3501 *et seq.*

between the parties, as is the case under the Commission's television captioning regulatory scheme.¹⁴

C. The Commission Should Not Adopt a Regulation Requiring VPOs to Provide Captions to VPDs and VPPS

In the Notice, the Commission proposes to require VPOs providing video programming to VPDs and VPPs for online delivery to provide each program with captions simultaneously (unless the programming is exempt, in which case the certification discussed above would be required). CBS believes that rather than a government mandate for the VPO to provide captions, it is far preferable to allow the VPD/VPP and VPO to determine how the captions will be provided by private arrangement.

The Commission's proposal assumes that the appropriate party to provide captions is always the VPO. But that assumption is simplistic and incorrect. There are occasions when the copyright owner of the programming is not the party that captions the programming for television distribution. There are similarly situations in which the party that produced or arranged for the production of captions for television is not the party that licenses it for later distribution online.¹⁵ Leaving determination of who will provide captions for the Internet-delivered version of the program to negotiation between the parties will ensure that an appropriate, cost-effective decision will be made.¹⁶

¹⁴ CBS agrees with NAB that reliance on a third party database to identify all video programming shown on television after the effective date is unworkable and beyond the Commission's statutory authority. *See NAB Comments at 28-29.*

¹⁵ *See Comments of the Motion Picture Association of America, Inc. at 5-6 (October 18, 2011) ("MPAA Comments").* As the MPAA Comments illustrate, the VPO often is not the party best positioned to create and distribute captions, as some commentators suggest. *See Comments of Google Inc. at 6-7 (October 18, 2011) ("Google Comments").*

¹⁶ Google's suggestion that placing responsibility on VPPs and VPDs would "require an extraordinary allocation of resources... to review each content file," *id. at 7*, is belied by the current regime in which local stations and

D. Any Regulation Holding VPOs Responsible for Others' Failure to Provide Captions to End Users Would Exceed the Commission's Statutory Authority and Violate the Constitutional Rights of VPOs

VPOs should under no circumstances be subject to enforcement action if they provide captions to a downstream distributor, and, for some reason, the VPD or VPP fails to provide captions to the end user. As described above, a VPO cannot control what is supplied by a downstream distributor to the end user. The Act recognizes this fact: it provides that the Commission must consider a VPD or VPP in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify video programming subject to the Act.¹⁷ If VPDs and VPPs must be deemed in compliance if they pass through captions then a VPO similarly must be deemed in compliance if it provides a caption file to its immediate downstream distributor and makes good faith efforts to indicate the programming should be captioned pursuant to the Act. Holding the VPO responsible for a failure by the entity ultimately providing the programming to the end user in such circumstances would clearly be contrary to the intent of the Act, violate the Administrative Procedure Act and raise constitutional due process and First Amendment concerns.

Under the Act, Congress has given the Commission the authority and obligation to regulate a wide set of entities that are involved in the provision of online captioned programming. The Commission may well be unfamiliar with some of these entities as regulation of the online world is a new area for the agency, but it cannot avoid its obligation to hold these entities accountable for online captioning failures for which they are responsible. Television

MPVDs successfully fulfill their obligation to provide captions in programming supplied to them by content owners without great expenditure of resources.

¹⁷ 47 U.S.C. §613(c)(2)(D)(vi).

content providers cannot and will not accept being subjected to liability for captioning failures of others simply because the Commission finds it easier to initiate enforcement actions against familiar targets.

II. THE COMMISSION’S PROPOSAL TO REQUIRE RETROACTIVE CAPTIONING OF PROGRAMMING ALREADY RESIDING ON THE WEB WITHOUT CAPTIONS IS CONTRARY TO THE PLAIN LANGUAGE OF THE ACT AND TO CONGRESSIONAL INTENT, AS WELL AS BEING EXTRAORDINARILY BURDENSOME AND IMPRACTICAL

The Notice suggests that while a program may not be subject to online captioning requirements as of the effective date of the Act because it had not been televised with captions as of that date, it “might later become subject to the requirements, once the program is re-run on television with captions after the effective date.”¹⁸ The Notice then constructs a highly burdensome and unworkable proposal that would require a VPO to monitor all of its programming that had ever been televised without captions and made available without captions online, and, within seven days of any reairing on television with captions, notify any online provider of the program that the existing online version must be updated or replaced with captions. Under this scheme, a caption file for the program also must be delivered to any online distributor within the same seven day period.¹⁹

This oppressive and impractical set of retroactive obligations is contrary to the plain language of the Act and clearly contrary to Congressional intent.²⁰ The Act states that captioning requirements apply only to online programming that was exhibited “on television with captions

¹⁸ Notice at ¶ 36.

¹⁹ The receiving VPD or VPP would then be required to make captions available online within five days of receipt of the certification. *Id.*

²⁰ See NCTA Comments at 18-19 (Oct. 18, 2011).

after the effective date of such regulations.”²¹ This definition by its own terms does not include an online version of a program that was aired on television before the effective date.

Moreover, the Act’s legislative history establishes without question that Congress did not intend any retroactive application to programming placed online before the statute’s effective date. Both the House and Senate Reports plainly state that their respective Committees “elected to apply the captioning requirement *only prospectively* and only to programming that is aired on television with captions and also delivered using Internet protocol.”²² In other words, Congress only intended versions of the program televised with captions after the effective date that are then distributed online to be subject to a captioning requirement.

The Commission’s contrary, strained reading of the Act would result in an enormously burdensome and impractical exercise. VPOs will not necessarily know when uncaptioned, archival programs, which may have been licensed for television distribution over the course of many years to numerous entities, may be televised after the effective date with captions. Even assuming the VPO knows or learns of such a television exhibition after the effective date, the task of locating each and every site on which an uncaptioned version of the program may reside on the Internet would be difficult, if not impossible. To impose liability for what is likely an unavoidable failure to fulfill such obligations – whether the timeframe is seven days or longer – is completely unreasonable.²³

The marketplace, rather than a burdensome and impractical retroactive regulatory scheme, is the appropriate avenue for addressing the continuing existence of uncaptioned

²¹ 47 U.S.C. §613(c)(2)(A).

²² *S. Rep. No. 111-386 at 6 (2010)* (“*Senate Report*”); *H.R. No. 111-563 at 18 (2010)* (“*House Report*”) (Emphasis added).

²³ In addition, as NCTA points out, the task of supplying and attaching captions to a copy of a program already residing online is not as simple as the Notice implies. *See NCTA Comments at 19.*

television content online. If previously uncaptioned televised programs are broadcast with captions after the effective date, the strong likelihood is that there will be incentive to make those captioned versions available online. To the extent online users prefer captioned programming, they will seek out for viewing those newer versions of programming that have the desired captions.

III. THE COMMISSION SHOULD ADOPT SMPTE-TT AS THE INTERCHANGE FORMAT FOR DISTRIBUTION OF CLOSED-CAPTIONED DATA, AS RECOMMENDED IN THE VPAAC REPORT, AND IF IT DECLINES TO DO SO MUST PROVIDE A SAFE HARBOR FOR THOSE ENTITIES USING THE STANDARD

In its report, the VPAAC recommended that the Commission adopt the Society of Motion Picture Engineers Timed Text (“SMPTE-TT”) standard as the interchange format for distribution of closed-captioning data by content providers to programming distributors.²⁴ The Commission proposes to refrain from adopting this standard. CBS, which participated in the hundreds of hours of VPAAC deliberations with other television, online and disability group representatives, believes the Commission should accept the VPAAC’s recommendation and adopt SMPTE-TT as the required interchange format. However, if the Commission fails to accept the VPAAC’s recommendation, it should provide a safe harbor for those VPOs that use the SMPTE-TT standard.

As the VPAAC Report explains, captioning for television today is authored using standards embodied in what have come to be known as the CEA-608-708 format. The CEA-608 format was developed for analog television, and CEA-708 captions, which were developed for digital television, “have a much richer set of caption capabilities than CEA-608, and also allow

²⁴ 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) (“VPAAC Report”) at 26.

for the carriage of CEA-608 captions.”²⁵ Commission regulations require that “[d]igital television receivers and tuners must be capable of decoding closed-captioning information that is delivered pursuant to ...CEA-708-B.”²⁶

In light of the rich captioning capabilities of the CEA-708 standard, its universal use in captioning in television and the Commission’s requirement that television receivers and tuners be capable of decoding captioning information delivered pursuant to CEA-708, it would appear advisable to adopt an interchange format for distribution of captions online that is most compatible with the CEA-708 format. As the VPAAC Report stated, “Any technology used to repurpose and display [broadcast] programs over the Internet must properly translate and transport the CEA-608 and CEA-708 captions within the content to the end user.”²⁷ After intense review, VPAAC reported that “[o]f all the solutions available, SMPTE-TT best meets all the requirements...”²⁸

It is worth noting that the Act required the Commission to create the VPAAC for the stated purpose of having it develop and submit to the Commission a report identifying the technical criteria for ensuring reliable encoding, transportation, receipt and rendering of captions.²⁹ The VPAAC’s recommendation to adopt the SMPTE-TT standard falls within the VPAAC core statutory mission and its area of greatest expertise.

Yet the Commission proposes to reject the recommendation and instead suggests it should leave the selection of interchange format to negotiations between the VPO and

²⁵ *Id.* at 16-17.

²⁶ *Id.* at 17, quoting 47 CFR §15.122(b).

²⁷ *VPAAC Report* at 21.

²⁸ *Id.* at 26.

²⁹ *Pub. L. No. 111-260, §201(a) and (e)(1)(B-E)(2010)*

VPP/VPD.³⁰ CBS believes this proposal unnecessarily increases the risk that captions may be lost before reaching the end user or may reach that end user lacking some of the features that television viewers have come to expect under the CEA-708 standard.

In considering the interchange standard, the purpose of the Act should be kept in mind – that is, to ensure that programs exhibited on television also be captioned if they are simultaneously or later distributed over the Internet. Since the television industry over time has developed a captioning standard that provides rich captioning capabilities to its audiences, logic would suggest the Commission should require an interchange format that most effectively preserves and passes through those rich CEA-708 captioning features enjoyed on television for the online audience.

The result of failing to adopt a common standard is that television content providers may be forced to reauthor caption files and/or reestablish caption quality for programming previously and effectively captioned for television in CEA-708, solely because a downstream distributor refuses to use the interchange format that best transferred those captions. By CBS's count there are dozens of standards for distribution of video content on the web used by different companies for various devices. VPOs should not be required to invest the time and money necessary to ensure their captions can be translated without loss of quality by each of these different standards.³¹

In any event, should the Commission decide to refrain from adopting SMPTE-TT as the interchange format, its regulations must provide that any VPO delivering captions to a downstream distributor using the SMPTE-TT format has met its regulatory obligations and

³⁰ Notice ¶ 40.

³¹ See *Comments of Rovi Corporation at 6* (SMPTE-TT “was developed specifically to address the incompatibilities between IP video delivery systems, and to avoid requirements for VPOs to generate caption data files several ways for each of several different IP video delivery systems.”)

cannot be held responsible for a VPD/VPP's failure to provide captions to an end user or for the diminished quality of captions delivered to an end user.

In addition, as explained by NCTA, the schedule of deadlines for provision of online closed captions proposed in the VPAAC Report was premised on the adoption of the SMPTE-TT interchange standard.³² CBS agrees with NCTA that a longer rollout of captioning deadlines will be necessary if the Commission chooses not to adopt the SMPTE-TT standard.³³

IV. THE RULES SHOULD ONLY APPLY TO FULL-LENGTH TELEVISION PROGRAMS THAT ARE POSTED ONLINE AS ONE CONTINUOUS FILE OR IN SEGMENTS THAT COMPRISE THE ENTIRETY OF THE PROGRAM

The Notice proposes to apply online captioning requirements only to full-length programming.³⁴ This choice is required by the Act, whose legislative history reflects Congress' clear intent that the obligation to caption online apply only to full-length programming. Both the House and Senate reports explicitly state that their respective committees intended "for the regulations to apply to full-length programming and not to video clips and outtakes."³⁵

³² *NCTA Comments at 4-6.*

³³ *Id. at 4-9.*

Putting aside the timing issues presented by non-adoption of SMPTE-TT, CBS generally endorses the timetable for compliance with the forthcoming regulations proposed by NAB, which distinguishes between the major broadcast networks and local stations. *See NAB Comments at 19-20.* Online closed captioning presents very significant technical and financial challenges for local television stations.

Regarding the timetable for compliance, CBS also notes that varying definitions have been proposed for "near-live" programming. *E.g., compare NAB Comments at 20* ("programming that is produced from start to finish within 24 hours of being published or exhibited on television") and *NCTA Comments at 9* ("programming that is substantively recorded and produced with 12 hours of its distribution to television viewers"). CBS agrees with NCTA that the definition of "near-live programming should not exclude a program that contains some elements that were produced prior to the defined window, whether that be 12 or 24 hours. What is most critical is that the Commission give deference to the determinations made by the relevant parties as to whether their programming fits the category of "near-live." Parties should not be subject to enforcement action during the phase-in period simply because the Commission disagrees with a good faith assessment that programming falls in a category that need not be captioned yet online.

³⁴ *Notice at ¶ 21, citing 47 U.S.C. §613(H)(2)* ("The term 'video programming' means programming by, or generally considered comparable to programming provided by a television broadcast station...")

³⁵ *Senate Report at 13-14; House Report at 30.*

CBS agrees with NAB and NCTA that full-length programming should be defined as “programming that appears as a whole on television,” such as an episode of a television series, a sporting event, a news program or a movie.³⁶ Furthermore, to the extent a full-length television program is posted online “as one continuous file, or in separate segments that together compose the entirety of the program” it would be required to be captioned online. Individual segments of a program constituting in total less than the entirety of the program should be deemed “video clips” excluded from the Act’s coverage, and the definition of a “video clip” should be “an excerpt of a full-length program.”³⁷

The Notice asks whether the Commission should impose a time duration or program percentage limit on the definition of “video clips.”³⁸ Neither of these proposals should be adopted, as they both are premised on a concept rejected by the Act, namely the mandatory captioning online of elements of a television program constituting less than the whole. Moreover, posting of elements of a full program poses significant technical challenges, costs and delays over and above those posed by the posting of a full, captioned program. Each excerpt of a full captioned program must be separately identified, and its caption file exported, transferred, tested and published, a process that is time-consuming and labor intensive. On the network level alone CBS currently posts hundreds of such excerpts every month, so there would be a significant expenditure of time, money and effort if they were required to be captioned. Imposing such a burden would be unjustified under the Act, the clear intent of which is – to reiterate –to require that if a full television program is posted in full online, online viewers should have to opportunity to view that program with captions.

³⁶ *NAB Comments at 12; NCTA Comments at 20.*

³⁷ *See NCTA Comments at 20.*

³⁸ *Notice at ¶ 21.*

V. THE RULES SHOULD EXEMPT CONSUMER-DISTRIBUTED PROGRAMMING AS WELL AS CONSUMER-CREATED PROGRAMMING

CBS agrees with NAB that consumer-distributed programming as well as consumer created-programming should be exempt from captioning requirements.³⁹ Consumers frequently redistribute programming without consent of the VPO, which should have no responsibility or liability for unauthorized, uncaptioned redistributions. Even in the event that a VPO permits consumers to redistribute portions of programming – for example to the consumer’s own site or social networking site personal page – the VPO should have no responsibility for such postings, as there simply is no way that a VPO can monitor or control them.⁴⁰

VI. THERE IS NO BASIS IN THE ACT FOR ADOPTING “QUALITY” STANDARDS FOR ONLINE CAPTIONS

Without citation to any specific provision of the Act, the Notice states that “it appears that Congress intended, at a minimum, that captions of IP-delivered video programming should be of at least the same quality as captions shown on television.” From this groundless assumption, the Notice proposes that the Commission adopt a requirement that online captions be “of at least the same quality” as television captions for the same program, and suggests that the Commission consider “such factors as completeness, placement, accuracy, and timing.”⁴¹

The Act authorized the VPAAC to consider and recommend to the Commission only technical standards related to the ability to “reliably encode, transport, receive and render closed

³⁹ *NAB Comments at 13-14.*

⁴⁰ CBS agrees with NCTA that the regulations should not apply to programming that has aired on television in countries other than the United States. *See NCTA Comments at 20-21.*

⁴¹ *Notice at ¶ 18.*

captions.”⁴² There is no grant of authority to adopt quality standards, and therefore no basis for the Commission to consider the qualitative factors it enumerates. The Commission has refrained from adopting quality standards in its regulations governing television captions, presumably for the sound reasons that CBS and many others have expressed to the Commission in other proceedings implicating the quality issue.⁴³ To introduce such standards for online captions – the very requirement for which is triggered by what has been captioned on television – would be strikingly anomalous.

Any regime requiring online captions to be of at least as good quality as the television captions of the same program is unworkable. There are numerous technical hurdles to overcome in translating television captions to online captions (including, for example, the issue of whether the interchange format used carries forward the features of the television captions). Assessing whether online captions are “as good as” television captions would require a subjective assessment involving a highly wasteful and time-consuming commitment of Commission and private resources.

CBS and other content providers have long demonstrated their commitment to providing high quality captions on television, and there is no reason to doubt they will devote similar effort and resources to providing high quality captions online. But attempting to mandate quality by government regulation, rather than relying on programmers’ intrinsic motivation to achieve it, will be counter-productive. As aptly noted by the NAB, imposition of regulations requiring

⁴² *Pub. L. No. 111-260, §201(e)(1)(B)(2010). See generally §201(e)(1)(B)-(E).*

⁴³ *See, e.g., In the Matter of Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking, CG Docket No. 05-231, Reply Comments of CBS Broadcasting Inc. at 4-8 (December 16, 2005).*

“quality standards” for online captions will only create disincentives for making programming available online.⁴⁴

VII. COMPLAINT PROCEDURES SHOULD FOLLOW THE COMMISSION’S RULES FOR TELEVISION CAPTIONING COMPLAINTS, WHICH ARE DIRECTED TO PROGRAMMING DISTRIBUTORS, THE PARTIES THAT SUPPLY PROGRAMMING TO END USERS

CBS agrees with the Commission’s view that it should adopt complaint procedures for online captioning that are analogous to those for television captions.⁴⁵ However the Commission’s procedures should follow the television model more closely than proposed in the Notice.

The rules for television captioning complaints provide that complaints be sent either to the “video programming distributor responsible for delivery and exhibition of the video programming” or to the Commission.⁴⁶ If complaints are filed with the Commission, they are forwarded to the video programming distributor.⁴⁷ It is appropriate that the Commission send complaints to the television programming distributor, because that entity has the direct relationship with the viewer.

The online captioning regulations similarly should require that complaints be sent only to the VPD/VPP that makes the programming directly available to the online user, not to the VPO. In the event the Commission permits a complainant to file directly with the Commission, it similarly should forward the complaint to the VPD/VPP that makes the programming directly available to the online user. The complaint should not be sent to the VPO, unless the VPO is the

⁴⁴ *NAB Comments at 14-15.*

⁴⁵ *Notice at ¶ 43.*

⁴⁶ *47 CFR §79.1(g)(1).*

⁴⁷ *Id. at §79.1(g)(2).*

direct supplier of the programming online to the end user. As stated by NAB, initiating simultaneous investigations by sending the complaint to both VPDs and VPOs will create confusion and waste resources.⁴⁸

In order to be able to direct complaints properly, the Commission should revise the existing form for disability access complaints (Form 2000C) in the manner proposed in the Notice.⁴⁹ In particular, in addition to basic information about the complainant, the form should require the complainant to identify the exact programming, the direct provider of the programming and the software and device used to view it. The Notice also raises the suggestion that the Commission should decline to consider complaints that do not include certain information.⁵⁰ CBS believes this proposal should be adopted. Complaints that fail to provide the information listed above should not be considered, because investigating them will create an excessive burden both on the Commission and on any VPD to which they are referred. In the likely event that there are multiple distributors of the same programming, it is unreasonable to force a VPD to initiate an investigation on speculation that it may be the source of programming that it may or may not have distributed to a user who may or may not have had equipment capable of displaying captions.⁵¹

⁴⁸ *NAB Comments at 33.*

⁴⁹ *Notice at ¶ 46.*

⁵⁰ *Id.*

⁵¹ The Commission also asks how it should define a *de minimis* failure, which under the Act “shall not be treated as a violation of the regulations.” *Notice at ¶41, quoting 47U.S.C. §613(c)(2)(D)(vii).* The Commission should reject proposals to strictly define *de minimis* captioning failures or limit them to “extraordinary” circumstances. Rather, the Commission should address this issue in the flexible manner it adopted in the television captioning arena. *See 47 C.F.R. §79.1(e)(10)* (“In evaluating whether a video programming provider has complied with the requirement that all new nonexempt video programming must include closed captioning, the Commission will consider showings that any lack of captioning was *de minimis* and reasonable under the circumstances.”)

CONCLUSION

The television closed captioning rules have worked extremely well in facilitating the delivery of high quality closed captions to the television audience, and have done so without imposition of “quality” standards. Those regulations provide the best template to ensure that online audiences enjoy high quality captioning service. Placing the responsibility on the entity delivering captions to the end user and directing complaints to that entity has worked well in the television arena, and a similar regulatory structure should be adopted for online captioning. As provided by the Act, the Commission’s online captioning rules should regulate only prospectively and should only cover full programs that are posted online in their entirety.

Respectfully submitted,
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