

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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



**COMMENTS ON THE PETITION FOR RECONSIDERATION FILED BY THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The American Cable Association (“ACA”) submits these comments in support of the Petition for Reconsideration (“Petition”) filed by the National Cable & Telecommunications Association (“NCTA”) in response to the adoption of rules by the Commission in the above captioned proceeding.<sup>1</sup> NCTA’s Petition requests that the Commission

(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.<sup>2</sup>

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<sup>1</sup> Petition for Partial Reconsideration of the National Cable & Telecommunications Association, *In the Matter of Implementation of the Commercial Advertisement Loudness Migration (CALM) Act*, MB Docket No. 11-93, (Aug. 8, 2012); *In re Implementation of the Commercial Advertisement Loudness Migration (CALM) Act*, Report & Order, 26 FCC Rcd 17222 (2011) (“Order”).

<sup>2</sup> See Petition at 2.

As discussed herein, ACA believes each of these requests has a sound legal and policy basis and should be granted.

**I. THE ACT APPLIES ONLY TO COMMERCIAL ADVERTISEMENTS AND NOT PROMOTIONAL MATERIAL**

In the *Order*, the Commission finds there is “no policy or legal reason to exempt program-length commercial or commercial advertisements promoting television programming (‘promos’) from the scope of the rules.”<sup>3</sup> Like NCTA, ACA submits that the Commission is substituting its own policies in place of a statute that on its face clearly does not apply to promos. The statute (“CALM Act”) states that it applies “only insofar as such recommended practice concerns the transmission of commercial advertisements.”<sup>4</sup> There is only one reason for this limitation: to exclude non-commercial advertisement content from being subject to the statute even though the Recommended Practice A/85 (“RP”) covers promos and other “interstitial” or “short-form” content.<sup>5</sup> While the Commission is correct that excluding promos may result in this content being transmitted at excessive loudness,<sup>6</sup> that policy determination does not give the Commission the authority to write a different statute. In sum, the Commission should reverse its position and grant NCTA’s request to exclude promos from being covered by the statute’s requirements.

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<sup>3</sup> *Order*, ¶19.

<sup>4</sup> 47 U.S.C. § 621.

<sup>5</sup> See ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television, Document A/85:2011, 25 July 2011, at 15 (“short form content – Advertising, commercial, promotional or public service related material or essence. Also termed ‘interstitial’ content. The typical duration is less than approximately two to three minutes.”).

<sup>6</sup> See *Order*, ¶19.

## II. MVPDS ARE NOT LIABLE FOR FAILURES OF PROGRAMMERS TO EMBED COMMERCIAL ADVERTISEMENTS IN VIOLATION OF THE RP

The RP is designed to cover the entire ecosystem of entities involved with loudness management in video programming. Each entity in that ecosystem, from content creators to MVPDs, has a crucial role to play, and the RP does not direct MVPDs to undertake actions that programmers are best equipped to undertake.<sup>7</sup> Yet, the CALM Act only seeks to incorporate the RP insofar as it applies to broadcasters and MVPDs and not the other entities in the ecosystem. As a result, the Commission decided in the *Order* to effectively rewrite the responsibilities shared among MVPDs and other entities in the RP and make only MVPDs liable if programmers who embed commercial advertisements do not comply with the RP.<sup>8</sup> Again, ACA insists that the RP only requires MVPDs that have implemented AC-3 technology to pass through without alteration the dialnorm metadata in commercial advertisements inserted upstream by programmers. In addition, MVPDs have an obligation to notify programmers that they believe are not transmitting their signal in compliance with the RP.

In its Petition, NCTA requests that the Commission make clear that an MVPD will not be liable – and may continue to carry the programming – if it works in good faith with a programmer that is not complying with the RP to rectify the problem.<sup>9</sup> ACA submits that

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<sup>7</sup> For a more complete discussion of the shared responsibilities in the RP, *see e.g., Ex Parte Presentation of the American Cable Association*, MB Docket No. 11-93 (Oct. 20, 2011). In this presentation, ACA notes that there are approximately 7,500 cable systems, most of which distribute the same feeds of several hundred programming channels to consumers. Consequently, it would be costly and duplicative to have each of these 7,500 systems install and utilize equipment to monitor and correct the loudness of commercial advertisements inserted in several hundred programming channels upstream. The RP recognizes this fact and establishes an efficient process whereby programmers are directed to insert the commercial advertisements correctly and the 7,500 cable systems are required to pass through the signal without alteration.

<sup>8</sup> *Order*, ¶¶30-44.

<sup>9</sup> *See* Petition at 5.

NCTA's request is consistent with the obligations placed on MVPDs by the RP, and, as such, should be incorporated into the Commission's implementation of the statute. Should the Commission continue to insist on its interpretation of the statute, ACA encourages it to give MVPDs sufficient time to work with non-compliant programmers to remedy any problem. This would avoid having MVPDs drop programming networks, which often raises the ire of its subscribers.

### **III. MVPDS SHOULD BE ABLE TO CONTACT PROGRAMMERS WHILE CONDUCTING SPOT CHECKS**

While the RP relies on cooperation among the entities in the programming creation and distribution ecosystem, the Commission determined that during the spot check process an MVPD cannot inform the programmer prior to conducting the test.<sup>10</sup> NCTA argues that this requirement is unreasonable and "will simply interfere with and unnecessarily delay valid efforts to remedy any loudness problem."<sup>11</sup> It asks for it to be repealed.

ACA supports NCTA's request. Its MVPD members have a long history of working cooperatively with programmers to address signal quality and other technical issues. As NCTA notes, these entities are currently working under the auspices of the Society of Cable Television Engineers to develop recommended practices for conducting spot checks.<sup>12</sup> Rather than assuming they will somehow collude to undermine the test, the Commission should presume they will work in good faith to address any problem of excessive loudness. Should there be evidence that this is not occurring, the Commission can step in.

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<sup>10</sup> See 47 C.F.R. §76.607(a)(3)(iv).

<sup>11</sup> Petition at 7.

<sup>12</sup> See *id.*

Respectfully submitted,

*Thomas Cohen*

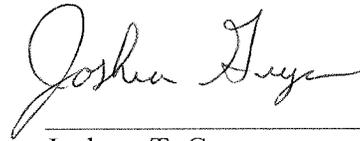
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**Certificate of Service**

I, Joshua T. Guyan, hereby certify that on this 14<sup>th</sup> day of September, 2012, I caused a copy of the foregoing Comments of the American Cable Association to be served by USPS First Class Mail on the following:

Representative Anna Eshoo  
U.S. House of Representatives  
205 Canon Building  
Washington, DC 20515

A handwritten signature in cursive script that reads "Joshua T. Guyan". The signature is written in black ink and is positioned above a horizontal line.

Joshua. T. Guyan