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

In the Matter of	)	
	)	
Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act	)	MB Docket No. 11-93
	)	

PETITION FOR PARTIAL RECONSIDERATION OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Pursuant to Section 1.429 of the Commission's rules, the National Cable & Telecommunications Association ("NCTA"),[1] hereby submits this petition for partial reconsideration of the *Order* in the above-captioned proceeding.[2]

INTRODUCTION

In adopting rules implementing the Commercial Advertisement Loudness Mitigation ("CALM") Act,[3] the Commission intended to "incorporate the [ATSC] Recommended Practice and make commercial volume management mandatory," while "reduc[ing] the burden associated with demonstrating compliance in the event of complaints, and reflect[ing] the practical concerns described in the rulemaking record."[4] In a handful of respects, the rules fail to achieve that intended balance and are more burdensome than necessary. The Commission can – and should –

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1 NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $185 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

2 *In re Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report & Order, 26 FCC Rcd 17222 (2011) ("*Order*"); 77 Fed. Reg. 40276 (July 9, 2012).

3 The Commercial Advertisement Loudness Mitigation ("CALM") Act, Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621).

4 *Order* ¶ 8.

reconsider certain of its rules to reduce these burdens without sacrificing the CALM Act's benefits.

Specifically, the Commission should (1) limit its rules to "commercial advertisements," rather than also including promotional material; (2) clarify that a cable operator will not be held liable in instances where, after performing spot checks of embedded network advertising, the operator has notified that network and the Commission of the network's non-compliance; and (3) not prohibit cable operators from contacting program networks when performing spot checks.

DISCUSSION

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO APPLY OBLIGATIONS UNDER THE ACT TO PROMOTIONAL MATERIAL.

Pursuant to the CALM Act, the Commission's task was limited to "incorporating by reference and making mandatory" the Advanced Television System Committee's ("ATSC") Recommended Practice A/85 ("RP") "*only insofar* as such recommended practice concerns the transmission of *commercial advertisements*."[5] The Commission erred by including promotional material ("promos") in the definition of "commercial advertisement"[6] for these purposes and thus subjecting them to the rules.

In the *Order*, the Commission mistakenly conflates "commercial advertisements" and promos, defining promos as "commercial advertisements promoting television programming."[7] In fact, promos are distinct from "commercial advertisements." Generally, commercial

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[5] 47 U.S.C. § 621(a) (emphasis added). The RP covers a wide range of practices that are not addressed by the CALM Act, and in fact differentiates between commercial advertisements and promotional material. *See* RP at 15 (defining "short form content" to include "[a]dvertising, commercial, promotional or public service related material or essence"); *id.* at 69 ("Content includes commercials, promotional materials ("promos"), and programming. The term "interstitials" applies to both commercials and promos.").

[6] *See Order* ¶ 19. ("Based on the current record, we … find no policy or legal reason to exempt … commercial advertisements promoting television programming ('promos') from the scope of the rules.").

[7] *Id.*

advertisements are material transmitted in exchange for some type of payment or remuneration,[8] while promos are not.[9] Under the Communications Act, for instance, public broadcasting stations are prohibited from carrying "advertisements," defined as any message or programming material being broadcast in exchange for remuneration from a commercial entity to promote its service or product.[10] However, public stations can and do broadcast promos of upcoming programming without running afoul of the advertising ban. Indeed, the *Order* excludes noncommercial educational television stations from the rules.[11] The *Order* provides no reason for treating promos differently in the broadcast and non-broadcast contexts.[12]

The *Order's* suggestion[13] that covering promos would not impose compliance burdens beyond those already necessary for commercial advertising completely overlooks the increased burdens resulting from extending the rules to networks that carry no commercial advertising but do carry promos, such as C-SPAN, Disney Channel, and premium networks. In the Washington, D.C. market, for example, it would mean extending the strictures regarding compliance,

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8 *See, e.g.*, 47 U.S.C. § 399B.

9 *See* Starz Ex Parte (filed Dec. 5, 2011) ("Starz receives no compensation for any of the promotional announcements for its programming.")

10 *See* 47 U.S.C. 399B.

11 *Order* ¶ 18 & ¶ 19 n. 100 (finding that "non-commercial broadcast stations are excluded from the statute except to the extent they transmit commercial advertisements as part of an 'ancillary or supplementary service'").

12 Moreover, as Commissioner McDowell pointed out in his Separate Statement, the Commission itself has "recognized the content distinction between advertisements and promos and has treated them differently" in other instances. *Order*, Separate Statement of Commissioner Robert M. McDowell at 17280. For example, in the closed captioning rules, the Commission treats "interstitials, promotional announcements, and public service announcements" separately from "advertisements." *Compare* 47 C.F.R. § 79.1(a)(1)(pertaining to "advertisements"), *with* 47 C.F.R. § 79.1(d)(6)(pertaining to "interstitials, promotional announcements, and public service announcements"). Furthermore, in limiting the amount of commercial matter in children's programming, the Commission has explained, under the Children's Television Act, why it applies the commercial limits to only certain types of promos. *See In re Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report & Order, 21 FCC Rcd 11065 ¶¶ 46-49 (2006) (explaining that including certain program promotions in the definition of "commercial matter" would help protect children from over-commercialization of programming consistent with the overall intent of Congress in the [Children's Television Act of 1990]).

13 *Order* ¶ 19, n. 102.

certification and spot-check testing to approximately 40 additional networks.[14] In addition to the burden that some non-advertiser-supported networks might face should they have to purchase equipment to ensure that their promos are not "loud," adding these networks to the sizable universe of networks for which cable operators already are responsible under the rules will lead to increased CALM Act compliance costs on operators. Operators may need to acquire additional test equipment to spot check more networks, and may need to devote additional personnel to ensure that promos on these other networks comply with the RP.

For these reasons, the Commission should reconsider its decision and conclude that promos should not be treated as "commercial advertisements" for these purposes.

II. CABLE OPERATORS SHOULD BE PROTECTED AGAINST LIABILITY WHERE THEY HAVE TAKEN MEASURES TO IDENTIFY A PROBLEM WITH A NON-COMPLIANT NETWORK.

Under the Commission's rules, if an operator is notified of a "pattern or trend" of complaints, it must perform a "spot check." If that spot check indicates noncompliance with the RP, the operator "must inform the Commission and the programmer in question of the noncompliance indicated by the spot check, and direct the programmer's attention to any relevant complaints."[15] The operator then must re-check the noncompliant network's commercials and notify the Commission and the network of the result of the re-check.[16] At that point, if the network still has not remedied the problem, the operator continues to carry it at its peril. Per the *Order*, "the … MVPD's actual knowledge that the commercials in the

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[14] *See* www.xfinitytv.comcast.net/tv-listings?cmpvd=xfdash_tvlistings.

[15] *Order* ¶ 44.

[16] *Id.*

programming are not compliant with the RP means that … MVPD is liable for future commercial loudness violations in that programming…."[17]

While the *Order* states that the Commission can take mitigating factors into consideration in any enforcement action,[18] this is little comfort for the operator who may be carrying a network that technically is in violation of the CALM Act rules. Rather than take this gamble, an operator may feel compelled to drop the network – a network that in all likelihood is one with fewer resources than the mainstream networks and one that is more likely to serve niche audiences. This would not be an ideal outcome. As the Commission has previously recognized,[19] deletions of networks can cause customer disruption and confusion, and operators' strong preference would be to avoid such situations.

Rather than leaving these determinations to case-by-case enforcement actions after the fact, the Commission should make clear on reconsideration that an operator that (i) notifies the network and Commission of non-compliance in accordance with the rules and (ii) works in good faith to have the network rectify the problem as expeditiously as possible, will not face any enforcement liability if it continues to carry that network's programming. A suspension of enforcement under this framework would provide an alternative to signal deletions, which subscribers, operators, and the Commission would find undesirable. It would also provide a

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[17] *Id.*

[18] *Id.*, n. 196.

[19] *See, e.g.*, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565, 8605 (1993) (recognizing "subscriber confusion" that could result from deletion of networks).

reasonable opportunity for operators to work cooperatively with networks to address any loudness issues.[20]

III. THE RULES SHOULD FACILITATE, RATHER THAN INHIBIT, PROMPT RESOLUTION OF ANY IDENTIFIED PROBLEMS WITH "EMBEDDED" ADVERTISING.

Programmers and cable operators must collaborate to ensure that cable customers have the optimal viewing experience. As the *Order* acknowledges, "the RP relies on … cooperation [between the 'content supplier and recipient'] for effective loudness control; without it, transmission of 'embedded' commercials that comport with the RP would be impractical at best."[21]

The rules generally encourage cable operators and programmers to work together – with one glaring exception. The rules provide that "the cable operator or other MVPD must not inform the network or programmer of the spot check prior to performing it."[22] This provision needlessly interferes with the programmer/operator relationship in a manner counterproductive to accomplishing the goal of identifying and expeditiously resolving problems with loud commercials.

The *Order* provides only the most cursory discussion of this prohibition on prior notice to the programmer, stating only that it is designed "to promote the reliability of the spot check."[23] But the restriction will hardly serve that purpose. Spot checks will be most reliable if operators and programmers, using good engineering practices, can work together to ensure that they are properly testing and measuring the relevant data. Indeed, to that end, the Society of Cable

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[20] Because issues solely associated with compliance at the network level would presumably affect many operators carrying the same service, a general effort to obtain compliance would be particularly appropriate and enforcement action involving a single operator highly arbitrary.

[21] *Order* ¶ 12.

[22] 47 C.F.R. § 76.607(a)((3)(iv).

[23] *Order* ¶ 38.

Television Engineers, through its programmer, operator and equipment supplier members, is working to develop recommended practices for spot checking.[24] Those practices all rely on the good faith cooperation of all entities involved in program delivery.

The role of the spot check should be to identify whether any problems exist and to quickly remedy those problems. This unreasonable restriction will simply interfere with and unnecessarily delay valid efforts to remedy any loudness problem, and should be eliminated on reconsideration.

CONCLUSION

For the reasons stated above, NCTA requests that the Commission adopt the changes described herein.

Respectfully submitted,

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August 8, 2012

[24] SCTE's Digital Video Subcommittee's "Video and Audio Services" working group has formed a subgroup to help develop these recommended practices.