

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

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

REPLY COMMENTS



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I. INTRODUCTION AND OVERVIEW

In its initial comments in this proceeding, ACA focused on several key implementation issues. First, the need to clarify that the video programming providers (“VPPs”) and video programming distributors (“VPDs”) using Internet protocol to distribute their services that will be subject to the new IP captioning obligations (i) are those who distribute covered programming over the Internet and (ii) do not include multichannel video programming distributors (“MVPDs”) using Internet protocol, including over the Internet, to distribute their subscription MVPD services within their MVPD footprint. That is, entities that use Internet protocol either for the distribution of traditional broadcast and cable programming networks over MVPD plant or video services online to their MVPD customers, must be clearly distinguished from non-MVPD online providers and distributors that make available to end users video programming over the Internet under a variety of methods. Second, the need to follow the statutory directive of imposing no more than the statutory obligation of “enabling the rendering or pass-through of closed captions” on VPPs/VPDs while placing primary responsibility for including captions on video programming owners (“VPOs”). Third, the need to clarify that the IP closed captioning requirements do not apply to broadband Internet service providers (“ISPs”).

There is much recorded support for these recommendations from a variety of commenters. ACA urges the Commission to adopt its recommendations in promulgating the new IP closed captioning rules to avoid either imposing conflicting and burdensome obligations, or requiring compliance with a patchwork of requirements on its members who offer video, broadband Internet, and voice services in smaller markets and rural areas. MVPDs, particularly smaller operators, should not have to comply with more than one set of rules aimed at achieving the same purpose: rendering video programming more accessible to the deaf and hard-of-hearing communities through the inclusion of closed captioning.

In enacting the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),¹ Congress carefully delineated the appropriate roles and responsibilities of the three named video programming entities in the CVAA: video programming owners (“VPOs”); video programming providers (“VPPs”) and video programming distributors (“VPDs”).² Definitional clarity in the Commission’s implementing regulations will provide the foundation for a well-functioning regulatory system, and it is particularly important for the successful implementation of the CVAA’s IP closed captioning mandates. To achieve the goal of increasing the accessibility of video programming over the Internet, these new rules must fit seamlessly and without confusion or conflict into an existing and well-developed regulatory framework for delivering captioning video programming to the American public. As ACA noted in its initial comments, Congress intended to fill a gap in the provision and distribution of captioned video programming once exhibited or shown on television that is distributed over the Internet. It did not intend to upset a settled captioning regime for MVPDs.³

To further avoid confusion over which captioning rule applies when MPVDs use Internet protocol instead of some other distribution technology and to achieve greater definitional clarity, ACA recommended that the Commission incorporate distinctions drawn between online video distributors and MVPDs contained in the definition of “online video distributors” (“OVDs”) developed in the *Comcast-NBCU Order*.⁴ Use of the elements found in the definition of an OVD in defining a “video

¹ Pub. L. No. 111-260, § 202(b), 124 Stat. 2751 (2010).

² Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 § 202(b)(2)(D)(iii)(iv) & (vi) (2010) (making technical corrections to the CVAA) (“CVAA”).

³ *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 of the American Cable Association, 10-13 (filed Oct. 18, 2011) (“ACA Comments”).

⁴ ACA Comments at 8-9; *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, ¶¶ 60-90 (2011) (“*Comcast-NBCU Order*”); *see also id.*, Appendix A, Conditions.

programming distributor” would enable the Commission to cleanly distinguish the online providers and distributors subject to the CVAA IP captioning requirements from MVPDs already subject to a well-established, but different set of captioning obligations under Section 713(a) and (b) of the Communications Act and Part 79 of the Commission’s rules.⁵

Incorporating the distinctions between MVPD online distribution and non-MVPD online distributors as done in the *Comcast-NBCU Order* will accomplish two objectives. First, it will avoid poor implementation of the new rules that would lead to overlapping new and old captioning requirements, thus creating the potential for the new rules to conflict with the existing rules. Second, even if the two sets of captioning rules do not overlap or conflict, MVPDs would be left with a confusing patchwork of regulations intended to accomplish the same goal of delivering captioned programming to their customers. This would potentially create confusion for both MVPDs and closed captioning consumers. Given the complexity of the undertaking to ensure the availability and accessibility of captioned programming online, making these careful definitional distinctions is critical to the successful implementation of the CVAA captioning requirements.

A variety of stakeholders urged the Commission to clarify that the new rules apply *only* to video programming distributed over the Internet.⁶ Many commenters also agree with ACA that a

⁵ 47 U.S.C. § 613 (a) & (b); 47 C.F.R. § 79.1 – 79.3.

⁶ *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 of NCTA at 10-11 (filed Oct. 18, 2011) (“NCTA Comments”); *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 of the ITTA at 2-3 (filed Oct. 18, 2011) (“ITTA Comments”); *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 of AT&T, 2 (filed Oct. 18, 2011) (“AT&T Comments”); see also *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 of Google, 7 (filed Oct. 18, 2011) (“Google Comments”); *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 of the National Association of Broadcasters, 6, 7-8 (filed Oct. 18, 2011) (“NAB Comments”) (assuming new mandates apply to video distribution “online”); *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century*

pass-through requirement for video programming providers and distributors is all that is either called for or necessary under the CVAA.⁷ ACA's additional suggestion that the Commission further clarify that the IP closed captioning requirements do not apply to broadband Internet access service providers is also well supported in the record.⁸

Consistent with these ends, ACA recommends that the Commission:

- Interpret CVAA references to the distribution of video programming using Internet protocol to refer to distribution of video programming over the Internet using IP technology.
- Incorporate elements of the definition of an OVD from the Comcast-NBCU Order to cleanly distinguish MVPDs subject to existing captioning requirements from online video distributors subject to the new IP closed captioning requirements.
- Hew closely to the statutory mandate of the CVAA and impose no more than a "rendering or pass through" obligation on video programming distributors.
- Clarify that the IP closed captioning obligation does not apply to broadband Internet access service providers.

As the record reflects, the online video programming distribution environment is nascent, evolving and complex, involving multiple participants, not all of whom are subject to the Commission's jurisdiction.⁹ The Commission must avoid imposing conflicting, unnecessary and burdensome obligations, or a patchwork of requirements on MVPDs, particularly smaller MVPDs with more limited access to capital and smaller subscriber bases over which to spread regulatory

Communications and Video Accessibility Act of 2010, MB Docket No. 11-154, Comments of the Consumer Groups (TDI, et al),¹⁸ (filed Oct. 18, 2011) ("Consumer Group (TDI, et al) Comments") (assuming new mandates apply to "Internet-delivered video that has first been published or exhibited on television").

⁷ See, e.g., NCTA Comments at 14-15; AT&T Comments at 5-9; *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 of Verizon, 2-4 (filed Oct. 18, 2011) ("Verizon Comments"); *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 of Microsoft, 6-7 (filed Oct. 18, 2011) ("Microsoft Comments").

⁸ ITTA Comments at 2-3; NCTA Comments at 11 n. 21; AT&T Comments at 2.

⁹ See, e.g., NAB Comments at 3 ("the instant proceeding presents novel questions about an extremely complex programming distribution ecosystem that is still very much evolving"); NCTA Comments at 2 ("There are multiple entities involved in providing television programming to viewers via the Internet either through streaming or downloading. . . . Imposing captioning requirements on the complex and still emerging online distribution chain presents complex and difficult issues.").

compliance costs. Clarity of roles and obligations in such a confusing environment is crucial to the successful implementation of the important public policy objective of ensuring that deaf and hard-of-hearing consumers will be able to enjoy the same captioned programming shown on television when it is distributed over the Internet.

II. THE MARKETPLACE FOR THE DISTRIBUTION OF VIDEO PROGRAMMING ONLINE IS COMPLEX AND DYNAMIC GIVING RISE TO THE NEED FOR SIMPLE AND STRAIGHTFORWARD CAPTIONING REQUIREMENTS

MVPDs, including the small and independent cable operators comprising ACA's membership, already provide captioning with the video programming distributed as part of their traditional MVPD subscription service consistent with Part 79 of the Commission's rules.¹⁰ This includes those MVPDs using Internet protocol transmission technology. Video programming suppliers, including broadcasters and cable programming networks, have had years of experience in complying with existing captioning mandates. This has occurred within a distribution environment largely under the control of the distribution platform owners, whether they are broadcasters or MVPDs.

In contrast to the well-established marketplace for the delivery of traditional MVPD services, the online video programming distribution market is evolving, complex and dynamic. It is composed of both MVPD online distributors and non-MVPD online distributors.¹¹ This development gives rise to need for regulatory requirements that are particularly simple and straightforward. Many MVPDs are already offering online viewing options in a variety of ways to their subscribers as a complement or component of their subscription television service. Some MVPDs either are, or soon will be,

¹⁰ That is, MVPDs today are providing captioned programming where required by the Commission's rules as part of their traditional MVPD subscription service regardless of whether their networks distribute video programming to subscribers using analog, digital, MPEG2 or Internet protocol distribution technologies. See ACA Comments at 4; ITTA Comments at 2-3; NCTA Comments at 24. Although only some MVPDs use Internet protocol today, an increasing number will in the future use Internet protocol instead of other distribution technologies to distribute their traditional subscription television services.

¹¹ *Comcast-NBCU Order*, ¶¶ 60-90 (discussing Internet delivery of video programming by both MVPDs offering online access to programming and non-MVPD "online video distributors" or "OVDs" making available video programming over the Internet).

delivering service enhancements, using IP, over the Internet, as part of their MVPD subscription offerings by means of options such as an online portal run by the MVPD that allows subscribers to access video programming over their Internet connections. Yet others make arrangements with programmers to permit their authenticated MVPD subscribers to access video programming made available online by cable programming networks, such as HBO GO and ESPN3. Today, some ACA member companies offer ESPN3 access to their MVPD subscribers, and a few offer access to HBO GO. ACA understands that for such services, the MVPD arranges with the programmer for its subscribers to access the programming and the role of the MVPD is more closely analogous to a facilitator or enabler rather than a direct distributor. Only a handful of ACA members, and those are ACA's largest members, are offering today or even contemplating launching in the near future a "TV Everywhere" type product giving subscribers online access to their subscription programming as an added feature of their MVPD offerings.¹²

The main categories of over-the-Internet video programming available exclusively to MVPD subscribers by their MVPD include:

- 1) A video-on-demand-like service run by programmers, like HBO GO:
<http://www.hbogo.com/#home/>.
- 2) A streaming service run by programmers, like ESPN3:
http://espn.go.com/watchespn/index/_source/espn3/#.
- 3) A video-on-demand-like service run by an MVPD, like Xfinity TV:
<http://xfinitytv.comcast.net/>
- 4) A streaming service run by an MVPD, like TWCable TV for iPad:
http://www.timewarnercable.com/nynj/learn/cable/TWCableTV/TWCableTV_iPad.html

All of these online MVPD service components utilize IP distribution, and are delivered over the Internet, but are only made available to MVPD subscribers within the MVPD's footprint. In contrast, non-MVPD online video distributors like Hulu, Netflix, Amazon Prime, and Apple TV deliver video programming to their end users everywhere directly over the Internet. An MVPD can also act

¹² Todd Spangler, *How Critical is TV Everywhere? It May be the Future of Pay Television – But Not All Are Sold*, Multichannel News (Oct. 17, 2011), available at http://www.multichannel.com/article/475334-How-Critical-Is-TV-Everywhere_.php (last visited Nov. 1, 2011).

as an online video distributor, separate and apart from the MVPD services described above, by making video programming available beyond its MVPD footprint by means of the Internet. Broadcasters also make available a variety of online viewing options, including streaming and pre-recorded programming, through broadcaster websites, and in so doing, act as video programming providers or distributors for their own content.¹³ These broadcaster websites are generally hosted by third parties, introducing an additional level of complexity into the world of online distribution.¹⁴

The record demonstrates that the new and complex ecosystem for providing and delivering closed captioning with video programming delivered using IP and over the Internet requires an even higher level of cooperation among those in the content production and distribution chain than was true for conventionally-delivered video programming.¹⁵ Although the Commission's existing rules have functioned in the traditional broadcaster and MVPD program delivery environment, they were not specifically tailored for the complex and ever-evolving inter-networking environment of Internet-distributed video programming.¹⁶ Many commenters have identified technical and contractual issues identified as impediments to meeting the IP closed captioning requirements ahead of the implementation schedule proposed in the NRPM.¹⁷

There are a multiplicity of video programming suppliers, providers, distributors and device manufacturers in the Internet television distribution chain, many of whom are either not subject to

¹³ NAB Comments at 2-3, 8-9. NAB explains that the Internet-delivery environment is vastly different than the broadcast-delivery environment, containing multiple links in the chain of delivery to end users: many video content providers, including broadcasters, have increasingly engaged content delivery networks ("CDNs") and third-party vendors to facilitate video delivery in the IP environment. In addition, while broadcasters either encode Internet-based content locally or rely on a third-party vendor for encoding, they typically employ CDNs to deliver that content.

¹⁴ NAB Comments at 8-9.

¹⁵ NCTA Comments at 4.

¹⁶ *Id.* at 28.

¹⁷ NAB Comments at 4, 18-19; NCTA Comments at 4-6. Some of these same concerns apply to the online video programming currently made available by MVPDs.

Commission regulation – such as content delivery networks, software manufacturers and equipment vendors – or who are otherwise unfamiliar with closed captioning requirements. In addition, as the NPRM reflects, today there are multiple closed captioning formats, and no set technical standards for the interchange and delivery of IP video programming.¹⁸ MVPDs offering online options today are still working out market-based arrangements with video programmers for captioning and other features. As a consequence, VPOs remain the sole entities able to ensure that captions are inserted into programming where required in the first instance.¹⁹ In sum, the record demonstrates that many technical and contractual obstacles must be overcome to make captioning work for consumers in this complicated and evolving IP and Internet environment, and that adequate time will be needed for all parties to understand their respective obligations and take appropriate steps to ensure compliance.

It is apparent from the foregoing that the online video programming distribution market is new, complex and rapidly evolving. Given this uncertain environment, and the multiple hats that can be worn by MVPDs in making available video programming using IP to MVPD subscribers, ACA reiterates its call for the Commission to take a light touch in its initial implementation of the closed captioning requirements of the CVAA and to be very clear in delineating the obligations of MVPDs under the new captioning mandates.²⁰

As discussed in more detail below, to avoid subjecting MVPDs who make online distribution a component of their MVPD services to multiple sets of captioning requirements, ACA's proposed

¹⁸ *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, ¶¶ 39-40 (rel. Sept. 19, 2011) (“NPRM”).

¹⁹ The Commission has recognized that “the interchange format involves negotiations between the VPO and VPP/VPD, which typically requires the entities involved to reach a mutually agreeable solution,” and accordingly appropriately proposed not to adopt a specific interchange format, but rather to rely on marketplace solutions. NPRM ¶ 40.

²⁰ ACA Comments at 19; see also NCTA Comments at 4 (“Imposing captioning requirements on the complex and still emerging online distribution chain presents complex and difficult issues. . . . Congress did not intend the Commission to adopt an overly regulatory approach.”).

interpretation of the CVAA would treat MVPDs using these components of MVPD service as MVPD services subject to existing captioning requirements.²¹ An MVPD acting as an online video distributor outside its MVPD footprint would be treated instead as a VPD and subject solely to the new IP closed captioning requirements under new Section 79.4 of the Commission's rules, whereas an MVPD using IP distribution for its traditional MVPD services would continue to be subject solely to the existing closed captioning obligations under existing Section 79.1-79.3 of the Commission's rules.

III. THE COMMISSION MUST MAKE CLEAR IN ITS DEFINITIONS THAT THE IP CLOSED CAPTIONING RULES APPLY TO DISTRIBUTION OF VIDEO PROGRAMMING OVER THE INTERNET RATHER THAN VIA IP TECHNOLOGY

As ACA urged in its comments, to achieve the Commission's goal of creating a balanced implementation program for IP-delivered captioning, it is critical that the rules clarify that the new closed captioning requirements apply to online video programming providers and distributors using IP to distribute programming over the Internet, and not to MVPDs using IP, including over the Internet, to deliver MVPD subscription service within their MVPD footprint.²² Limiting the sweep of the IP closed captioning obligations to video programming distributed over the Internet – online – is not only the most natural and reasonable interpretation of the statute, but also one that will (i) avoid needless confusion over which captioning rules apply to an MVPD using IP to distribute video programming to its subscription television customers and (ii) avoid imposing unnecessary burdens on smaller providers. By making this clarification, the Commission will help ensure the successful rollout of the new captioning mandates. This interpretation is well supported in the record, will avoid confusion, help ensure smooth implementation of the new captioning regime, and should be adopted by the Commission.

²¹ As explained in Section III.B, *infra*, to the extent the Commission accepts this definition a video programming distributor subject to the IP closed captioning requirements, it should also grant a temporary blanket waiver to MVPDs to provide captioned programming online until the new rules take effect.

²² ACA Comments at 2.

A. The Commission Should Interpret the Statutory Reference to the Distribution of Video Programming Using IP to Refer to Distribution Over the Internet Using IP

In its comments, ACA objected to the Commission's proposal to define a video programming provider ("VPP") and video programming distributor ("VPD") simply as an "entity that makes available to directly to the end user video programming through a distribution method that uses IP" because this over-broad definition would sweep in MVPDs already subject to existing captioning mandates.²³ ACA recommended instead that the Commission narrow its definition of VPDs subject to the new captioning requirement to include only an entity that makes available directly to the end user covered video programming using IP distribution online, that is, over the Internet.²⁴ ACA reasoned that making the "IP vs. Internet" distribution distinction in the rules is consistent with (i) the statutory language, (ii) the canons of legislative interpretation (iii) the legislative history; and (iv) the report of the advisory committee charged with making recommendations concerning implementation of the IP captioning requirements to the Commission.²⁵ The record fully supports ACA's recommendation.

Many commenters agreed that the Commission should impose the statutory obligation to enable the rendering or pass-through of captions solely on VPDs who distribute video programming over the Internet.²⁶ NCTA similarly urges the Commission to modify its proposed definition of VPD to focus not on the *transmission technology* used to deliver video programming, but rather "to focus on the *platform* – the Internet—through which that programming is distributed."²⁷ ITTA, whose member

²³ *Id.* at 7.

²⁴ In its comments, ACA took no position on the NPRM's proposal to treat the two statutory categories of entities subject to the IP captioning rules – video programming providers and video programming distributors – interchangeably. ACA Comments at 7 n. 18; NPRM § 15. Although ACA took no position on that proposal, for ease of reference, ACA referred to VPPs and VPDs as "VPDs" in its comments and continues the practice in these reply comments.

²⁵ ACA Comments at 7-13.

²⁶ NCTA Comments at 1, 10-11; ITTA Comments at 2-3; AT&T Comments at 2.

²⁷ NCTA Comments at 10.

companies include many MVPDs who use IP to deliver to end users video programming that is being exhibited on television (“IPTV providers”), aptly explained the reasons for this necessary qualification:

[T]he Commission should make clear that the definition of VPD does not apply to MVPDs that provide television programming to end user subscribers via IP transmission. MVPDs that provide subscription video service to customers, including IPTV providers, are subject to the closed captioning obligations set forth in Part 79 of the Commission’s rules, which cover the provision of video programming to residential households for distribution and exhibition on television. The goal of the instant proceeding is to apply captioning requirements for programming delivered online, not to address the captioning obligations to which IPTV providers already must comply under Part 79 of the Commission’s rules. The Commission should clarify that the online captioning requirements it is proposing to adopt are intended to apply to video programming provided on the Internet and not video programming provided via IP transmission generally.²⁸

Tellingly, several other commenters, including advocates for the deaf and hard-of-hearing communities, simply *assume* that the rules will apply only to online/Internet distribution of video programming once shown on television, thus evidencing the common understanding that the captioning requirements of the CVAA were originally intended, and are currently understood, to apply only to online video distributors.²⁹ Application solely to Internet-distributed video programming is clearly the most natural and reasonable interpretation of the CVAA’s captioning mandate.

B. The Definition of a VPD Subject to the IP Captioning Requirement Should Incorporate Elements from the Commission’s Definition of an OVD from the Comcast-NBCU Order to Cleanly Distinguish MVPDs Subject to Existing Captioning Requirements from Online Providers Subject to the New IP Captioning Requirements

Distinguishing IP from Internet distribution is just the first step the Commission must take to safeguard that the new captioning rules do not sweep more broadly than Congress intended. To further ensure clarity of obligation and avoid subjecting MVPDs using IP distribution to duplicative

²⁸ ITTA Comments at 2-3.

²⁹ See, e.g., Google Comments at 7; NAB Comments at 6, 7-8 (assuming rules apply to video distribution “online”); Consumer Groups (TDI, et al) Comments at 2-5 (offering perspective of the deaf and hard-of-hearing consumer communities that CVAA captioning rules are applicable to “Internet delivered video programming;” discussing online video providers such as Netflix and Apple).

and potentially inconsistent captioning obligations and enforcement processes, ACA recommended in its comments that the Commission incorporate into its definition of a VPD the distinction between an MVPD and an online video distributor reflected in its definition of an “OVD” in the *Comcast-NBCU Order*.³⁰

In reviewing the potential competitive harms of the Comcast-NBCU combination, 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, Google TV and iTunes), but that Comcast-NBCU’s incentives to disadvantage these two types of rival distributors were similar.³¹ Although both may be considered online video distributors, MVPDs have existing program access rights that OVDs do not possess under the Communications Act, giving rise to the need to craft somewhat different remedial conditions for the two types of online distributor.³² For this purpose, the Commission defined the online video distributors – OVDs – who would be able to take advantage of special program access license conditions designed for their benefit by explicitly excluding from the category of OVDs an MVPD acting in its capacity as an MVPD in certain circumstances.

“OVD” means any entity that provides Video Programming by means of (i) the Internet or [(ii)] 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 it is offering Online Video Programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint.*³³

³⁰ ACA Comments at 8-9.

³¹ *Comcast-NBCU Order*, ¶¶ 75-90.

³² Although the *Comcast-NBCU Order* suggests that an online component of an MVPD service will be treated by the Commission as part of the MVPD service offering, the Commission has not yet addressed this question on an industry-wide basis.

³³ *Comcast-NBCU Order*, ¶¶ 67-90 (discussion the provision of online content to MVPDs and to non-MVPDs); Appendix A, Conditions, I. Definitions (emphasis supplied).

A benefit of making this distinction is that the Commission avoided the problem of a single entity having dual and potentially conflicting regulatory classifications affecting the same subject matter – its access to programming. Were the Commission to not address the problem of an MVPD qualifying as a “video programming distributor” under both existing Part 79 closed captioning requirements and the proposed new IP closed captioning requirements, a similar concern would arise.³⁴

ACA notes that the language referring to an “other IP-based transmission path provided by a Person other than the OVD” in the Comcast-NBCU conditions is similar but not identical to the definition of an “OVD” in the antitrust Complaint filed by the U.S. Department of Justice against the Comcast-NBCU transaction. There, the term appears to relate, *inter alia*, to the conditions imposed on Comcast-NBCU concerning Comcast’s offering of “specialized services” in its capacity as a broadband Internet service provider in DOJ’s Proposed Final Judgment (“PFJ”).³⁵ In the Complaint, DOJ defines an “OVD” as follows:

³⁴ 47 C.F.R. § 79.3(a)(5) (defines video programming distributor as “Any television broadcast station licensed by the Commission and any multichannel video programming distributor (MVPD), 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.”); NPRM, Appendix A – Proposed Rule changes, §2 (defining video programming distributor or video programming provider as “Any entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol.”).

³⁵ See *U.S. v. Comcast Corp*, Case No. 1:11-cv-00106, Complaint (D.C. Cir., filed Jan. 18, 2011) (“Complaint”); see also *U.S. v. Comcast Corp*, Case No. 1:11-cv-00106, Proposed Final Judgment (D.C. Cir., filed Jan. 18, 2011) (“Proposed Final Judgment”). OVDs are also discussed in the Competitive Impact Statement accompanying the Complaint at 11, 37-39 (“*Unlike MVPDs, OVDs do not own distribution facilities and are dependent upon ISPs for the delivery of their content to viewers;*” “Specialized Services are offered to consumers over the same last-mile facilities as Internet access services, but are separate from the public Internet,” and these can include online video programming) (emphasis added). Taken together these statements indicate a recognition that (i) an OVD that does not own distribution facilities can utilize Internet distribution or specialized services provided over a managed broadband ISP network to deliver video programming to an end user and (ii) that an MVPD can also act as an OVD by utilizing its own managed broadband ISP network to deliver online video programming using a specialized service offering that is not part of its MVPD subscription service. The Complaint’s definition of an OVD appears to suggest that the term is intended to include MVPDs who also offer video programming online *outside their MVPD service areas* either by means of the Internet or a specialized Internet service offering, but to exclude an MVPD *within its* “MVPD footprint” offering video programming by means of the Internet or a specialized Internet service as part of an MVPD subscription service. Although it would seem that an OVD would more likely use a combination of Internet and specialized service distribution to reach an end user, an OVD could also reach an end user by

“OVD” means any Person that distributes Video Programming in the United States by means of the Internet or another IP-based transmission path provided by a Person other than the OVD. This definition (1) includes an MVPD that offers Video Programming by means of the Internet or another IP-based transmission path outside its MVPD footprint as a service separate and independent of an MVPD subscription; and (2) excludes an MVPD that offers Video Programming by means of the Internet or another IP-based transmission path to homes inside its MVPD footprint as a component of an MVPD subscription.³⁶

The benefit of using these same distinctions in defining VPDs subject to the CVAA’s IP closed captioning rules is that they provide a way to cleanly separate online distributors from MVPDs, while recognizing that an MVPD can also act as an online distributor outside its MVPD footprint by providing an over-the-top video programming service. To achieve this goal, ACA recommends that the Commission adopt the following definition of a “video programming distributor” for purposes of closed captioning of video programming delivered using Internet protocol:

Any entity that makes available directly to the end user video programming using an IP distribution method over the Internet or other IP-based distribution path provided by an entity other than the VPD. A VPD does not include an MVPD using IP distribution inside its MVPD footprint or an MVPD to the extent it is offering online video programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint.³⁷

By adopting this definition, the Commission can establish a clear and reasoned distinction between an online VPD and those MVPDs who (i) either use IP distribution to provide their MVPD subscription service to subscribers or (ii) offer an online option such as “TV Everywhere” as a

wholly by means of common or private carrier distribution plant owned by third-party providers, coupled with the specialized services offered by a third-party broadband ISP. An MVPD choosing to provide online video programming services outside its MVPD footprint by similar means would, under this definitional framework, be considered solely an OVD rather than a traditional MVPD.

³⁶ Complaint at 5-6.

³⁷ The definition could be further clarified to specify, similar to DOJ’s definition of an OVD, that a “VPD” for IP closed captioning purposes includes an MVPD that offers video programming by means of the Internet or another IP-based transmission path *outside* its MVPD footprint as a service separate and independent of an MVPD subscription.

component of their MVPD subscription service within its MVPD footprint. Within its MVPD footprint, the MVPD using IP distribution either for their MVPD subscription services or an online component of its MVPD subscription service will remain subject solely to the closed captioning requirements of Section 713 (a) and (b) of the Act and Sections 79.1-79.3 of the Commission's rules. Outside its MVPD footprint, an MVPD acting as an OVD by distributing video programming over the Internet and/or by means of a specialized Internet service will be subject solely to the new IP closed captioning requirements of Section 713 (c) and Section 79.4 of the Commission's rules.³⁸ No programming that Congress intended to be distributed with closed captioning will escape coverage under the Commission's rules, consumers dependent on closed captioning to fully access and enjoy

³⁸ Although MVPDs currently making available video programming online as a component of their MVPD subscription service would benefit from being relieved of the burden of complying with two sets of captioning requirements for a single service should the Commission accept ACA's recommended approach to the definition of a "video programming distributor" for IP closed captioning purposes, those MVPDs should not be held responsible for providing captioning with video programming online until such time as the new IP closed captioning requirements go into effect for several reasons. First, given the uncertain legal status of online video programming offerings made available by MVPDs to their subscribers such as TV Everywhere, or authentication services for specific video-on-demand programming such as HBO GO and ESPN3, it would be unjust to attach liability before the Commission has directly resolved whether such offerings in fact fall within the definition of an MVPD service. Second, as discussed in Section II, *supra*, existing closed captioning rules were adopted at a time when MVPDs only distributed video programming in analog and digital formats (which does not preclude them from applying to other distribution formats, such as IP) by Commission-regulated entities providing service to the public over distribution networks under their ownership or control, not for the complex and ever-evolving inter-networking environment of the Internet. Third, unlike the new IP closed captioning requirements, the existing rules apply to covered video programming regardless of whether it was first exhibited or shown on television – a potentially unlimited universe of programming. Fourth, even if properly considered components of an MVPD service, the technical and contractual issues identified in the record as impediments to meeting the IP closed captioning requirements ahead of the implementation schedule proposed in the NPRM apply equally to these MVPD online offerings as they do to any Internet-delivered video programming. For these reasons, ACA respectfully requests that should the Commission agree, in the interest of avoiding confusion and undue burdens, that MVPDs including an online video programming in their MVPD services remain subject solely to existing captioning requirements, that it also grant a temporary blanket waiver of enforcement of the existing captioning rules until such time as the new rules designed for the online closed captioning environment take effect. This will afford both MVPDs making available an IP or online feature with their MVPD services, and all online video programming distributors, the time and certainty required to successfully implement closed captioning requirements designed for the IP and Internet environment. Should the Commission accept ACA's view that online services delivered by MVPDs to their MVPD customers are controlled by the existing captioning rules and grant its request that MVPDs be given additional time to comply by ensuring that required captions are rendered or passed-through with programming they made available to subscribers via IP distribution online, consumers would be no worse off than if Commission rejected the ACA's position and required all online IP-delivered MVPD services delivered to MVPD customers to be controlled by the new rules, as those new rules will not become effective under the schedule proposed in the NPRM for a year or more. See NPRM ¶¶23-28; Appendix A, § 79.4 (b)(1).

video programming will be protected, and MVPDs using IP technologies will avoid confusing and burdensome mandates.

IV. THE COMMISSION SHOULD HEW CLOSELY TO THE STATUTORY LANGUAGE AND IMPOSE NO MORE THAN A PASS-THROUGH OBLIGATION ON VPDS DISTRIBUTING PROGRAMMING OVER THE INTERNET

In its initial comments, ACA urged the Commission to adopt the clear distinctions in the responsibilities of video programming providers, distributors and owners it proposed in the NPRM.³⁹ Consistent with the CVAA, the proposed rules place the primary responsibility for compliance with the IP closed captioning mandates on VPOs to send program files to VPPs/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.⁴⁰ As ACA observed, there is no indication in either the statutory language or legislative history of the CVAA that Congress intended the Commission’s implementation of the IP closed captioning rules to include active monitoring responsibilities, and the Commission should therefore refrain from imposing any of the potential additional responsibilities identified in the NPRM.⁴¹

Particularly in the online video programming distribution environment, where access to programming once aired on television can be had through a variety of techniques (on-demand, streaming, via a programmer’s website or a distributor’s online portal), primary responsibility to ensure that captions as required by the rules are included in the programming data stream most appropriately rests with the content supplier, rather than jointly or severally by downstream providers

³⁹ ACA Comments at 13-15.

⁴⁰ NPRM ¶ 16; Appendix A, Proposed Rule Changes, § 79.4 (b)(2)(i) (Obligations of video programming distributors and providers – video programming distributors and providers must enable the rendering or pass through of all required captions to the end user).

⁴¹ ACA Comments at 14-15; NPRM ¶ 16.

and distributors.⁴² This clear allocation of responsibility according to the level of control exerted by VPOs and VPPs/VPDs will help achieve a smoothly functioning IP closed captioning system and meet the important public policy goal of enhancing the ability of consumers requiring captioning to enjoy video programming delivered over the Internet in a manner similar to what they enjoy over traditional distribution platforms.

There is wide support in the record for ACA's position, with commenters agreeing that a pass-through requirement is all that is either called for or necessary under the CVAA for VPPs and VPDs.⁴³ NCTA notes, for example, that it would be inappropriate for the Commission to impose any requirement for VPDs or VPPs to "*ensure that video programming has the required captions before they pass it through to viewers,*" a requirement that is neither imposed in the television environment nor necessary to resolve any identified problem in the online video programming environment.⁴⁴ Verizon affirms that the NPRM's proposed assignment of responsibility for including required closed captioning with the programming to the VPOs, leaving VPPs/VPDs with the obligation, when a program file is received with the required captions, of including the captions at the time the program file is made available to the end user, is a sensible one.⁴⁵ Verizon cautions the Commission against imposing additional affirmative obligations on VPPs/VPDs to ensure that the programming they pass through is appropriately captioned in the first instance.⁴⁶ Similarly, AT&T submits that under the CVAA, VPPs/VPDs have no independent obligation to determine whether programming is subject to captioning requirements before providing it to end users; provider/distributor obligations are limited to

⁴² Consumer Group Comments (TDI et al) at 37 (suggesting the imposition of exclusive joint and several liability on VPPs/VPDs rather than VPOs).

⁴³ See, e.g., NCTA Comments at 14-15; AT&T Comments at 5-9; Verizon Comments at 2-4; Microsoft Comments at 6-7.

⁴⁴ NCTA Comments at 14 (emphasis original).

⁴⁵ Verizon Comments at 2.

⁴⁶ *Id.* at 3.

passing through captions received and to “make a good faith effort to identify video programs that require closed captioning” under a mechanism established by the Commission.⁴⁷ Microsoft stresses that the role of the VPD under the CVAA is strictly limited to “merely a pass-through role.”⁴⁸ Google also supports the clear allocation of responsibility proposed in the NPRM between video programming owners, providers and distributors. As Google explains:

In contrast to VPOs, VPPs/VPDs are not in a position to determine whether programming is subject to closed captioning requirements. VPP/VPD systems are configured to receive program files and render or pass through required captions to end users. These systems generally do not enable a VPP or VPD to review video content, determine whether it is required to be captioned or exempt, and then create or add captions. Moreover, it would require an extraordinary allocation of resources by a VPP or VPD to review each content file in order to determine the nature of the programming. In view of VPOs’ ability to readily make such determinations, requiring the undertaking of VPPs/VPDs would be unduly burdensome. Requiring VPOs to provide closed captions therefore appropriately balances incentives and burdens among VPOs, VPPs, and VPDs, and furthers the goal of passing through as much captioned programming as possible to end users.⁴⁹

ACA emphatically agrees with these commenters that it would be unduly burdensome to impose primary responsibility on the distribution entities charged by Congress with solely a “rendering or pass through” obligation to review each content file prior to distribution to users online to determine whether it requires captioning or not, rather than placing that responsibility on the program owners.

For the reasons identified above, the Commission should reject the calls to place primary or sole responsibility on VPPs and VPDs to ensure that programming subject to the IP closed

⁴⁷ AT&T Comments at 7-8.

⁴⁸ Microsoft Comments at 6 (also urging the Commission to clearly distinguish the role of a VPP from that of a VPD to ensure that responsibility for receiving certification or rendering captioning from VPOs is properly allocated).

⁴⁹ Google Comments at 7-8.

captioning requirements contains the required captions.⁵⁰ Such a misallocation of responsibility would be not only unfair and unduly burdensome to smaller providers and distributors, but contrary to the statutory language and legislative intent of the CVAA. It would likely impede, rather than facilitate the cooperative arrangements among all the links in the Internet video programming owners and distribution chain that will be necessary to ensure that required captions are delivered to end users. In short, imposing primary or exclusive responsibility on VPPs and VPDs would be contrary to law and bad public policy and the Commission should politely decline to take this route in the rules it adopts in this proceeding.

V. THE COMMISSION MUST ALSO CLARIFY THAT THE IP CLOSED CAPTIONING OBLIGATION DOES NOT APPLY TO BROADBAND ISPs

In its comments, ACA also suggested that the Commission provide an additional clarification to avoid imposing IP captioning requirements on broadband ISPs who use IP to provide access to, rather than distribute, the content, services and applications, such as streaming video, available on the Internet.⁵¹ Several commenters agree with ACA's assessment that confusion could arise unless the Commission makes this clarification. The potential for confusion arises due to the fact that both broadband ISPs and online video distributors use IP to make video programming available to consumers, despite the fact that the two entities are providing distinctly different services to the public. In this regard, ITTA noted that its member companies also provide broadband ISP services and in that capacity, merely route and transmit the IP packets that contain the video stream to end users and have no control over the presence, insertion, placement, formatting or other aspects of the

⁵⁰ See, e.g., NAB Comments at 11 (“the Commission should place the burden of compliance on the entity that is closest to the end user. In some instances, that will be a broadcaster or other programmer acting as a VPD/VPP for its own content; in most instances, it will be a VPD/VPP to whom a programmer has provided content for distribution.”); Consumer Group Comments at 3, 5-9 (VPPs/VPDs should be the entities with whom the consumer primarily interacts to receive a video; VPPs/VPDs should have sole responsibility for compliance with captioning requirements, and exclusive liability for programming displayed with captions in violation of the statutory commands).

⁵¹ ACA Comments at 8 n. 22.

closed captioning data included with such video programming.⁵² Accordingly, ITTA averred it would be unfair and impractical for ISPs to be given responsibility for captioning compliance under the new IP closed captioning rules. ITTA recommended instead that responsibility for compliance must rest with the party or parties who can actually address captioning problems that may arise with online video programming.⁵³

ACA agrees with ITTA: it would be impractical and unfair to impose closed captioning compliance responsibilities on broadband ISPs simply because they use IP to distribute the IP packets containing the video stream to end-users. Doing so would impermissibly extend the closed captioning obligations to entities Congress did not intend to cover, would be inconsistent with the Commission's own definitions of broadband Internet access service providers, and would impose burdensome and unnecessary obligations on broadband ISPs. The Commission should avoid such outcomes by distinguishing broadband ISPs using IP distribution from VPDs for IP closed captioning purposes.

VI. CONCLUSION

In implementing the CVAA, the Commission must be careful to limit the scope of the IP closed captioning obligations to video programming distributed over the Internet – online. This includes avoiding the application of the new rules to MVPDs who provide an online video access component to their MVPD subscriptions. This is the most reasonable interpretation of the statute and will avoid confusion over which captioning rules apply to an MVPD using IP to distribute video programming to its subscription television customers. It will also avoid imposing unnecessary burdens on smaller providers. The Commission must further craft its rules in such a manner so that they do not impose greater obligations on providers than Congress intended. In particular, the new rules must only require that VPDs enable the rendering or pass through of closed captioning for

⁵² ITTA Comments at 3.

⁵³ *Id.*

programs they obtain from VPOs and distribute over the Internet. Finally, the Commission must make clear that the IP closed captioning rules do not apply to ISPs. By crafting rules that adhere to these principles, the Commission will ensure the successful roll out of the new captioning mandates consistent with the will of Congress.

Respectfully submitted,
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