

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

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

**PETITION FOR TEMPORARY PARTIAL EXEMPTION OR LIMITED WAIVER
FROM THE PROVISIONS OF SECTION 79.4(c)(2)(i) RELATING TO
THE RENDERING OF CAPTIONS, INCLUDING TO THE
APPLICATIONS, PLUG-INS, OR DEVICES PROVIDED BY A VPD**

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To: The Commission

PETITION FOR TEMPORARY PARTIAL EXEMPTION OR LIMITED WAIVER

I. Introduction and Summary

This petition is being submitted pursuant to Section 202(b) of the CVAA¹ and Section 79.4(d)(1) of the Commission’s rules² to request a temporary exemption from portions of the Commission’s rules that define the obligations of video programming distributors. Specifically, the Digital Media Associations (“DiMA”),³ a national trade organization devoted primarily to the online video and audio industries, requests that those VPDs that do not currently provide closed captioning be exempt for a limited time period, until January 1, 2014, from the provisions of Section 79.4(c)(2)(i) relating to the rendering -- but not the pass-through -- of captions, including to the applications, plug-ins, or devices provided by a VPD. This limited exemption request should be granted because the technological challenge to develop and deploy applications,

¹ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751, §202(b) (2010) (“CVAA”).

² 47 C.F.R. §79.4(d)(1).

³ DiMA members Apple Inc. and Google do not join this Petition.

plug-ins, or devices to render captioning for video programming distributors (“VPDs”) that have not provided closed captioning previously imposes significant difficulty to achieve by September 30, 2012.

In the alternative to an exemption request, DiMA requests that the Commission use its authority under Section 1.3 of its rules to waive the specified provisions in Section 79.4(c)(2)(i) for all VPDs until January 1, 2014, for good cause.⁴ Under either procedural step, the public interest would be served by this limited extension. The VPDs represented by the undersigned are committed to deploying IP closed captioning as rapidly as possible, but because certain VPDs are not currently providing closed captioning, additional time is needed to come into full compliance with the Commission’s requirements.

II. A TEMPORARY EXEMPTION FOR VPDs OF THE IP CLOSED CAPTIONING REQUIREMENTS RELATING TO RENDERING OF CLOSED CAPTIONING IS IN THE PUBLIC INTEREST.

a. Requirements of Section 79.4(c)(2)(i).

The new duties of a VPD are set forth in Section 79.4(c)(2)(i). That rule requires a video programming distributor to “[e]nable the rendering or pass through of all required captions to the end user, maintaining the quality of the captions provided by the video programming owner and transmitting captions in a format reasonably designed to reach the end user in that quality. A video programming distributor or provider that provides applications, plug-ins, or devices in order to deliver video programming must comply with the requirements of Section 79.103(c)-(d).”⁵

⁴ *Id.* §1.3.

⁵ *Id.* §79.4(c)(2).

This rule for the first time requires online video distributors to pass through closed captioning, to render the closed captioning, and in that context to ensure that VPDs are able to offer users the full functionality of user configuration options found in Section 79.103(c). Pursuant to the provisions in Section 79.4(b), a VPD must comply with these requirements for prerecorded programming by September 30, 2012, and VPD software must include closed captioning functionality in each upgrade or new release issued thereafter.⁶

DiMA does not object to (and does not seek a waiver from) the pass-through obligation, since that is consistent with the report from the Video Programming Accessibility Advisory Committee⁷ and the Commission's Notice of Proposed Rulemaking.⁸ However, the other two requirements under Section 79.4(c)(2)(i), which relate to rendering, combine to impose obligations on VPDs represented by the undersigned that present significant technical difficulties in the time allotted. In order to render video programming, VPDs generally utilize a VPD-provided application, plug-in, or device that is either downloaded by a user or installed by a device manufacturer to enable users to access the VPD's content.

Accordingly, after September 30, 2012, VPDs must comply with the myriad technical requirements in Section 79.103(c). However, the video content provided by these VPDs is often

⁶ The Report & Order states that “[i]f a VPD uses software to enable the rendering or pass through of captions, the VPD is responsible only for software it deploys after the applicable compliance date [of six months].” Report & Order at ¶53. The Commission further explains that it considers “upgrades to VPD software to be new applications.” *Id.* at n. 227. VPD Petitioners urge the Commission to maintain this “next upgrade” position after the exemption period requested herein has elapsed.

⁷ First Report of the Video Programming Accessibility Advisory Committee, Closed Captioning of Video Programming Delivered Using Internet Protocol at 29-30 (“VPAAC Report”) (July 13, 2011).

⁸ *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*, Notice of Proposed Rulemaking, 26 FCC Rcd. 13734, at Appendix A (Sept. 19, 2011) (“NPRM”).

displayed on hundreds of devices ranging from televisions, set-top boxes, DVD players and game consoles to personal computers and tablets. Consequently, the software, application or plug-in used by the VPD must be tailored to each device in order to accommodate the huge variety of hardware, software, screen sizes, and user interfaces employed by each device. The amount of effort to ensure that each application or plug-in is upgraded to comply with the closed captioning requirements and to ensure that the captioning function works appropriately on each device is substantial and will be extremely difficult to accomplish in the short timeframe set by the Commission.

For these reasons, DiMA requests a temporary exemption from the rendering requirement in the first sentence of Section 79.4(c)(2)(i) and all of the second sentence of Section 79.4(c)(2)(i) until January 1, 2014.

b. Standard of Review

Congress granted the Commission authority to “exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program or equipment.”⁹ The Commission’s rules further state that the Commission may grant to video programming distributors an exemption from the closed captioning rules upon a showing that the requirements “impos[e] significant difficulty or expense.”¹⁰ The Commission identified the following factors it will consider in determining

⁹ Section 202(b) of the CVAA (adding a new Section 713(c)(2)(D)(ii) to the Communications Act, 47 U.S.C. §613(c)(2)(D)(ii)).

¹⁰ 47 C.F.R. §79.4(d)(1). Because the Report and Order concludes that “video programming providers” and “video programming distributors” have the same meaning, the Order also makes clear that the reference to video programming provider in Section 79.4(d)(1) subsumes VPDs. *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming*: (continued...)

whether an obligation imposes significant difficulty or expense: (i) the nature and cost of the closed captions for the programming; (ii) the impact on the operation of the video programming provider; (iii) the financial resources of the video programming provider; and (iv) the type of operations of the video programming provider.¹¹ In addition, Section 79.4(d)(3) directs a petitioner to “describe any other factors it deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements of this section”¹²

In assessing this temporary exemption, DiMA urges the Commission to evaluate this petition in light of the limited nature of the exemption requested. The VPDs represented by the undersigned commit to complying with the pass-through requirement and will work diligently in the extra months requested to comply with the IP closed captioning requirements. DiMA is not seeking a permanent exemption and consequently urges the Commission to evaluate this request differently than a request for a permanent exemption.

c. Consideration of Statutory Factors

1. The Nature and Cost of the Closed Captions for the Programming

In order to comply with the requirements to render closed captioning, a video programming distributor will need to develop new software that can render IP closed captioning on multiple devices. In many cases this will mean working with third-party software vendors. Implementing these obligations will involve tremendous complexity for providers and doing so in the very short time period mandated under the existing rules place demands on VPDs that

Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 27 FCC Rcd. 787 at ¶¶ 9, 62-63 & n. 257 (Jan. 12, 2012) (stating the Section 79.(d)(1) exemption process includes VPDs) (“Report & Order”).

¹¹ 47 C.F.R. §79.4(d)(2).

¹² *Id.* §79.4(d)(3).

even large companies cannot meet. Companies plan significant changes to complex software systems over far longer timeframes than six months. Companies require these longer time periods for several reasons.

- First, large software changes require additional highly skilled programmers, designers, and engineers. Demand for these individuals already far outstrips supply; companies compete aggressively for these individuals; and even well-funded VPDs simply cannot all add enough programmers familiar with the relevant software quickly enough to meet the mandate.
- Second, even if additional developers were available, rushing substantial changes to complex software projects is likely to be counter-productive, and perhaps even harmful. Unplanned changes in course increase the likelihood of bugs and other errors, which threaten to undermine not only user configurable settings, but also core captioning and other important device functions, because the software that must be changed integrates multiple classes of device functions.
- Third, companies need longer time periods in order to complete critical tests of new software – the testing regimes alone often run longer than six months. These tests identify unexpected problems introduced by substantial changes to existing software and are a central part of all software development. It would be significantly difficult to develop new software functions, test the new software, and then fix problems identified by the testing – all in only six months.

Once a VPD has worked with its vendors and developed the appropriate adaptations for its applications, plug-ins, or devices, the VPD then has to test the software and also tailor it for captions to be displayed on, in some cases, hundreds of devices ranging from televisions, game consoles, personal computers, and tablets, which all have different hardware, software, screen

sizes and user interfaces. This entire process is a significant undertaking that will take substantial time.

Because certain VPDs represented by DiMA are not currently providing closed captioning, the challenge they face to design, build, test and operate an entirely new capability is substantial. To accomplish this goal, a VPD will have to develop a series of processes and mechanisms to enable content owners to transmit programming with closed captions; store the closed captions; prepare such content to be passed through to the end user, and upgrade the applications, plug-ins, or devices to display the captions at the request of the user.

VPDs are working closely with suppliers and software vendors to develop the capability to render digital closed captioning across hundreds of devices. For example, these VPDs must add a “rendering engine” to their video player since that capability has not existed previously. Adding this capability alone is a large undertaking which will take longer than September 30, 2012. Then, they must ensure that this rendering engine can comply with the myriad obligations found in Section 79.103(c). These detailed technical requirements cover every feature of captions from character color and background color, to character size, font styles, character edge attributes and character opacity.¹³ And under each requirement there are multiple sub-requirements, including the requirement to offer eight different font styles, five different character edge attributes, eight different character color and separately background color, three different opacities, and a range of character sizes.¹⁴

¹³ Report & Order at ¶113 (“We believe that by incorporating the precise language of the VPAAC Report, we will ensure that manufacturers will clearly understand their obligations regarding the features they are required to implement and support.”).

¹⁴ 47 C.F.R. §79.103(c)(1-10).

Because these VPDs would be deploying closed captioning rendering capability for the first time, they will need to test the rendering engine and software and then tailor it for hundreds of different devices on which the captions can be displayed. Additionally, they also will have to design user interfaces and customer support tools to help users access the captioning features. This also takes substantial effort, yet is necessary to achieve the Commission's goals of providing access to closed captions. This entire process is a significant undertaking that will take substantial time because deployment will vary by device.

DiMA's members are working diligently to comply, and once they have added closed captioning capabilities to their offerings, it will become part of their routine operations. But it imposes substantial difficulty to accomplish all this work by September 30, 2012. The challenge facing VPDs that have never offered closed captioning is at least as great as the challenge facing apparatus makers, and yet the Commission concluded that "manufacturers generally require approximately two years to design, develop, test, manufacturer and make available for sale products."¹⁵ Software development and deployment requires close coordination between the manufactures and VPDs, and both should be allotted the same amount of time to come into compliance.

2. *The Impact on Operations*

As explained above, the Commission's rules impose new obligations on VPDs, and these obligations weigh particularly heavy on VPDs that have not previously offered closed captions. All VPDs currently are working with video programming owners to create systems to ingest, store, pass-through, and render closed captioning. In addition to these complex software and

¹⁵ Report & Order at ¶122.

database systems that must be built out of whole cloth, the rules necessitate the drafting and amending of contracts; designing and developing a rendering engine; and adapting the rendering engine to the various video players that a VPD uses. The impact of the additional obligation to make applications, plug-ins, and devices compliant with the millions of technical combinations rooted in Section 79.103(c) across the hundreds of devices on which their content can appear, and include closed captioning functionality in each upgrade or new release issued after September 30, 2012, imposes significant difficulty on the affected VPDs.¹⁶

3. Financial Resources

This factor is not directly relevant to a request for a temporary exemption to allow for more time to comply. The challenge is not the expense of compliance, though it is an expensive undertaking. Rather, the difficulty is imposed by the short time allotted by the Commission. The financial resources of the VPD Petitioners are significant but cannot solve for the complexity involved in the time allotted.

4. The Type of Operation

Some of the VPDs represented by DiMA have been in the online video business for a range of time, but do not currently provide closed captioning. Together these VPDs offer large catalogs of online video content, and a large percentage of that programming is (a) prerecorded and (b) will appear on television after September 30, 2012. Thus, for the first time these VPDs will need to offer closed captioning that will be rendered or displayed using a VPD-provided application, plug-in, or device on multiple platforms. DiMA's members will work with their vendors to design and build a rendering engine and ensure that the application, plug-in, or device they supply to users to view their programming can meet the many detailed technical

¹⁶ Report & Order at ¶53

requirements in Section 79.103(c). Once that step has been met, the VPDs then will test to ensure that the various products operate on the various devices that support a VPD's content. This all will take time and imposes significant difficulty to accomplish by September 30, 2012.

d. A Temporary Exemption Is Supported by Other Relevant Factors and Serves the Public Interest.

The Commission's rules require a petitioner to "describe any other factors it deems relevant to the Commission's final determination" ¹⁷ A number of relevant factors establish that grant of a temporary, partial exemption would be in the public interest.

1. Not all VPDs currently provide closed captioning.

For the first time, the VPDs within DiMA's membership will be regulated by the FCC and required to provide closed captioning. They are committing to offering this feature, but it represents a substantial undertaking to move from not currently providing closed captioning to moving in a short time frame to full IP closed captioning.

2. The six-month time frame is not realistic.

The September 30, 2012 deadline for full compliance is not realistic for some VPDs. The challenge to both add captioning capability, and then meet the myriad technical requirements, simply cannot be accomplished with any confidence by September 30, 2012. The Commission was not clear during the rulemaking process that all these requirements would apply by September 30 of this year and if it had been, the affected VPDs would have made their views known then.

¹⁷ 47 C.F.R. §79.4(d)(3).

3. *The public interest would be served by a common deadline for VPDs and apparatus makers.*

Under Section 79.103(a), apparatus makers, including the software they use and the video players they incorporate, have until January 1, 2014, to comply with the IP closed captioning technical requirements. Under the Commission's rules, VPDs, by contrast, have only until on or shortly after September 30, 2012, to make their video players, *i.e.*, their applications, plug-ins or devices, compliant with the same requirements. This disparity makes little sense because the technical challenges are quite similar: apparatus makers and VPDs both will have to upgrade their video players to display IP closed captioning consistent with the technical requirements.¹⁸ The public interest is served by all parties in the online video industry addressing the Commission's rules at the same time.

4. *The Commission's rules will apply to many companies for the first time.* The CVAA gives the Commission authority over many entities it has never regulated before, including some of the undersigned. The undersigned VPDs are working aggressively to comply, but the Commission should not set an unrealistic deadline, especially for companies that have not

¹⁸ Previous parties have asked the FCC to reach—and the FCC has previously refrained from reaching—into a device or service to regulate its piece parts, and has instead focused on the objectives it wants to achieve. *See In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, IT and Telecom RERCs Comments at 4-5; *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd. 14581 at ¶ 58 (Oct. 7, 2011). Here too, the Commission would be better suited to take such an approach, focusing on rendering and refraining from reaching the piece parts involved with rendering. This would help to avoid creating conflicts in its rules, and as the Commission has previously found, the better interpretation of the CVAA “is that it does not impose independent regulatory obligations on providers of software.” 26 FCC Rcd. 14581 at ¶ 58.

been subject to FCC regulations before. Congress and the FCC will succeed in transforming the online video experience, but it should not be unnecessarily rushed.

e. Given the Temporary Nature of the Waiver, Deploying Available Alternatives Is Not Necessary.

Section 79.4(d)(3) directs a petitioner to describe “any available alternatives that might constitute a reasonable substitute for the closed captioning requirements” While certain VPDs today do provide some form of closed captioning and will continue to do so, several of the VPDs represented by DiMA do not currently provide closed captions, and the deployment of available alternatives for a short time period for those VPDs is not in the public interest. Such deployment would detract from the effort that the technical staff at those VPDs will be undertaking to bring their products into compliance with the advanced technical requirements in Section 79.103(c), making the effort of those VPDs to adapt and deploy an alternative closed captioning system while at the same time pursuing an advanced closed caption system in the next fifteen months counterproductive and extremely burdensome. Consumers are best served if those VPDs who do not currently provide closed captions can instead focus on designing and building a compliant infrastructure right from the start.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD GRANT A LIMITED WAIVER TO VPDs OF THE IP CLOSED CAPTIONING REQUIREMENTS RELATING TO SECTION 79.4(c)(2)(i) RENDERING.

a. Standard of Review

Any of the Commission’s rules may be waived if good cause is shown.¹⁹ The Commission may exercise its discretion to waive a rule where the particular facts make strict

¹⁹ 47 C.F.R. §1.3.

compliance inconsistent with the public interest.²⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²¹ Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.²²

b. Entities Covered by the Waiver Request

Several VPDs within DiMA's member ranks are currently providing online video programming that does not include closed captioning. Those parties support the additional waiver request which was filed by DiMA on behalf of VPD petitioners for temporary relief from the CEA-708 requirements, but they need this additional request because their challenge is greater given that they currently do not provide closed captions.

c. Special Circumstances Warrant a Deviation From the General Rule.

As explained above, waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule.²³ Many special circumstances support a temporary, limited waiver of the provisions of Section 79.4(c)(2)(i) relating to the rendering -- but not the pass-through -- of captions. Specifically, each of the other relevant factors discussed above in part II c in connection with the exemption request constitute special circumstances that would justify a limited waiver for good cause, and the entire argument in Part II is incorporated herein by reference.

²⁰ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Ne. Cellular*, 897 F.2d at 1166.

²² *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Ne. Cellular*, 897 F.2d at 1166.

²³ *Ne. Cellular*, 897 F.2d at 1166.

d. The Waiver Will Serve the Public Interest.

The Commission should grant a waiver when it will serve the public interest.²⁴ The limited nature of our waiver request, which is approximately fifteen months in length and applies only to the requirements of Section 79.4(c)(2)(i) related to rendering, including to applications, plug-ins, and devices (and not to the pass-through requirement), means that the Commission will achieve the goal set by Congress: “to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”²⁵ As explained above, it serves the public interest for manufactures of apparatus and software developers to meet this goal at the same time. Moreover, the public interest is served where the Commission’s deadlines are not artificial or unrealistic.²⁶ The current six-month timeframe was not tested through the rulemaking process, and if it had been, it would have been rebutted. Importantly, once the IP closed captioning system is built and operating, it will benefit persons with disabilities for years to come. But designing and building the infrastructure, and making it work the first time for consumers, is vitally important. The public will be better served by a

²⁴ *NetworkIP*, 548 F.3d at 125-28.

²⁵ See H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 9 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

²⁶ See, e.g., *In the Matter of Section 68.4(A) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, Cingular Wireless LLC Petition for Waiver of Section 20.19(c)(3)(i)(A) of the Commission’s Rules*, Memorandum Opinion and Order, 20 FCC Rcd. 15108 (Sept. 7, 2005) (granting a temporary extension of certain requirements related to hearing aid-compatible telephones based in part on technical challenges associated with meeting the requirements in the designated timeframe); *In the Matter of Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Americans with Disabilities Act of 1990*, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, 18 FCC Rcd. 12379, ¶ 15 (May 15, 2003) (noting that rules associated with the waivers for IP Relay and VRS providers were amended “so that TRS providers have one deadline instead of multiple deadlines to which they must adhere”).

smooth implementation of IP closed captioning that will be possible if the deadlines for apparatus makers and VPDs are made consistent.

Conclusion

For the reasons stated herein, compliance with specific portions of the Commission's rules within the short timeframe of six months set by the Commission imposes significant difficulty upon VPDs. Accordingly, the Commission should grant a temporary exemption from, or in the alternative waive for good cause, the rendering requirement in the first sentence of Section 79.4(c)(2)(i) and all of the second sentence of Section 79.4(c)(2)(i) until January 1, 2014, for all video programming distributors.

Respectfully submitted,

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Affidavit

I hereby certify that I have read this submission and to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact.

/s/ Lee Knife

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Date: May 8, 2012