

**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)	

**DIMA’S REPLY TO TDI, ET AL.’S OPPOSITION TO DIMA’S PETITIONS FOR
TEMPORARY PARTIAL EXEMPTION OR LIMITED WAIVER**

The record in this proceeding overwhelmingly supports the two petitions filed by the Digital Media Association (“DiMA”), which seek a temporary partial exemption or limited waiver until January 1, 2014 from the narrow subset of requirements contained in Section 79.4(c)(2)(i) relating to: (1) in the case of the Rendering Petition, the rendering (but not the pass-through) of closed captions and the user configuration and formatting requirements for applications, plug-ins, or devices provided by video programming distributors (“VPDs”), and (2) in the case of the 708 Petition, these user configuration and formatting requirements only. All of the VPDs that commented on the petitions either through their trade associations or on their own behalf — which includes most VPDs that are subject to these two provisions of the Commission’s rule — agreed that substantial technical obstacles make compliance with these specific requirements before the arbitrary six-month deadline significantly difficult or expensive, and urged the Commission to provide a brief extension by granting one or both of the petitions.

A coalition of accessibility advocates led by Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”) is the sole opponent to DiMA’s two petitions, which TDI mischaracterizes as an “unprecedented, bad-faith ploy to set back the progress of accessible

video programming.”¹ Each element of that statement is not true. As demonstrated in our petitions and the comments filed in response, DiMA’s members, along with the rest of industry, fully support the mandate of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) and have been working in good faith and in haste — in some cases long before the Act was even enacted — to *increase* and *improve* access to video programming delivered via Internet protocol (“IP”). The DiMA petitions call on the Commission to act using explicit authority and in a manner consistent with the direction Congress set in adopting the CVAA. Given the extremely narrow nature of DiMA’s requests — which are limited in time and scope — and the reasons provided in our petitions and the VPDs’ comments, DiMA’s petitions should be granted.

With this brief introduction in mind, the remainder of our reply focuses on two procedural issues that were raised in the opposition. First, the Commission has authority to grant the temporary, limited relief that we request. Second, the record is clear that VPDs did not have adequate notice that the Commission would impose a six-month deadline on VPDs for implementing the user configuration and formatting requirements in the applications, plugins, and devices that they provide, while providing apparatus makers a two-year deadline to comply with the same technical requirements for their software and video players.

¹ Telecommunications for the Deaf and Hard of Hearing, Inc., et al., 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, *Opposition to the Petitions for Temporary Partial Exemption or Limited Waiver by the Digital Media Association (DiMA)*, at iv (June 15, 2012).

I. THE COMMISSION HAS AUTHORITY TO GRANT THE REQUESTED TEMPORARY, LIMITED RELIEF.

TDI asks the Commission to treat DiMA's petitions for temporary partial exemption or limited waiver as untimely petitions for reconsideration. This request is deficient for two reasons. First, DiMA does not seek reversal or amendment of any of the Commission's rules; the Section 79.4(c)(2)(i) requirements remain in place, and VPDs will need to comply with these requirements as of January 1, 2014 when the temporary exemption or waiver would expire.² Second, DiMA's petitions implicate only a subset of regulated entities — VPDs that render, as opposed to pass-through, captions and VPDs who provide applications, plugins, or devices to deliver video programming via IP.

At bottom, DiMA's petitions seek very narrow relief — a *limited, temporary waiver* under Section 1.3 of the Commission's rules or, in the alternative, a *limited, temporary exemption* under Section 713(c)(2)(D)(ii) of the Communications Act, as amended by Section 202(b) of the CVAA. Regardless of which alternative is taken, the Commission has authority to grant DiMA's petitions.

A. The Commission has authority to grant DiMA's petitions under its general waiver authority.

Under Section 1.3 of its rules, the Commission may waive any provision of its rules “on its own motion or on petition if good cause therefor is shown.”³ This authority is

² Notably, granting DiMA's petitions would not amend the deadlines contained in Section 79.4 of the Commission's rules. Nonexempt, nonarchival, full-length video programming delivered using Internet protocol must still be provided with closed captions if it is published or exhibited on television in the United States with captions on or after: September 30, 2012, if it is prerecorded programming that is not edited for Internet distribution; March 30, 2013, if it is live or near-live programming; and September 30, 2013, if it is prerecorded programming that is edited for Internet distribution.

³ 47 C.F.R. § 1.3.

separate and distinct from the narrower exemption standard contained in the CVAA, and the two standards clearly serve different purposes.⁴ Consequently, the general waiver *standard* must not be conflated with that of a CVAA exemption, even if the *circumstances* explaining why each standard may be met are the same.

As explained by DiMA and the VPD commenters, the Commission on numerous occasions has relied on this general waiver authority to grant blanket waivers for an industry or waivers of its rules for classes of regulated entities.⁵ Consistent with this precedent, the Commission may grant DiMA's requested waiver, which is not only limited in time, but also is limited to the class of VPDs that render (as opposed to pass-through) captions and/or provide applications, plugins, or devices to deliver video programming via IP.

⁴ Compare *id.* § 79.4(d) (which asks the narrow question of whether the captioning requirements are “economically burdensome”), with *id.* § 1.3 (which addresses the broader question of whether there is *any* good cause to waive the captioning requirements).

⁵ See, e.g., *Wireless Telecommunications Bureau Clarifies and Waives Requirements for Ship Station Radar Equipment*, Public Notice, DA 12-880 (June 5, 2012) (granting a blanket waiver of the requirement in Section 80.273(b) that radar equipment on voluntary vessels comply with International Electrotechnical Commission standard 62252); *Mid-Sized Incumbent Local Exchange Carriers: Filing of Cost Allocation Manuals for the Separation of Costs Between Regulated and Nonregulated Activities*, Order, 14 FCC Rcd 20780 (Dec. 10, 1999) (waiving the deadline for all incumbent local exchange carriers required to file cost allocation manuals at the Class B account level); 47 U.S.C. § 621(b)(3) (“Nothing in this section affects the Commission’s authority under section 1.3 of its rules (47 C.F.R. 1.3) to waive any rule required by this Act, or the application of any such rule, for good cause shown . . . to a class of such stations, operators, or distributors.”).

B. The Commission has authority to grant DiMA’s petitions under Section 713(c)(2)(D)(ii) of the Communications Act, which was explicitly added by Section 202(b) of the CVAA.

Both of DiMA’s exemption requests are also based on Section 713(c)(2)(D)(ii) of the Communications Act, which was added by Section 202(b) of the CVAA.⁶ Section 713(c)(2)(D)(ii) reads as follows:

(D) Requirements for regulations.—

The regulations prescribed under this paragraph—

...

(ii) may 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[.]⁷

In authorizing the Commission to exempt any “*class of service*” or “*class of equipment*” from the captioning requirements for IP-delivered video programming, Congress provided a safety valve for the Commission to use at its discretion to afford relief where the IP captioning requirements would be economically burdensome. As explained in its petition, DiMA’s request for a temporary, partial, class-based exemption under Section 202(b) of the CVAA is entirely consistent with this purpose.

The fact that the preamble to this statutory provision contains the word “regulation” does not preclude the Commission from granting DiMA’s requested relief.

⁶ Much of TDI’s Opposition focuses on the relationship between Section 79.4 of the Commission’s rules and Section 713(d)(3) of the Communications Act. However, even if Section 713(d)(3) of the Communications Act — which governs exemption requests from the Commission’s captioning rules for video programming delivered via *broadcast*, and not *Internet protocol* — is interpreted to require case-by-case exemptions supported by an individualized showing, this analysis would not be determinative here, where the exemption request is based on Section 713(c)(2)(D)(ii) of the Act.

⁷ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 202(b), 124 Stat. 2751, 2771 (Oct. 8, 2010) (codified at 47 U.S.C. § 613(c)(2)(D)(ii)).

Significantly, the statutory text permits not only categorical, class-based exemptions, but also exemptions for a specific “service,” “program,” or piece of “equipment.” Consequently, an interpretation that would limit Section 713(c)(2)(D)(ii)’s application to only *categorical* exemptions granted through notice and comment rulemaking would not only be contrary to the plain text of the statute, but also would produce absurd results because it would require the Commission to initiate a rulemaking before it could grant a company’s individualized request under Section 713(c)(2)(D)(ii) to exempt a single “service” or “program.”⁸

Such an absurd interpretation should be avoided, and, consistent with longstanding tenets of statutory construction,⁹ Section 713(c)(2)(D)(ii) should be interpreted to achieve its purpose of providing the Commission broad authority to grant either case-by-case or class-based exemptions, regardless of whether such relief is provided through a rulemaking (which may be appropriate for requests seeking a categorical, permanent exemption) or a petition (where, like here, the request seeks only a limited, temporary exemption).

It also is worth emphasizing that most VPDs that are subject to the narrow subset of requirements contained in Section 79.4(c)(2)(i) relating to the rendering of closed captions and

⁸ In this respect, the statement in the Order that the Commission “will consider on a case-by-case basis petitions requesting an exemption based on economic burden filed by a *particular* mobile service provider, new network, or other *person or entity*” suggests only that if a person seeks an individualized exemption request, the Commission will treat the request as such, and does not clearly preclude the Commission from granting a class-based exemption under Section 713(c)(2)(D)(ii) where the request is formulated as such. *See* 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, *Report and Order*, ¶ 70 (Jan. 13, 2012) (emphasis added).

⁹ *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (*quoted in Coalition for Responsible Regulation, Inc. v. EPA*, (No. 09-1322) (D.C. Cir. June 26, 2012) slip op. at 25 (“[W]here a literal reading of a statutory term would lead to absurd results, the term simply has no meaning . . . and is the proper subject of construction by EPA and the courts.”)); *see also Holy Trinity Church v. U.S.*, 143 U.S. 457, 459 (1892) (“If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”).

the user configuration and formatting requirements for applications, plug-ins, or devices provided by a VPD — either through its trade association or on its own behalf — filed in support of one or both of our petitions for a temporary partial exemption or limited waiver.¹⁰ While requiring an individualized showing might be understandable where an exemption request is based on a VPD’s financial resources, in circumstances like these where the barriers to compliance are based on technical challenges that affect an entire class of regulated entities, individualized showings are not an efficient use of the Commission’s or a VPD’s time, which is better spent working to actually increase accessibility for deaf and hearing impaired consumers.

Moreover, as explained in the petitions, VPDs that are eligible for the requested exemption will have every incentive to deploy IP closed captioning capabilities as soon as they are ready for market. Granting the limited, temporary exemption requested will not slow down compliance efforts because implementation of these feature will provide the VPD a comparative advantage over other VPDs that do not have IP closed captioning capability.

II. THE COMMISSION DID NOT PROVIDE VPDS ADEQUATE NOTICE THAT THEIR APPLICATIONS, PLUGINS, AND DEVICES WOULD BE SUBJECT TO AN ARBITRARY SIX-MONTH COMPLIANCE DEADLINE.

There is unanimous agreement in the record among VPDs that the six-month deadline for VPDs to come into compliance with the user configuration and formatting

¹⁰ See Comments of the Motion Picture Association of America, the National Cable & Telecommunications Association, and the National Association of Broadcasters in Support of DiMA Petition for Temporary Partial Exemption or Limited Waiver (collectively, representing all six of the major motion picture studios, the cable industry, and the broadcast television industry) [hereinafter, “MPAA/NCTA/NAB Comments”]; Comments of DirecTV, LLC; Comments of Rovi Corporation; *Ex Parte* Notice of the Walt Disney Company and Viacom (June 12, 2012).

requirements listed in Section 79.103(c) was not foreseeable based on the Commission's Notice of Proposed Rulemaking.¹¹ As the joint comments filed by MPAA, NCTA, and NAB explain:

The Notice of Proposed Rulemaking in this proceeding, however, did not propose to regulate VPDs in this manner – the only discussion of Enhanced Features relates to apparatus manufacturers under Section 203 of the CVAA. As a result, VPDs had no notice that they would be subject to a more stringent deadline for applications and plug-ins.

The comments also establish that the VPAAC Report did not include the notion that VPDs would have only six months to comply whereas equipment makers would have until January 1, 2014, and indeed the VPAAC Report discussed hardware and software requirements in the same context as having shared obligations.¹²

This point is relevant because as DiMA and the VPD parties explained, had they known that a six-month compliance deadline would be imposed on their applications, plugins, and devices, they would have alerted the Commission to the significant burden that a much shorter deadline imposes before the Commission issued its final rule. The fact that most VPDs who are subject to this arbitrary deadline subsequently expressed in good faith (either on their own or through their trade associations) a concern about this short timeframe is powerful evidence that VPDs had insufficient notice.

Conclusion

DiMA's members share TDI's desire to increase access to video programming delivered via IP for individuals who are deaf or hard of hearing. Along with the rest of the online video programming industry, DiMA's members are working diligently to come into

¹¹ Comments of DirecTV, LLC, at 2; MPAA/NCTA/NAB Comments, at 4–5, 15–17.

¹² See MPAA/NCTA/NAB Comments, at 15-17.

compliance with Section 79.4(c)(2)(i) related to the rendering and user configuration and formatting requirements. DiMA's petitions for temporary partial exemption or limited waiver are narrowly tailored to provide companies a brief period of additional time — until January 1, 2014 — to construct, test and deploy an entirely new and complex closed captioning infrastructure, a task that imposes substantial difficulty or expense to accomplish in the artificially short time set by the Commission. For the reasons provided by DiMA and the VPD commenters in this proceeding, DiMA's petitions should be granted.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Lindsey L. Tonsager, hereby certify that on this 2nd day of July, 2012, I caused a copy of the foregoing “DIMA’S REPLY TO TDI, ET AL.’S OPPOSITION TO DIMA’S PETITIONS FOR TEMPORARY PARTIAL EXEMPTION OR LIMITED WAIVER” to be sent as follows:

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