

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**REPLY OF THE CONSUMER ELECTRONICS
ASSOCIATION TO OPPOSITION TO
PETITION FOR RECONSIDERATION**

I. INTRODUCTION

Pursuant to Section 1.429(g) of the Commission’s rules,¹ the Consumer Electronics Association (“CEA”) hereby urges the Commission to reject the opposition (“Opposition”)² of Telecommunications for the Deaf and Hard of Hearing, Inc. et al. (“Groups”) to CEA’s petition for reconsideration (“CEA Petition”)³ of the *IP Captioning Order*.⁴ Among other things, the *Order* adopted new closed captioning rules for certain types of equipment (the “apparatus closed captioning rules”). In the CEA Petition, CEA requests the Commission to:

- Limit the scope of Section 79.103 of the rules⁵ to only those devices intended by the manufacturer to receive, play back, or record *video programming*, rather than broadly applying these rules to any device with a video player;
- Exclude removable media players from the apparatus closed captioning rules; and

¹ 47 C.F.R. § 1.429(g).

² Opposition to the Petition for Reconsideration of the Consumer Electronics Association of Telecommunications for the Deaf and Hard of Hearing, Inc. et al., MB Docket No. 11-154 (filed June 7, 2012) (“Opposition”).

³ Petition for Reconsideration of the Consumer Electronics Association (“CEA”), MB Docket No. 11-154 (filed Apr. 30, 2012) (“CEA Petition”).

⁴ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (2012) (“*IP Captioning Order*” or “*Order*”).

⁵ 47 C.F.R. § 79.103.

- Clarify that the January 1, 2014 compliance deadline for apparatus closed captioning requirements refers to the date of manufacture, not the date of importation of apparatus.

Because the Opposition fails to demonstrate why these three points do not merit reconsideration, the Commission should grant the CEA Petition in its entirety.

II. TO BE CONSISTENT WITH THE CVAA, THE COMMISSION SHOULD NARROW THE SCOPE OF SECTION 79.103 TO APPLY ONLY TO APPARATUS THAT INCLUDE “VIDEO PROGRAMMING” PLAYERS

As requested in the CEA Petition, the Commission should limit new Section 79.103 to only those devices intended by the manufacturer to receive, play back, or record video programming, rather than broadly applying the rule to any device with a video player. Contrary to the Opposition, CEA is not merely repeating prior arguments.⁶ CEA’s request satisfies the procedural requirements of Section 1.429 of the rules for reconsideration because it presents new facts and arguments that have not been fully addressed by the Commission.⁷ The request focuses on how new Section 79.103 exceeds the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)⁸ by covering devices that are not designed to receive, playback, or record video programming as the CVAA requires.

Contrary to the Opposition,⁹ the *Order* fundamentally errs by equating apparatus “capable of” playing back video programming with apparatus “designed to” receive, play back or record video programming. The Opposition compounds this error by arguing that it is not

⁶ See Opposition at 3–5.

⁷ See CEA Petition at 3 n.4, *citing* 47 C.F.R. § 1.429(b)(1)–(3). The CEA Petition provides new facts and information in addressing the specifics of Section 79.103, which applies the apparatus closed captioning rules to devices with video players for the first time. Moreover, reconsideration is warranted because narrowing the scope of Section 79.103 as requested in the CEA Petition would serve the public interest. See CEA Petition at 3 n.4, *citing* 47 C.F.R. § 1.429(b)(3).

⁸ Pub. L. No. 111-260, §§ 202, 203, 124 Stat. 2767-2773 (2010). The CVAA amends the Communications Act of 1934 (the “Act”).

⁹ See Opposition at 2–9.

possible for a manufacturer to create a product that is capable of, but not designed to, receive or playback video programming.¹⁰ As explained in the CEA Petition, camcorders and digital still cameras are two examples of devices that are not designed or intended to play back video programming but are nonetheless capable of doing so.¹¹

In contrast, numerous popular applications (“apps”) are specifically designed to play video programming.¹² Therefore, the Commission should revise Section 79.103(a) and the accompanying note by replacing “video player” with “video programming player.” A “video programming player” should be defined as an app or feature specifically intended by the manufacturer to enable access to “video programming,” as defined in the CVAA,¹³ not video in general.¹⁴ Inclusion of a video programming app or feature in a product at time of sale should be taken as an indication of the manufacturer’s intent that it be used for accessing video programming, while the absence of such a feature should be taken to indicate the opposite. Reconsideration would bring Section 79.103 into conformance with the CVAA, not unduly restrict that section as the Opposition seems to fear.¹⁵

¹⁰ *See id.* at 5–6.

¹¹ *See* CEA Petition at 4, 7.

¹² Apps from Hulu and Netflix are examples of such video programming apps.

¹³ *See* CVAA § 202(a) (defining “video programming” as “programming by, or generally considered comparable to programming provided by a television broadcast station but not including consumer-generated media”).

¹⁴ *See* CEA Petition at 4–5. Because “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,” the Commission must interpret the phrase “designed to” in accordance with the ordinary and widely-held meaning of the term “design.” *See* CEA Petition at 5 (quoting *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 22 (D.C. Cir. 2010) (internal quotation marks omitted)).

¹⁵ *See* Opposition at 6.

Contrary to the Opposition,¹⁶ the waiver process is not an appropriate mechanism for addressing the infirmities of Section 79.103.¹⁷ As the CEA Petition shows, the mere presence of a waiver process cannot save an irrational rule, such as Section 79.103 in its present form, or extend regulatory jurisdiction to the playback function of consumer electronics devices.¹⁸

In addition, the Opposition attempts to equate CEA's request with several "broad, unspecific requests" for exemptions or waivers that were considered and rejected in the *Order*.¹⁹ To the contrary, the CEA Petition asks specifically that the Commission give effect to the language used in the CVAA by narrowing the scope of Section 79.103 to apply only to apparatus that include video programming players.²⁰

Finally, the Opposition attacks CEA's discussion of digital still cameras by arguing that certain multipurpose smartphone models are among the most common still cameras used on a popular photo-sharing website but also are capable of playing back video programming.²¹ This attack is unwarranted. The CEA Petition requests a narrowing of Section 79.103 to be consistent with the CVAA, not a general carve-out for multipurpose devices such as smartphones. A smartphone sold with a video programming app preinstalled, for example, would not qualify for the narrowing that CEA requests; the presence of such an app would indicate the manufacturer's intent that the smartphone be used for accessing video programming.

¹⁶ *See id.* at 11.

¹⁷ The Opposition mischaracterizes the standard for purpose-based waivers of the new rules by focusing on whether "an overwhelming majority of consumers" use the device to view video programming instead of a device's "primary purpose" or "essential utility," both of which will be examined on a case-by-case basis. *Compare* Opposition at 10, *with Order*, 27 FCC Rcd at 849 ¶ 106.

¹⁸ *See* CEA Petition at 7–8; *see also id.* at 7 (quoting *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988)) ("The FCC cannot save an irrational rule by tacking on a waiver procedure." (internal quotation marks omitted)).

¹⁹ *See* Opposition at 10 (citation omitted) (internal quotation marks omitted).

²⁰ *See* CEA Petition at 3–8.

²¹ *See* Opposition at 10–11.

III. “REMOVABLE MEDIA PLAYERS” SHOULD NOT BE COVERED UNDER THE APPARATUS CLOSED CAPTIONING RULES

The Commission should exclude removable media players from the apparatus closed captioning rules. Contrary to the Opposition,²² the CEA Petition satisfies the procedural requirements of Section 1.429 because it presents new facts and statutory arguments that have not been fully addressed by the Commission, especially because the *Order* extended the new rules to removable media players in a manner that does not comport with the statute.²³

On the merits, and contrary to the Opposition,²⁴ Section 203 of the CVAA does not apply to removable media players (unless they also are equipped with an interface to the Internet and an app or feature, included at time of sale, for accessing Internet Protocol video programming, in which case they would be covered for that reason rather than because of their ability to play removable media). Given the context provided by the language used throughout the CVAA, including in Sections 202(b) and 204, the *IP Captioning Order* improperly interprets Section 203 as covering removable media players.²⁵ The Opposition’s lengthy arguments concerning the relationship of Sections 202(b), 203 and 204 of the CVAA fail to recognize that just as Congress was consistent in its understanding of the term “transmitted” in the CVAA and in other nearly contemporaneous communications legislation, the Commission should be consistent as well.²⁶

²² See *id.* at 12–13.

²³ See CEA Petition at 9–10 n.29, citing 47 C.F.R. § 1.429(b)(1)–(3). The CEA Petition addresses the particulars of the *Order*’s first-ever application of the closed captioning rules to removable media players. See CEA Petition at 8–9, 11–18. Moreover, reconsideration of this issue as requested in the CEA Petition would serve the public interest. See *id.* at 9–10 n.29, citing 47 C.F.R. § 1.429(b)(3).

²⁴ See Opposition at 11–14. The Opposition repeats much of the statutory analysis in the *IP Captioning Order*. Compare Opposition at 13–14, with *IP Captioning Order*, 27 FCC Rcd at 845–46 ¶ 99.

²⁵ See CEA Petition at 12–16.

²⁶ See Opposition at 14–16.

In addition, the Opposition erroneously asserts that the CVAA grants the Commission jurisdiction over devices that do not transmit or receive communications over wire or radio.²⁷ Although the Opposition argues that reading the phrase “transmitted simultaneously with sound” in the specific context of Section 203 leads to the conclusion that Section 203 must apply to removable media players, this is not the case.²⁸ Instead, the Commission should give effect to Section 203 by applying Section 79.103 to digital video recorders (“DVRs”), which may receive *or* play back video programming at any given time, depending on the function the user selects.

Moreover, contrary to the Opposition, requiring removable media players to include captioning capability would not serve the public interest, because the Section 79.103 closed captioning obligations do not apply to video programming provided on removable media (*e.g.*, DVD or Blu-ray DiscTM).²⁹ To the extent that other agency regulations require captioning of programs on DVDs for specific purposes, there already are DVD players available in the marketplace that can render or pass through the captioning.³⁰ Thus, DVD players are *already*

²⁷ *See id.* at 17.

²⁸ *See id.* at 13–14. As noted in the CEA Petition, the CVAA did not amend the Commission’s general grant of jurisdiction in Section 2(a) of the Act to grant the Commission authority over the playback function of a consumer electronics device. The Opposition does not contradict this fact. The Opposition also fails to address the Commission’s lack of ancillary jurisdiction over a device’s playback function. *See* Opposition at 12–17.

²⁹ The Opposition does not deny that Section 79.103 of the Commission’s rules does not require captioning of video programming provided on removable media. *See* Opposition at 17.

³⁰ For instance, Sony offers portable DVD players with closed caption decoder capability. *See, e.g., Sony Travel Movie Player: Portable DVD Player (Sony DVP-FX780)*, SONY USA, <http://store.sony.com/webapp/wcs/stores/servlet/ProductDisplay?catalogId=10551&storeId=10151&langId=-1&productId=8198552921666438918#specifications> (last visited June 13, 2012) (identifying, in product specifications, “closed caption” and “multiple language display” as two “convenience features”); *Sony DVP-FX970 9” single-disc portable DVD player*, VANN’S, http://www.vanns.com/shop/servlet/item/features/485173384/sony-dvp-fx970?s_c=site_search (last visited June 13, 2012) (listing “closed caption and multiple language display” as one of the product’s specifications). Philips also offers DVD players with caption decoder capability. *See User Manual for HDMI 1080p DVD Player (DVP 3980)*, PHILIPS, 38 (2008), http://download.p4c.philips.com/files/d/dvp3980_37/dvp3980_37_dfu_aen.pdf (describing the

available to provide closed captioning capability in removable media devices as needed, a fact that the Opposition does not acknowledge.

The Opposition's claims that subtitles for the deaf and hard of hearing ("SDH") only cover the portions of video programming that are not in English are inaccurate.³¹ As the name implies, the purpose of SDH is to make video programming accessible to the deaf and hard of hearing by rendering in text the portions of video programming that are in English as well as non-language information.³²

Finally, the Commission should accord little weight to the Opposition's arguments that SDH is not a complete functional substitute for closed captions. Notwithstanding the recommendations of the Video Programming Accessibility Advisory Committee cited in the Opposition,³³ Section 303(u) of the Act does not specifically require that devices include user control features for manipulating closed captions in all video programming players. That section requires only that such apparatus "be equipped with built-in closed caption decoder circuitry or capability designed to *display* closed-captioned video programming."³⁴

IV. THE COMMISSION SHOULD CLARIFY THAT THE JANUARY 1, 2014 DEADLINE FOR COMPLIANCE REFERS TO THE DATE A PRODUCT IS MANUFACTURED

CEA urges the Commission to clarify that the January 1, 2014 compliance deadline for the apparatus closed captioning rules refers to the date of manufacture, not the date of

"closed caption" feature as one that "is only available if the disc contains of special video signal data" and that "shows sound effects on the screen if your TV supports this feature, such as 'phone ringing' and 'footsteps'").

³¹ See Opposition at 19.

³² Blu-ray Discs™ primarily use subtitles, including SDH, which, as stated in the CEA Petition, has been identified by an authoritative source as a form of "captioning" for video content. See CEA Petition at 17. Thus, as a general matter, Blu-ray Disc™ players support SDH, rather than closed captioning as contemplated in the *Order*.

³³ See Opposition at 19.

³⁴ See 47 U.S.C. § 303(u)(1)(A) (emphasis added).

importation of apparatus.³⁵ In opposing CEA’s request, the Groups improperly seek “clarification,” largely based on Paragraph 122 of the *Order* and Sections 79.102 and 79.103 of the rules, that all apparatus *offered for sale* after January 1, 2014 must satisfy the apparatus closed caption decoder requirements.³⁶

The Opposition’s proposed “clarification” should be rejected. The Opposition’s “clarification” was not raised in the Groups’ lengthy petition for reconsideration³⁷ in this proceeding and should be dismissed as a late-filed petition for reconsideration.³⁸ It also is nonsensical and impractical. The CVAA grants the Commission no authority over retailers, which exert ultimate control over when devices are offered for sale. Moreover, the passage from Paragraph 122 of the *Order* quoted by the Opposition³⁹ cannot be read as requiring all devices “offered for sale” after January 1, 2014 to comply with the apparatus closed captioning requirements. That passage merely describes the length of time generally needed to bring a product to market and does not reflect the language of the relevant rules governing the

³⁵ See CEA Petition at 19–21.

³⁶ See Opposition at 20–22.

³⁷ See Petition of Telecommunications for the Deaf and Hard of Hearing, Inc. et al. for Reconsideration, MB Docket No. 11-154 (filed Apr. 27, 2012).

³⁸ See 47 C.F.R. § 1.429(l) (untimely petitions for reconsideration “plainly do not warrant consideration by the Commission”); see also *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State And Local Public Safety Agency Communication Requirements Through the Year 2010*, 15 FCC Rcd 16844, 16862 ¶ 37 n.113 (2000) (noting that certain contentions were untimely presented in opposition, rather than being timely raised in petition for reconsideration).

³⁹ See Opposition at 21 (“More specifically, the [*IP Captioning Order*] states that manufacturers will ‘design, develop, test, manufacture, and *make available for sale*’ accessible new products by January 1, 2014” (emphasis in original) (quoting *IP Captioning Order*, 27 FCC Rcd at 859 ¶ 122)).

compliance deadline.⁴⁰ In addition, contrary to the Opposition’s suggestion,⁴¹ manufacturers would not be able to “determine a hard deadline” for manufacturing based on the date a product is available for sale simply by determining the average time it takes for a product to work its way through retail channels. As the CEA Petition shows,⁴² the date of importation is subject to variables outside of the control of manufacturers, including shipping times, customs delays, and security requirements at the point of importation.

Instead, the Commission should grant CEA’s request and clarify that the compliance deadlines in the new rules refer specifically to the date of manufacture, so that apparatus manufactured on or after January 1, 2014 are subject to the new rules, without affecting the importing, shipping, or sale of apparatus manufactured before that date.⁴³ The clarification requested by CEA would provide greater certainty for manufacturers and would be consistent with the Commission’s past practice regarding compliance deadlines in multiple proceedings.⁴⁴

Similarly, clarifying that the January 1, 2014 deadline applies to the date of manufacture will have little or no effect on the availability of new compliant products because the expected interval is brief between the date of a product’s manufacture and its importation.⁴⁵ CEA asked

⁴⁰ See 47 C.F.R. §§ 79.101(a)(2), 79.102(a)(3), 79.103(a), 79.104(a). The rule sections cited by the Opposition in “requesting clarification” are two of those for which CEA is properly seeking reconsideration.

⁴¹ See Opposition at 22.

⁴² See CEA Petition at 20.

⁴³ In the CEA Petition, CEA also urged the Commission to add explanatory notes to Sections 79.101(a)(2), 79.102(a)(2), 79.103(a) and 79.104(a), stating that the new obligations in those rule provisions “place no restriction on the importing, shipping or sale of apparatus that were manufactured before January 1, 2014.” See CEA Petition at 21.

⁴⁴ See CEA Petition at 19–20. The Opposition barely acknowledges this longstanding precedent but does not otherwise address it. See Opposition at 20.

⁴⁵ The Opposition makes farfetched claims about the effect of CEA’s requested clarification, asserting that January is an “especially active shopping month.” Opposition at 21. However, the most active shopping occurs during the Christmas holiday season, which begins and ends before January 1. It is thus improbable that consumers will “flock to” retail outlets in January. *Id.*

its members for information about typical importation times for consumer equipment.

Depending on the equipment type and the place of manufacture, the typical intervals between date of manufacture and date of importation are short, varying from two to three days for truck shipments to the United States to about two to three weeks for shipments by sea.

Finally, the Commission should reject the Opposition's request in the alternative for a labeling requirement.⁴⁶ The Groups failed – again – to raise this new proposal in their petition for reconsideration, and thus this request also should be dismissed as an untimely request for reconsideration.⁴⁷ Section 203 of the CVAA contains no provision authorizing labeling of the type the Groups requested.⁴⁸ This type of labeling requirement for a one-time compliance deadline was not imposed for digital closed captioning or V-chip implementation. Especially because the intervals between date of manufacture and date of importation are so short, such a requirement would harm consumers and manufacturers alike by imposing substantial additional compliance costs for no practical benefit.

V. CONCLUSION

For the foregoing reasons, the Commission should grant the CEA Petition.

Respectfully submitted,

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⁴⁶ See Opposition at 22–23.

⁴⁷ See *supra* notes 37–38.

⁴⁸ See CVAA § 203.

CERTIFICATE OF SERVICE

I, Christopher Ross Clark, hereby certify that on this 18th day of June, 2012, copies of the foregoing "Reply of the Consumer Electronics Association to Opposition to Petition for Reconsideration" in MB Docket No. 11-154 were sent by U.S. Mail to the following parties:

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