

January 9, 2012

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

Re: *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

Dear Ms. Dortch:

On January 5, 2011, Jim Coltharp, Chief Policy Advisor for FCC & Regulatory Policy at Comcast Corporation; Charlie Kennamer, Vice President, Engineering Policy and Industry Affairs at Comcast Cable; Jerry Parkins, Director, Digital Technology and Standards at Comcast Cable; and Cathy Fox, Senior Counsel at Comcast Corporation; and Jonathan Friedman and the undersigned of Willkie Farr & Gallagher LLP spoke separately by telephone regarding the above-captioned proceeding with (1) Michelle Carey, Mary Beth Murphy, Diana Sokolow, Steven Broeckaert, Alison Neplokh, and Jeffrey Neumann, all of the Media Bureau, and (2) Erin McGrath, Acting Legal Advisor, Media, to Commissioner McDowell.¹

On both calls, Comcast expressed concerns regarding the retroactive application of the captioning rules to archived online content. We noted our agreement with legal arguments made by NCTA that the plain language of the statute and legislative history indicate Congress's intent that the rules apply prospectively to programming exhibited on television after the effective date of the rules.²

To the extent the Commission nonetheless requires video programming distributors ("VPDs") and video programming owners ("VPOs") to replace uncaptioned programming that is already online with captioned versions, we urged that sufficient time and flexibility be provided to comply with any such requirements. The captioning of archived online content presents significant logistical challenges. Because of the complex video distribution ecosystem, which involves many different

¹ Ms. Fox did not participate in the second call.

² See Comments of the National Cable & Telecommunications Association, MB Docket No. 11-154, at 18-20 (Oct. 18, 2011).

players, VPDs like Comcast may have no way of knowing whether a particular uncaptioned program available online has become subject to the rules as a result of a captioned version of the same program having been shown somewhere on television by some distributor or broadcast station.³ There currently are no mechanisms available to ensure that VPDs receive the necessary information and captioned program files to comply with any rules that apply to archived online content. To address this reality, the Commission must afford all parties sufficient time to develop such mechanisms.

We also noted that there may still be some situations where a VPD will have no knowledge that it is distributing content that has, subsequent to its initial posting online, become subject to the captioning rules. Holding a VPD responsible in such situations would be unreasonable. Therefore, consistent with the CVAA, the Commission should provide that a VPD that has no way of knowing about the need to swap an uncaptioned legacy asset with a new, captioned version, has not violated the statutory “good faith” standard and remains in compliance.⁴

Apart from the difficulties involved with identifying archived programming that has become subject to the rules, there are significant challenges involved with substituting a captioned version of programming for an uncaptioned version that is already online. Because of the technical issues and potential number of assets involved, Comcast urged the Commission to afford VPDs an adequate amount of time, such as 90 days, to complete the asset swap process.⁵ Comcast explained that it typically receives assets for online distribution on a “push” basis – i.e., VPOs will send assets to Comcast, and Comcast will then process those files for online distribution. As consumer demand for online video continues to grow, Comcast will be receiving and processing more and more assets. But its processing capacity is limited by equipment and system constraints, human resources constraints, and other factors. Therefore, it would be difficult, if not impossible, to quickly process and swap out a significant number of archived online video assets as might be required by retroactive application of

³ For example, Comcast may distribute on Xfinity.com library content that was originally produced decades ago. The owner of that content may have licensed it broadly over the years, perhaps to multiple broadcast stations and/or cable networks and other online distributors. Comcast has no way of tracking whether any of the assets on Xfinity.com have been shown on television by another party. This complexity is compounded because some possible distribution outlets are either outside Comcast’s cable footprint (e.g., a broadcast station in a state where Comcast does not operate) or are cable networks not carried by Comcast. Video programming owners themselves may not have a feasible way to monitor all television distribution of their content, particularly for library content that has been licensed to many parties.

⁴ See CVAA § 202(b) (amending 47 U.S.C. § 713(c)(2)(D)(vi) to provide that a VPD shall be deemed in compliance with the rules if it “enables the rendering or pass through of closed captions and makes a good faith effort to identify programming subject to the Act . . .”).

⁵ The forthcoming Order should specify discrete time periods for (1) VPOs to identify programming now subject to the rules and to provide an updated, captioned file to VPDs, and (2) VPDs to comply with the asset swap requirements. Establishing a single time-frame for both entities’ compliance would be insufficient because it could result in situations where the VPD has very little time to complete the asset exchange. For instance, if the rules provided 90 days for both entities to address the issue, and the VPO did not provide updated assets until the 84th day, the VPD would be left with a mere six days to complete a burdensome task.

the rules, while also processing significant volume of new content that is continually delivered to Comcast.⁶

We expect that during the phase-in period of the rules, the added burden of swapping archival content on a short timetable, such as 30 days, could overwhelm our capacity. The additional burden of swapping out archival content would conceivably limit or delay our ability to keep other current and more compelling content up to date. In light of these realities, 90 days is a reasonable amount of time to afford VPDs to complete required asset swaps.

In the meeting with Ms. McGrath, we also described our significant concerns about any mandates that interconnection mechanisms, such as HDMI connectors, pass through closed captioning data and highlighted that numerous other parties had raised similar concerns.⁷ The statute clearly directs the Commission to allow a source device to render closed captions in the source device itself *or* pass through closed captions for rendering in a connected device.⁸ Any rule mandating that source devices pass through caption data would be in direct contradiction with the statute. It would also create significant consumer confusion. The new HDMI connectors would be compatible *only* with equipment manufactured after the new standard is deployed several years in the future. Consumers would face substantial costs in acquiring new, compatible equipment, and there would be significant customer confusion and frustration regarding compatibility issues with the millions of legacy video devices that do not support pass-through over HDMI. Undoubtedly, Comcast and other operators would face an avalanche of questions and complaints from customers frustrated – through no fault of Comcast's – by such compatibility issues.

⁶ If Comcast were required to change an asset from an uncaptioned version to a captioned version, it would necessitate a complete swap out of the asset. Online video distribution technology, and the workflows that support it, are still in their infancy, and there is currently no feasible way to simply add the closed captioning data to an existing asset.

⁷ See, e.g., Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154 (Jan. 5, 2012); Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154, Attachment at 3 (Dec. 16, 2011); Letter from Jason E. Friedrich, Head of US Government & Regulatory Affairs, Motorola Mobility, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154, at 1 (Oct. 27, 2011).

⁸ 47 U.S.C. § 303(z)(2) (emphasis added). Other provisions of the CVAA also clearly allow for the rendering *or* pass through of closed captions. See *id.* §§ 303(z)(1) & 713(c)(2)(D)(vi).

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Please do not hesitate to contact me should you have any questions regarding this matter.

Respectfully submitted,

/s/ Brien C. Bell
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