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Via Electronic Filing

October 26, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: Written Ex Parte Submission – MB Docket No. 11-154

Dear Ms. Dortch:

The Consumer Electronics Association ("CEA"), by the undersigned, hereby responds to the *ex parte* filing submitted by the National Association of the Deaf et al. on October 9, 2012 in the above-referenced docket ("NAD *Ex Parte*").[1] Specifically, this letter addresses statements in the NAD *Ex Parte* concerning CEA's pending limited petition for reconsideration of the *IP Captioning Order*[2] ("PFR"), filed on April 30, 2012.[3]

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[1] *Ex Parte* Notice of the National Association of the Deaf et al. ("NAD"), CG Docket No. 10-213, MB Docket No. 11-154, at 4–5 (filed Oct. 9, 2012) ("NAD *Ex Parte*").

[2] *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*").

[3] CEA, Petition for Reconsideration, MB Docket No. 11-154 (filed Apr. 30, 2012) ("PFR"). The PFR urges the Commission to: (i) limit the applicability of the apparatus closed captioning rules to only those devices intended by the manufacturer to receive, play back, or record video programming, rather than broadly applying them to any device with a video player; (ii) reconsider the finding in the *IP Captioning Order* that standalone removable media players (*e.g.*, Blu-ray Disc™ and DVD players) are covered by Section 79.103; and (iii) clarify that the January 1, 2014 compliance deadline refers specifically to the date of manufacture, so that only apparatus manufactured on or after that date are subject to the new rules, without affecting the importation, shipment, or sale in the United States of apparatus manufactured before that date.

These arguments overlook the plain language of Section 303(u) of the Communications Act of 1934, as amended (the "Act").[4] As discussed in more detail below, the Commission should pay no heed to these arguments and grant the PFR expeditiously.

The Apparatus Closed Captioning Rules Should Apply Only to Apparatus Designed to Receive or Play Back Video Programming. As requested in the PFR, the Commission should immediately revise new Section 79.103 of the rules and the accompanying note to clarify that the apparatus closed captioning requirements apply only to apparatus **designed to** receive or play back "video programming,"[5] not, as NAD argues, to "any apparatus that is capable of video playback."[6] CEA has explained on multiple occasions[7] that this clarification is necessary to bring the rule in line with Section 303(u) of the Act.[8] Section 303(u) limits the applicability of the apparatus closed captioning rules to a subset of video players (*i.e.*, players intended for receiving or playing back "programming by, or generally considered comparable to programming provided by a television broadcast station"[9]), rather than **all** video players. The NAD *Ex Parte* adds no new information or analysis to support its argument to the contrary.

NAD is inaccurate in its assertion that CEA's concerns are limited to camcorders and digital still cameras.[10] As CEA has explained previously, these devices are merely two examples of the ill effects of the *IP Captioning Order*'s approach in this area.[11] Indeed, there may be other unintended, negative consequences that stem from the *Order*'s approach. By equating "designed to" with "capable of," the *IP Captioning Order* ignores the plain language of the statute and impermissibly removes the manufacturer's intent – the hallmark of the term "design" – as a limitation to the scope of Section 79.103.[12]

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[4] 47 U.S.C. § 303(u)(1).

[5] *Id.* § 613(h)(2) (defining "video programming" as "programming by, or generally considered comparable to programming provided by a television broadcast station, but not including consumer-generated media").

[6] NAD *Ex Parte* at 4.

[7] *See, e.g.*, PFR at 3–4; Written *Ex Parte* Presentation of CEA, MB Docket No. 11-154, at 2 (filed Sept. 26, 2012)("CEA September 26 *Ex Parte*").

[8] *See* 47 U.S.C. § 303(u)(1) (requiring "that, if technically feasible . . . apparatus designed to receive or play back **video programming** transmitted simultaneously with sound . . . be equipped with built-in . . . capability designed to display closed-captioned video programming" (emphasis added)).

[9] *Id.*

[10] *See* NAD *Ex Parte* at 4.

[11] *See* PFR at 4, 7.

[12] *See id.* at 5–6.

NAD's suggestion that CEA file an "individualized waiver petition" for camcorders and digital still cameras[13] is insufficient to address the issue. The waiver mechanism established by the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") and the *IP Captioning Order*[14] does not by itself justify or save the serious flaw in statutory interpretation discussed above. As stated in the PFR, the waiver mechanism is untried and no requests for waiver of the apparatus closed captioning rules have been filed, let alone granted. More fundamentally, "[t]he FCC cannot save an irrational rule by tacking on a waiver procedure."[15] Where the Commission exceeded its statutory authority, it should not be CEA's responsibility to demonstrate "why the unique characteristics of the video programming players that CEA's members include on such devices make integrating closed captioning functionality unwarranted."[16]

Instead, as CEA has proposed, the Commission can resolve this issue by a clarification and revision of the note to Section 79.103(a) that replaces the term "video player" with "video programming player."[17] The Commission should clarify that the term "video programming player" means a feature specifically intended by the manufacturer to enable access to "video programming," as defined in the CVAA, not video in general.

The Apparatus Rules Should Not Apply to Removable Media Players. As requested in the PFR, the Commission should reconsider the *IP Captioning Order*'s application of the apparatus closed captioning rules to removable media players. CEA previously has demonstrated that Section 203 of the CVAA does not apply to removable media players such as DVD or Blu-ray Disc™ ("Blu-ray disc") 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 ("IP") video programming, in which case they would be covered for that reason rather than because of their ability to play removable media).[18] Further, subjecting removable media players to the closed captioning rules is unnecessary, as the removable media (*e.g.*, DVD or Blu-ray discs) essential to the operation of these players are not even required to contain the closed captions specified in the Commission's rules.[19] To the extent that DVDs, especially those "from the late 1990s and early 2000s," include closed captions,[20] there are HDMI-compatible DVD players

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[13] *See* NAD *Ex Parte* at 4.

[14] *See* 47 U.S.C. § 303(u)(2)(C); 47 C.F.R. § 79.103(b)(4).

[15] *See* PFR at 7 (quoting *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1998)).

[16] NAD *Ex Parte* at 4.

[17] *See* PFR Reply at 3; *see also* PFR at 8; CEA September 26 *Ex Parte* at 3.

[18] See PFR Reply at 5.

[19] *See* PFR at 10.

[20] *See* NAD *Ex Parte* at 5.

available in the marketplace that can render or pass through the closed captioning, as CEA previously has pointed out in this proceeding.[21]

Although, as NAD notes, Internet-connected removable media players must display closed captions for IP-delivered video programming, this has no bearing on whether they must also display closed captions for video programming content distributed on removable media.[22] Section 203 of the CVAA does not, by its terms, impose a closed captioning requirement on removable media or removable media players. This is rational, because it leaves undisturbed the successful and well-established use of Subtitles for the Deaf and Hard of Hearing ("SDH") on Blu-ray discs and other forms of removable media. As CEA has explained, it does not serve the public interest for the apparatus closed captioning rules to apply to removable media players even though, as mentioned above, the FCC does not require closed captioning of the video programming content on the removable media (*e.g.*, DVD or Blu-ray discs) that these players need to operate.[23]

Because the pleading cycle for the PFR is complete, and CEA's members need certainty in the near future as they design products affected by issues raised in the PFR, CEA urges the Commission to grant the PFR as quickly as possible.

Pursuant to Section 1.1206 of the Commission's rules,[24] this letter is being electronically filed with your office. Please let the undersigned know if you have any questions regarding this filing.

Respectfully submitted,

/s/ **Julie M. Kearney**

Julie M. Kearney
Vice President, Regulatory Affairs

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[21] *See* PFR Reply at 6, n.30 (noting that Philips offers an HDMI-compatible DVD player with closed caption decoder capability); *see also User Manual for HDMI 1080p DivX Ultra DVD Player (DVP 5990)*, Philips, 43 (2009) http://download.p4c.philips.com/files/d/dvp5990_37/dvp5990_37_dfu_aen.pdf (describing the closed caption feature as one that "is only available if the disc contains of special signal data" and that "shows sound effects on the screen if your TV supports this feature, such as 'phone ringing' and 'footsteps.'").

[22] *See* NAD *Ex Parte* at 5.

[23] *See* PFR at 9 (citing *IP Captioning Order*, 27 FCC Rcd at 846, ¶ 99 n.398).

[24] 47 C.F.R. § 1.1206.