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

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Opposition to the Petitions for Reconsideration filed by Telecommunications for the Deaf and Hard of Hearing et al. ("TDI")[1] and TVGuardian, LLC ("TVGuardian") in the above-captioned proceeding.[2] TDI, among other things, seeks reconsideration of the Commission's *IP Captioning Report and Order*[3] that permits video programming distributors ("VPDs") to provide "video clips" online without captions. TVGuardian urges the Commission to reconsider its rule that allows a recording device to either render captioning *or* pass caption information through to consumer devices. The Commission's decisions are fully supported by the terms of the CVAA and by sound public policy. The Petitions should be denied.[4]

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[1] Petition for Reconsideration of the Commission's Report and Order filed by Telecommunications for the Deaf and Hard of Hearing et al. (Apr. 27, 2012) (hereinafter "TDI Petition for Reconsideration").

[2] Petition for Reconsideration filed by TVGuardian, LLC (Apr. 16, 2012) (hereinafter "TVGuardian Petition for Reconsideration").

[3] Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, 27 FCC Rcd 787 (2012) (hereinafter "IP Captioning Report and Order.").

[4] Both Petitions essentially repackage arguments that already have been thoroughly considered and rejected by the Commission in its *IP Captioning Report and Order*. *See IP Captioning Report and Order* at ¶ 47 (rejecting, among other things, TDI's argument that the term "video clips" means only material promotional in nature or of a certain duration); *id.* at ¶¶ 115-119 (rejecting claim that caption data must be passed through to the receiving device.) As such, under Section 1.429 of the Commission's rules, the Petitions should be dismissed on procedural grounds. *See* 47 C.F.R. §1.429(l).

DISCUSSION

I. THE COMMISSION CORRECTLY DECIDED TO ONLY REQUIRE CAPTIONING ONLINE OF "FULL-LENGTH" TELEVISION PROGRAMS

The Commission's online captioning rules strike a balance that maximizes the amount of online video content that will be captioned without imposing unjustified burdens on regulated entities. One example of that balance is that the rules require the online captioning of "full-length programming,"[5] including full-length programming "posted online in multiple segments, to enable consumers to more readily access a particular segment of a program…"[6] But they exempt "video clips"[7] from an online captioning mandate (while encouraging voluntary efforts in this area).[8]

TDI claims that the Commission lacked authority to interpret the CVAA to apply online captioning mandates only to full-length programming. It asserts that the unambiguous language of the CVAA compels the Commission to ensure that captioned television programming is captioned when distributed online, regardless of its "length or completeness."[9] TDI also argues that the Commission cannot rely on Congress's intent as expressed in the legislative history,[10] or that it misconstrued that intent.[11]

TDI's statutory construction argument is flawed in several respects. The CVAA does not require all video programming to be captioned online – only "video programming delivered using Internet protocol that was published or exhibited on television with captions after the

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[5] "Full-length programming" is defined as "video programming that appears on television and is distributed to end users, substantially in its entirety, via Internet protocol, excluding video clips or outtakes." 47 C.F.R. § 79.4(a).

[6] *IP Captioning Report and Order* at ¶ 45.

[7] "Video clips" are defined as "excerpts of full-length video programming." 47 C.F.R. § 79.4(a).

[8] *IP Captioning Report and Order* at ¶ 48.

[9] TDI Petition for Reconsideration at 4.

[10] *Id.* at 8.

[11] *Id.* at 9-12.

effective date…." Video clips that are posted online have not been published or exhibited on television with captions in that form.[12] Rather, video clips are created separately for online distribution, in some cases even before a full-length program has aired on television with captions.[13] In other cases, the clips may include video that is not even the same video that is shown on television. And video clips may contain non-sequential footage taken from different parts of a full-length program. The plain meaning of the CVAA thus supports the Commission's common sense decision to apply the requirements to "full-length" programming and not to video clips. But, if there were any ambiguity in the statutory language, the legislative history makes clear Congress's intent that, at this time, "the regulations apply to full-length programming and not to video clips or outtakes."[14]

TDI claims that the Commission must ignore this straightforward expression of congressional intent, stating that the "unambiguous" language of the CVAA trumps the intent of the drafters.[15] But it can hardly be argued that the language "unambiguously" covers all programming posted on the Internet that was aired on television with captions in a different

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[12] Contrary to TDI's contention (TDI Petition for Reconsideration at 6), video clips and programming "edited for Internet distribution" are not one and the same. *See* VPAAC Report at 30 (explaining that programming "prerecorded and edited for Internet distribution to the end user" means edits to a television program, such as alternate music scores or scene deletion). Full-length programs edited for Internet distribution are distributed online in substantially the same form as they aired on television. *See IP Captioning Report and Order* at ¶ 60 (explaining the "substantially edited" means the deletion of scenes or alterations to the televised version of musical scores). As described above, that is not the case with video clips.

[13] *Id.* at 12 ("[s]ome stations post news stories ahead of airtime").

[14] S. Rep. No. 111-386, 111th Cong., 2d Sess. at 6 (2010) (hereinafter "Senate Report"); H.R. Rep. No. 111 -563, 111th Cong. 2d Sess. at 18 (2010) (hereinafter "House Report").

[15] TDI Petition for Reconsideration at 8-9.

form, as is the case with video clips.[16] The Commission's resort to review of the legislative history was entirely appropriate.[17]

TDI also tries to distort the meaning of this legislative history. It argues that the Committees' intent was not to exclude "video clips," but to refer to "short advertisements, interstitial material, promotional announcements, and public service announcements that need not be captioned on television and therefore are generally not subject to the CVAA's requirements when delivered via IP – because they are generally not published or exhibited on television with captions."[18] But this reinterpretation fails to hold water, as NCTA's Reply Comments explained.[19] It strains credulity to argue that Congress meant simply to make clear that these types of short form programming are excluded under the CVAA since they are already excluded from the Commission's television captioning rules. There is no plausible explanation why Congress would have referred only to "video clips" if that was its intent, given that other types of programming (such as late night programming) are also exempt from any television captioning obligations. A much more plausible explanation is that Congress meant what it said – to exclude "video clips" from an online captioning obligation.

Nor is there any evidence to back up TDI's alternative claim that Congress must have meant to refer to the exclusion of "consumer generated media" from the online captioning obligation when it mentioned "video clips."[20] The Senate Report elsewhere explains that "Consumer-generated media is specifically excluded from the definition of 'video

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[16] In fact, TDI's comments in the FCC's rulemaking referenced this legislative history, and proposed that the Commission define "full-length programming" as "any video that is not a video clip or outtake." TDI Reply Comments at 7. TDI's reversal on this point is unexplained.

[17] 2A Sutherland Statutory Construction §48.01(2000).

[18] TDI Petition for Reconsideration at 10-11.

[19] NCTA Reply Comments at 5.

[20] TDI Petition for Reconsideration at 11.

programming.'"[21] Consumer-generated media is a defined term in the CVAA, with no reference to the whether the online content is "full-length" or not.[22] Congress must have had something else in mind, then, when it also mentioned an exclusion for "video clips", and TDI provides no basis in the legislative history for conflating the two distinct concepts. The Commission decision not to rely on the post hoc explanation of individual legislators,[23] under these circumstances, was entirely reasonable.

In short, the Commission's decision to exempt video clips from an online captioning mandate is the best interpretation – indeed, the only logical reading – of the CVAA and its legislative history. This decision also is correct as a matter of policy given the technical challenges that video programming distributors would otherwise face. The CVAA was intended to apply where television captions could be repurposed for use on the Internet. While technology has developed to enable full-length television programming that airs with captions to be repurposed for use online, the record showed that video programming distributors often cannot reuse caption files from a television program when video clips are created.[24] Captions are lost or garbled when a program is transcoded for delivery over the Internet, requiring captions for clips to be re-authored from scratch. Today, the manual process involved in captioning even a few minutes of footage for online viewing can take hours. Under these circumstances and given

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[21] Senate Report at 6.

[22] CVAA, § 3 ("consumer generated media" means "content created and made available by consumers to online websites and services on the Internet, including video, audio, and multimedia content").

[23] In any event, such a letter cannot override clear legislative history. *See* Chickasaw Nation v. U.S., 534 U.S. 84 (2001) ("A 'statement [made] not during the legislative process, but after the statute became law… is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently.'" (*citing* Heintz v. Jenkins, 514 U.S. 291, 298 (1995)).

[24] *See, e.g.*, Reply Comments of the Association of Public Television Stations and the Public Broadcasting Service at 6 (explaining that "video clips currently must be separately captioned, even if the clip is taken from a full-length program that has been captioned for IP distribution."); Comments of the National Association of Broadcasters at 12-13 (describing "substantial production costs and delays associated with any requirement to caption an excerpt of a full-length program").

current technology, subjecting clips to a captioning rule would impose enormous burdens on responsible entities, burdens that would significantly exceed those required to provide full-length video programming online with captions.[25]

While some clips posted online may be captioned voluntarily – and as technology improves, it may be simpler to do so over time for more clips – the CVAA did not intend the Commission to impose any such obligation at this time.[26]

II. THE CVAA PROVIDES AN OPTION TO EITHER RENDER OR PASS-THROUGH CAPTIONS TO RECORDING DEVICES

TVGuardian takes issue with the Commission's interpretation of Section 203 of the CVAA. TVGuardian contends that the *IP Captioning Report and Order* fails to comply with the CVAA because it does not require VPDs to pass through closed captioning data to consumer equipment. However, TVGuardian's interpretation conflicts with the plain meaning of the CVAA and the Commission was right to reject it.

Both FCC rules at issue in TV Guardian's reconsideration petition track the statutory language that provides alternative methods of making closed captioning available to consumers. Section 79.104(a)(2) states that recording devices subject to this section "must enable the rendering *or* the pass through of closed captions such that viewers are able to activate and de-activate the closed captions as the video programming is played back…"[27] This rule essentially "incorporate[s] the statutory language of Section 203(b) directly into [the FCC's] rules."[28]

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[25] *See, e.g.,* CBS Reply Comments at 15 ("posting 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.").

[26] Given these significant economic burdens, even if, as TDI claims, video clips somehow are covered under Section 202(a), video clips would qualify for a class exemption under Section 202(c).

[27] Emphasis supplied.

[28] Report and Order at ¶ 114.

Similarly, Section 79.103(d) requires that "all video outputs of covered apparatus shall be capable of conveying from the source device to the consumer equipment the information necessary to permit *or* render the display of closed captions."[29] In relevant part, this language mirrors the statutory language of Section 203(b) of the CVAA, which also provides for such interconnection mechanisms "to permit *or* render the display of closed captions." Both provisions clearly offer two alternatives to making captioning viewable on consumer devices: either rendering *or* passing through the closed captions in the case of recording devices and "permitting" *or* rendering the display from the video output.

TVGuardian claims that by allowing rendering to occur other than in the consumer equipment, the rules somehow run afoul of the obligation to enable viewers to activate and de-active closed captions.[30] But TVGuardian fails to show how this is the case. At least with respect to cable operator-supplied DVRs, cable customers are able to play back video programming with captions if the consumer opts to record a program with captions. Thus, the statutory intent is fulfilled. Moreover, with respect to TVGuardian's own device, TVGuardian acknowledges that the device *does* have the ability to "activate or de-activate" captions via certain inputs on the device.[31]

TVGuardian also argues that by providing the option of rendering (rather than passing through), "Congress only wanted to give the FCC flexibility to grant exceptions to the pass through rule for connections in which the FCC determines that enforcement would actually be *technically infeasible*."[32] But TVGuardian provides no support for this reinterpretation, which it

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[29] Emphasis supplied.

[30] TVGuardian Petition for Reconsideration at 1.

[31] *Id.* at 5.

[32] *Id.* at 4 (emphasis in the original).

creates out of whole cloth. Neither the plain language of the CVAA nor the legislative history suggests any such "technical infeasibility" limitation on the provider's choice between rendering or passing through the caption data.[33] Further, the Commission correctly determined that "the manner in which the HDMI connection carries captions satisfies the statutory requirement for interconnection mechanisms."[34] Captions are rendered in the set-top box and other "source devices", decoded and mixed into the video stream, and then carried by the HDMI connector to the receiving device.[35] This method of providing captions fully complies with the provisions of Section 203.

CONCLUSION

For the foregoing reasons, the Commission should deny the reconsideration petitions of TDI and TVGuardian.

Respectfully submitted,

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[33] *See, e.g.*, House Report at 30 ("Section 203(b) provides that devices designed to record video programming enable the rendering or the pass through of closed captions… if doing so is achievable."); Senate Report at 6 (same).

[34] *IP Captioning Report and Order* at ¶ 116.

[35] *Id.*

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that on this 7th day of June, 2012, I caused a copy of the foregoing "Oppositions to Petition for Reconsideration" of the National Cable & Telecommunications Association to be served by postage pre-paid mail on the following:

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