

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Accessibility of User Interfaces, and Video)	MB Docket No. 12-108
)	
Programming Guides and Menus)	

Comments of the American Council of the Blind

Introduction

The American Council of the Blind (ACB) is pleased to submit these comments on the Federal Communications Commission’s Notice of Proposed Rule Making (NPRM) regarding the Accessibility of User Interfaces, and Video Programming Guides and Menus. Gathered for the purpose of advising the Commission on the implementation of the 21st Century Communication’s and Video Accessibility Act (CVAA), an advisory committee submitted three reports in April 2012: 1) on the availability of video described content; 2) on access to emergency information to blind and visually impaired people; and 3) on accessibility to user interfaces, program guides, and navigation devices. The Federal Communications Commission proposes the last set of rules based on the Advisory Committee’s reports.

The American Council of the Blind (ACB) is a national membership organization whose purpose is to work toward independence, security, equality of opportunity, and improved quality of life for all blind and visually impaired people. Founded in 1961, ACB's members work through more than 70 state and special-interest affiliates to improve the well-being of all blind and visually impaired people by: serving as a representative national organization; elevating the social, economic and cultural levels of blind people; improving educational and rehabilitation facilities and opportunities; cooperating with the public and private institutions and organizations concerned with blind services; encouraging and assisting all people with severely impaired vision to develop their abilities and conducting a public education program to promote greater understanding of blindness and the capabilities of people who are blind.

As an organization that promotes the interests of consumers who are blind, visually impaired, and deaf-blind, we first commend the Federal Communications Commission (FCC) for recognizing the imbalance represented in the VPAAC report—in particular, the Working Group 4 report. While correcting the imbalance in the makeup of Working Group 4, the FCC has acknowledge that the final regulations that will achieve accessibility of user interfaces and video programming guides and menus must allow for the fostering of maximum innovation and flexibility, meeting, at the same time, the intent of CVAA to provide full accessibility for consumers.

Scope of Section 204 and 205

It is vital that the final adopted regulations ensure that the device coverage, whether done through Section 204 or Section 205 of the CVAA, provide maximum choice for consumers. No matter whether consumers obtain their device that will receive or play back video or audio programming by using an existing relationship with their MVPDs or some other retail channel. Fundamentally speaking, apparatus or navigation devices, as such devices appear on the market, are not significantly different. In fact, it may well be argued that they are one and the same. An examination of design, production, and marketing trends suggest that differences, if they exist, will soon disappear. Considering the timeline for implementation for the rules in this proceeding, it is incumbent upon the FCC to create rules that are forward-looking and not based on the current market. As such, the interpretations of the definitions in Sections 204 and 205 require additional considerations that are not readily apparent in the Commission’s analysis in this NPRM.

We recognize the limiting factors that have gone into FCC’s consideration of navigation devices in Section 205 to merely those “provided” by MVPDs, thereby moving all other categories of devices to be considered as apparatus in Section 204. While—on the surface—this interpretation appears to streamline Sections 204 and 205, it neglects several complicating factors: The first of these factors is the definition of “provided by” and secondly the definition of “retail.”

When considering navigation devices in Section 205, the FCC’s interpretation does not make clear, for instance, that all devices and methods of viewing the MVPDs’ video programming, it must be accessible. When MVPDs “provide” “navigation” devices, they ensure that devices in multiple classes are available to consumers. There may be one device that is generally available to everyone as a benefit of subscription and additional devices available to rent that provide advanced features such as DVRs. There are recognizable instances when such devices are also available to purchase from retailers other than the MVPDs in question. These cases indicate that the navigation devices fall across both Sections 204 and 205. If rules are adopted, The Commission must determine which device fall into which section on a case by case basis, creating an additional burden on the FCC. Moreover, the if the Commission is asked to determine the placement of a device, it will certainly be impossible to meet Congress’ requirement that the MVPD must provide access in a timely manner.

The consideration of the previously discussed factor also suggests a potential loophole in FCC’s thinking regarding retail. As the thinking in the NPRM suggests, separating video programming apparatus to Section 204 will provide a clear delineation between MVPDs and devices purchased via retailers. This is far from the reality. Regardless of whether consumers have a previously existing relationship with MVPDs, this factor has no bearing on whether MVPDs are also retailers. As some MVPDs provide devices for purchase or rent, they automatically become retailers—no matter whether the devices they make available (or “provide”) happen to be branded specifically for their purpose. Taking into account this fluid retailer relationship and the navigation devices MVPDs provide, the clear separation conceived by the FCC has several holes in logic that cannot be explained away. Further, as the ultimate responsibility for the accessibility of the hardware and the software falls on manufacturers and software developers, ACB finds no reason to disconnect the MVPDs for their responsibility to ensure that all devices they provide are fully accessible.

For these reasons and additional concerns elucidated below, we must agree with the objections raised by Commissioner Pai. Even if devices happen to fall in both sections, we find that the scope of Section 205 cannot be artificially limited. If it is done,

we predict that those devices that MVPDs do not directly provide to consumers as a benefit of subscription (but are available to other subscribers for either rent or sale) will not be made accessible and, further, that, unless such devices are explicitly covered by Section 204, consumers who are blind or visually impaired will find that such devices are not accessible. We call on the Commission to avoid creating such a large gap by ensuring that all navigation devices are covered by Section 205.

We recognize the challenge posed to the Commission by Congress by explicitly exempting all navigation devices from the scope of coverage of Section 204. We believe that Congress separated these two categories of devices particularly due to the contractual obligations and flexibilities faced by MVPDs. It is precisely because of (and not despite of) the preexisting relationships that consumers have with MVPDs that Section 205 explicitly covers devices and software that they provide to their subscribers. The FCC and Commissioner Pai should examine the special relationship between the consumer, MVPDs, and the devices and software they provide. Rather than thinking the two sections as separate, however, we urge the FCC to apply the following logic to conceive the interrelation between digital apparatus as covered under Section 204 and navigation devices as covered under Section 205:

1. Digital apparatus as conceived in Section 204 is a superset of all devices capable of receiving or playing back video programming including those capable of doing so via internet protocols. These devices may include (but not be limited to) commercially sold DVRs, DVD/disk players (regardless of current Blu-ray or other future storage method or format), boxes capable of serving as intermediaries between televisions and MVPDs navigation devices, stand-alone digital hardware capable of bringing together video material from disparate commercial and/or open sources, television sets, or just software designed to receive or play back video programming.
2. Regardless of whether any device provided to a consumer by MVPDs fits the definition of digital apparatus as conceived in Section 204, such device shall be covered as a navigation device under Section 205.

3. MVPDs shall have the contractual obligation to ensure accessibility to all the navigation devices they make available to consumers with disabilities, irrespective of rental or retail pricing.
4. The hardware manufacturers and software developers of navigation devices as covered in Section 205 and made available through MVPDs, in turn, shall have the obligation to make such features accessible. If MVPDs are responsible for the design, software development, and manufacturing of covered equipment and software, then the responsibility of making software and hardware accessible shall be of MVPDs.
5. Should MVPDs choose to deliver video programming by using other software or network based capability such as a mobile application, the MVPDs shall have the obligation to make guides, navigation, captioning, and video description accessible to people with disabilities through such software or network based service.
6. While MVPDS shall have the maximum flexibility to deliver accessible navigation by using any software, peripheral device, equipment, service, or solution at no additional charge and within a reasonable time, MVPDs shall not presume that a blind or deaf consumer owns a device on which software or network based accessible service is being offered.

In addition to the arguments above, we point out that the phase in requirements for Section 204 and 205 are different. Our analysis of Section 204 being the superset of 205 is further validated by the fact that Congress gave manufacturers of all equipment no less than two years after the promulgation of the rules to begin manufacturing and importing accessible devices. On the other hand, MVPDs are given no less than 3 years to begin placing devices. This indicates that MVPDs are given the time to test equipment or software. As we have noted in other proceedings, however, we should point out that the equipment and software manufacturers do not exist in a vacuum. The discussion of accessibility has been taking place since the passage of the CVAA.

To the extent that the FCC's analysis takes into account MVPDs, it does not go far enough. As the discussion above suggests, MVPDs are engaged in several levels of

business practices; for those business practices to result in accessible devices, software, or network based services for people who are blind or visually impaired, the FCC must look at MVPDs more broadly.

In paragraph 13, the Commission asks: “If we interpret Section 205 to only cover navigation devices supplied by MVPDs, how do we explain the provisions that apply certain requirements set forth in the statute to manufacturers of hardware and software?” to some extent we have already discussed the role of manufacturers of hardware and software as they relate to MVPDs above. While section 204 provides a direct link to the manufacturers of hardware and software, the link in Section 205 is not directly tangible. Congress has recognized the special role that MVPDs play as intermediaries. As the FCC points out, the MVPDs have preexisting relationships with consumers. As such, it must be incumbent upon those MVPDs to ensure accessibility of equipment and software by contractually (or otherwise) demanding from their manufacturer partners the accessibility of software and equipment. The reporting requirements and complaint procedures must recognize this relationship. When complaints are filed against MVPDs through Section 205, those complaints are not appropriate for the equipment manufacturers or software developers as the relationship of the consumer is directly with a MVPD.

We want to acknowledge the fear that the Commission has regarding the potential nullification of large swaths of Section 204 due to the exception placed by Congress on navigation devices. (See Paragraph 16 of the Commission’s analysis.) So long as the FCC’s regulations make certain that either digital apparatus (as covered under Section 204) or navigation devices (as covered under Section 205) are accessible, we do not believe that gaps will exist. For this to occur, however, the Commission must clarify, in no uncertain terms, that all navigation devices provided by MVPDs without exception must be accessible to persons who are blind or visually impaired. Even if Sections 204 and 205 are mutually exclusive, they do not lessen the burden on the manufacturers to make such devices accessible. That said, however, we favor the interpretation of Sections 204 and 205 as suggested in paragraph 17—namely that Section 205 devices are a subset of Section 204 devices. The exception is only granted so that MVPD relationships can be recognized. Particularly, we insist on an interpretation that will place less of a burden on

the consumer. ACB wishes to avoid circumstances that will allow MVPDs to shift the responsibility of devices onto manufacturers or software developers—especially when the MVPDs already have legal agreements. The interpretation in paragraph 17 (and as proscribed above) will ensure that consumers have only one place to reach when requesting accessible equipment.

The Commission further wonders in its analysis in paragraph 19 whether its rules can apply to such set top boxes as TiVos. As we have discussed above, some MVPDs have established relationships with manufacturers of such devices as TiVos to provide their devices to their subscribers. This being the case, we firmly believe that any equipment provided to consumers, no matter who the manufacturer is, must be accessible. In the case of MVPDS, the responsibility of ensuring that the accessibility occurs directly lies on MVPDS—and through Section 205, the manufacturer or software developer. Ultimately, the primary responsibility for this equipment will be placed on the manufacturer regardless of the retail channel used to make available the equipment. The coverage in Section 205 does not change the responsibility, merely the method of coverage. We think of Section 205 as a procedural convenience to aid the consumer.

As we have indicated above, the FCC's concerns in paragraph 20 regarding shared responsibility of software developers and hardware manufacturers is valid. In so far as the equipment supplied by MVPDs is manufactured by third parties, Congress' intent is clear. It clearly places the responsibility of ensuring full accessibility on both manufacturers, software developers, and MVPDs. This interpretation is consistent with the view that digital apparatus covered in Section 204 must be accessible and that such apparatus must be made accessible by the manufacturers. That said, however, it cannot always be stated that MVPDs and manufacturers of devices they supply are different parties. We can point to several instances that prove that MVPDs engage in the design, development, testing, and distribution of both digital apparatus and navigation devices. In these cases, MVPDs must be considered as manufacturers and software developers as well as entities that “provide” navigation devices to consumers with disabilities.

To the extent that manufacturers or MVPDs make video programming available through nontraditional navigation devices and software such as cell phones or PCs and when such nontraditional devices or software is made available via retail channels—available via purchase at cost or available at no additional cost to any consumer, the MVPDs must ensure the accessibility of this retail based solution. As the FCC suggests in paragraph 23, this is a legitimate concern. No matter where the ability to receive or play back video programming occurs, it must be fully accessible. This full accessibility includes the ability to find, browse for content, play, record, bring up captioning or video description and more. If the function is made available to consumers without disabilities, that function must be made accessible to consumers with disabilities—in particular, to consumers who are blind or visually impaired.

Software to receive and play back video programming

Similar to the concerns raised in Paragraph 23, those raised in paragraph 24 must be argued in the same manner. The FCC should not limit the definition of navigation device in a restrictive manner as to exclude mobile applications or other software on other platforms. As we have repeatedly stated, we do not believe that the manner of viewing video programming will be limited to “television sets” in the future; nor will the manner of obtaining video content be limited. The FCC must regulate with the proverbial eye toward the future. With that in mind, Section 204 and Section 205 must also cover apps, modules, web sites, or any other method of delivering video programming or accompanying apps to traditional methods of viewing video programming. all features, so long as they are made available to consumers without disabilities, must be made accessible to consumers who are blind or visually impaired. This applies to software applications or other future methods of programming delivery. No matter where the offering occurs, inside the home or outside the home, full programming or subset of programming, offerings working only through the MVPDs IP network or offerings working outside the IP network, the accessibility should not be affected as these factors have no bearing on how accessibility is created or delivered.

Digital apparatus as covered in Section 204

We agree with the Commission's analysis of what digital apparatus consists of and the tentative conclusion that it should be similarly implemented to Section 203. We do not believe that the addition of the term "digital" to modify apparatus has any bearing on the conclusion that the Commission has reached. In addition, regardless of whether a digital apparatus needs to be downloaded in order to receive and transmit video programming, it should still be covered under Section 204. We further agree with the FCC's analysis in paragraph 29 that the original design and the intent of the manufacturer should not matter and that the functionality should govern the coverage and the accessibility. Moreover, we agree with the FCC that regardless of where the device or software is created or manufactured, it should not be exempted from coverage.

Functions that must be made accessible

For the most part, we agree with the FCC's analysis on what functions must be made accessible under Sections 204 and 205. We, however, do not agree that that debugging or diagnostic functions should be exempted from this requirement. The fundamental assumption is that these functions are only accessed by technicians. This assumption is flawed in two respects: First, it presumes that only technicians access these functions. Often times, online or telephone based technical support personnel will ask consumers to perform certain diagnostic tasks to determine technical support issues. Without access to these functions, consumers who are blind or visually impaired must rely on a technician to be sent to their homes or other locations. This is neither convenient nor necessary. Further, it does not provide timely service. Secondly, the presumption is that a technician him/herself is not blind or visually impaired. We fundamentally reject this analysis and ask that the FCC reconsider.

In commenting on the essential functions as defined in the VPAAC report, we stated in our comments that the FCC not consider these essential functions as the ultimate list of functions that need to be made accessible. We believe that it should be sufficient to provide to the manufacturers the information that all functions, if they happen to have

been included on a device or software, must be accessible. We do not believe that regulations are appropriate places to provide guidance. Should the FCC choose to provide guidance it must do so separately and not as part of this proceeding. We are very concerned that including a list of functions as a part of the regulatory process will reduce such a list to be the “be all and end all” of the functionality needed. Moreover, we find that this list does not include such essential functions as recording for DVRs. The FCC failed to take into account our comments to the VPAAC report regarding this issue. But, we do agree with the Commission’s tentative conclusion that the list in the VPAAC report, is a representative sample. We also believe that the term “appropriate functions” does not exclude diagnostic functions. In fact, the term “appropriate functions” is merely an adjectival oddity. We urge the FCC not to use it to exclude functions that it is determined to be “inappropriate” based on erroneous assumptions.

In paragraph 33, the FCC ask some important questions. Questions regarding third-party information and third-party applications. To the extent that third-party information is used to provide information about video programming—information such as programming guides, the manufacturer of the device or software must make the interface accessible so that this information is available to consumers who are blind or visually impaired. Manufacturers must be responsible for creating the appropriate interfaces to ensure that third-party information can be fully accessible. In the case of third-party applications such as Netflix or Amazon or something else altogether, the manufacturer must provide platform based provisions (such as accessibility APIs) so that those applications can be made accessible. If a manufacturer is advertising a particular app as a benefit of a certain apparatus or device, then it must be the device manufacturer’s responsibility to make the app accessible. Otherwise the burden of creating and providing the accessible app must fall on the third party developer. In addition, if the manufacturer makes the downloading of apps possible, it must ensure that the download process is fully accessible. We ask the FCC to fully delineate these responsibilities so that there is no confusion regarding third-party information or apps. We believe that the FCC has been fully authorized to create requirements to make third-party information and apps accessible through Sections 204 and 205.

Additionally, we strongly believe that the requirements for interface accessibility should not differ whether a device is covered by Section 204 or Section 205. As we have already argued, devices and software covered under Section 205 are a subset of those covered in Section 204. As a result, we find the distinction and the specificity in Section 205 to be illustrative and not conclusive.

Functions required by Section 205

As stated above, we do not believe that the accessibility requirements for digital apparatus or navigation devices should differ. If done, it will only sow unnecessary confusion. Therefore, we urge the Commission to remain consistent and apply the same set of standards to both groups of devices.

As suggested above, the identified 11 essential functions in the VPAAC report do not cover all essential functions. These examples are meant to be illustrative. Including them as a part of the regulations will do more harm than good. We strongly urge the Commission to leave any reference to “essential” functions out of its regulations. Should guidance be provided, it should be done as a separate document and not through this proceeding.

Having a list of functions also deters from these regulations being proof. As the FCC asks in paragraph 37, what happens when methods of navigation or functions change? Simply stating that all functions must be made accessible will not only provide the accessibility for the current generation of devices, we believe it will provide accessibility guidance for new devices. It will also provide manufacturers the maximum flexibility on making these new methods of navigation accessible.

With respect to other functions of an apparatus, we agree that the FCC should apply the guidance contained in Section 6.3(a) of FCC’s rules (which implements Section 255 and 716 of the CVAA), to explain that “accessible” means

- (1) Input, control, and mechanical functions shall be locatable, identifiable, and operable in accordance with each of the following, assessed independently:

- (i) Operable without vision. Provide at least one mode that does not require user vision.
- (ii) Operable with low vision and limited or no hearing. Provide at least one mode that permits operation by users with visual acuity between 20/70 and 20/200, without relying on audio output.
- (iii) Operable with little or no color perception. Provide at least one mode that does not require user color perception.

(2) All information necessary to operate and use the product, including but not limited to, text, static or dynamic images, icons, labels, sounds, or incidental operating cues, comply with each of the following, assessed independently:

- (i) Availability of visual information. Provide visual information through at least one mode in auditory form.
- (ii) Availability of visual information for low vision users. Provide visual information through at least one mode to users with visual acuity between 20/70 and 20/200 without relying on audio.¹

We ask the FCC to ensure that no matter what regulations they establish, they do not limit the accessibility because one method of accessibility is provided. For instance Footnote 99 of FCC's analysis asks if a remote needs to be accessible if all functions can be activated via a camera or speech recognition. That example precludes other methods and other disabilities. Artificial constraints on accessibility of interfaces are not helpful to people who are blind or visually impaired.

Technical Standards

In light of the constraints placed on the FCC by Congress in that the Commission is prohibited from promulgating technical standards, we urge the FCC to establish performance objectives that will ensure that the devices and software will be usable. This will require user research on the manufacturers' part. The application of current or future

¹ 47 C.F.R. § 6.3.

accessibility standards may not be sufficient. Considering the fact that these regulations must be forward-looking, performance standards that require the interface accessibility to provide “effective communication” as defined by the DOJ will suffice.

Separate equipment or software

We agree with the Commission’s tentative conclusion that all function of a device or digital apparatus must be made accessible should a manufacturer or MVPD should choose to provide accessibility through separate equipment or software. After the implementation of these regulations and the passage of the deadlines, consumers should expect no delay in obtaining the equipment or software. In addition, should additional software be required and such software can only be operated via a third-party device such as a laptop, tablet, smart phone or a future device, the manufacturer or MVPD cannot expect the consumer to own such a device.

Section 205 and activation of video description

According to our analysis, Section 204 is a superset of Section 205. As such, we find that despite video description not being explicitly mentioned as an activation method along with captioning, it is and should be covered as an accessibility feature that should be activated by the press of one button or single-step activation .

Respectfully submitted,

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