

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

In the Matter of

ACCESSIBILITY OF USER INTERFACES, AND
VIDEO PROGRAMMING GUIDES AND MENUS

MB Docket No. 12-108

COMMENTS OF DIRECTV, LLC

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SUMMARY

Sections 204 and 205 of the CVAA impose requirements designed to ensure that hardware and software used to view video programming will be accessible to and usable by the visually impaired. Specifically, these sections require that “digital apparatus” and “navigation devices,” respectively, provide certain on-screen text menus in audible form and provide a mechanism comparable to a button, key, or icon for certain accessibility functions. Once implemented, these requirements should greatly improve the ability of visually impaired consumers to interact with video programming.

In enacting these requirements, however, Congress demonstrated its expectation that the Commission would implement them in a manner that allows for future innovation. Thus, for example, the Commission may not mandate the use of particular technology, must afford regulated entities “the maximum flexibility” in determining the methods for achieving compliance, and is to phase in the requirements over several years.

These limitations are critical, not only for regulated entities, but for the visually impaired as well. As the VPAAC recognized, “it is impossible to predict how innovation and the advance of technology will open up new ways of using devices.” It is also impossible to know what new types of accessibility technology may be developed over the next few years. Were the Commission to lock in particular approaches to meeting the statutory requirements, it could deny the blind and visually disabled community the benefits of unforeseen technological innovations that would provide a greatly enhanced video experience. Accordingly, the Commission must honor Congress’s call for flexibility wherever possible.

The Commission must also recognize the very real limitations Congress placed upon its authority, particularly in choosing the specific functions that “digital apparatus” and “navigation

devices” must make accessible. Both the language and the structure of Sections 204 and 205 impose very specific requirements on the devices they cover. They do not afford the Commission *carte blanche* to adopt additional obligations, or to conclude that requirements placed on one class of devices are “reasonable” to place on the other. That is not to say that DIRECTV would not implement additional accessibility features and functions in its equipment. If the technology develops to the point where such capabilities can be offered efficiently and economically for an improved viewer experience for blind and visually impaired consumers, DIRECTV will have every incentive to make them available. Nonetheless, the Commission must respect the limits imposed by Congress.

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DIRECTV, LLC (“DIRECTV”) files these comments in response to the notice of proposed rulemaking issued in this proceeding to implement Sections 204 and 205 the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”).¹ These provisions are designed to ensure that hardware and software used to view video programming will be accessible to and usable by the visually impaired. DIRECTV continues to support such efforts to improve accessibility of technology non-disabled consumers take for granted. However, in implementing these provisions of the CVAA, the Commission must both honor the Congressional directive to afford regulated entities maximum flexibility in achieving compliance and also recognize the limitations Congress placed on its authority in this area.

¹ See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, FCC 13-77 (rel. May 30, 2013) (“Notice”).

INTRODUCTION

Section 204 of the CVAA, entitled “User Interfaces on Digital Apparatus,” directs the Commission to do three things with respect to “digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound.”

- One is to require that they be built in a way that makes them “accessible to and useable by individuals who are blind or visually impaired.”²
- The second is to require that, if on-screen text menus or other visual indicators built into the digital apparatus are used to access the “appropriate” functions previously identified, such functions shall be accompanied by audio output.³
- The third is to require manufacturers to build in access to “closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features.”⁴

Similarly, Section 205 of the CVAA, entitled “Access to Video Programming Guides and Menus Provided on Navigation Devices,” directs the Commission to do two things with respect to “navigation devices.”

- One is to require that “the on-screen text menus and guides provided by navigation devices . . . for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired.”⁵
- The other is to require, “for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features.”⁶

Accordingly, one of the Commission’s principal tasks in this proceeding is determining what Congress meant by the terms “digital apparatus” and “navigation device,”⁷ terms that the

² 47 U.S.C. § 303(aa)(1).

³ *Id.* at § 303(aa)(2).

⁴ *Id.* at § 303(aa)(3).

⁵ *Id.* at § 303(bb)(1).

⁶ *Id.* at § 303(bb)(2).

⁷ *Notice*, ¶¶ 6 *et seq.*

statute makes mutually exclusive.⁸ The Commission lays out competing arguments for both a very broad and fairly narrow application of the navigation device requirements in Section 205. DIRECTV takes no position on this issue, as the set-top boxes provided to consumers by a multichannel video programming distributor (“MVPD”) such as DIRECTV are “navigation devices” no matter how the Commission ultimately construes the term. DIRECTV will thus address these comments to issues involved in the implementation of Section 205 only.

DISCUSSION

I. THE COMMISSION MUST ALLOW FLEXIBILITY IN IMPLEMENTING ACCESSIBILITY SOLUTIONS FOR NAVIGATION DEVICES

Congress directs the Commission to implement navigation device accessibility requirements flexibly no less than four times. Section 205 prohibits the Commission from specifying the technology to be used to meet the accessibility requirements it imposes.⁹ It also twice directs the Commission to provide regulated entities the “maximum flexibility” to determine the manner of achieving compliance.¹⁰ It then provides a minimum phase-in period of two to three years before the requirements take effect.¹¹ Congress could not have been clearer on this point.

These statutory directives do more than merely protect industry from overly-intrusive regulation. They also protect the visually impaired themselves from inefficient, consumer-unfriendly “solutions” imposed by regulatory fiat. Accessibility solutions are only beginning to be developed, and there is no way to know at this point where innovation in this area will lead.

⁸ 47 U.S.C. § 303(aa)(4).

⁹ *Id.* at § 303(bb)(1).

¹⁰ *See* CVAA Section 205(b)(4)(A) and (b)(5).

¹¹ *Id.* at Section 205(b)(6).

Cloud computing, ubiquitous networking, flexible handheld technologies, new user interaction technologies such as touch screens and motion sensing, and other developments promise to revolutionize this field, offering a range of possibilities well beyond the accessibility technologies mandated for traditional broadcast and MVPD services.¹² As discussed below in more detail, inflexible Commission rules could easily lock visually disabled viewers out of such technological advancements.

A. Flexibility for Audible Text Menus and Guides

DIRECTV agrees that the basic obligation under Section 205 to provide on-screen text menus and guides that are “audibly accessible in real-time” is self-implementing.¹³ Nonetheless, the statute directs the Commission to implement requirements for such audible guides flexibly. In this regard, DIRECTV urges particular flexibility in three respects: (1) the content of audible text; (2) models that must be compliant; and (3) compliance using software and peripheral devices.

1. Content of Audible Text

The Commission should clarify that the audible guide requirement does not necessarily require exactly replicating in audible form the complete on-screen text. Text menus are optimized for visual consumption. They may not, and generally do not, translate well for consumption by those with visual impairments. For example, it takes a few seconds to view an entire on-screen programming guide covering several hours of multiple channels. Replicating all

¹² See Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: User Interfaces, and Video Programming and Menus, at 9 (Apr. 9, 2012) (“VPAAC Second Report: User Interfaces”) (noting that “it is impossible to predict how innovation and the advance of technology will open up new ways of using devices”).

¹³ Notice, ¶ 37.

of this information audibly would take several minutes and may also not be particularly useful to the customer. Attempting to navigate via such a “word-for-word” audio replication would take even longer. MVPDs should be allowed to design systems that make text menus and guides audibly accessible in a manner that enhances functionality and the viewer experience, even if that means that only certain portions of the screen are relayed audibly at a given time, or even if relevant information *not* presented on-screen is relayed audibly. MVPDs, in other words, should be allowed to focus on solutions that *work* for the visually impaired, rather than accounting for every word on a television screen. The Commission should allow MVPDs to provide audible versions of on-screen text menus and guides in any manner that enables a visually impaired user to access and manage the functions used for the display or selection of multichannel video programming.

2. Devices Covered

Like most MVPDs, DIRECTV offers a number of set-top box models with varying capabilities. The *Notice* asks whether Section 205 requires MVPDs to provide accessible versions of *all the classes* of navigation devices they make available to subscribers, so that those seeking accessibility features can choose among various price points and features.¹⁴ DIRECTV submits that such a requirement would be both unwise and inconsistent with the statute.

The MVPD business is extremely competitive. Providers are constantly seeking new ways to offer content to their subscribers whenever and however they want it. As a result, MVPDs have imposed ever-shorter cycles for developing and deploying new technologies, features, and functions. The competition in innovation has greatly benefited consumers, as MVPDs now offer cloud-based services, time- and place-shifting capabilities, and whole-home

¹⁴ *Notice*, ¶ 53.

video networks. In some cases, meeting the accessibility requirements of Section 205 could be fairly straightforward for such new offerings. In other cases, however, the time required to bring such innovations to market could be significantly lengthened if every new model of navigation device must meet those requirements. In the meantime, all subscribers would be denied the benefits of the new features and functions. That would not serve the public interest.

Moreover, taking an approach that requires all navigation devices to comply with the requirements of Section 205 would exceed the Commission's statutory authority. Congress specifically provided that "[a]n entity shall only be responsible for compliance with the requirements added by [Section 205] with respect to navigation devices that it provides to a requesting blind or visually impaired individual."¹⁵ Clearly, Congress contemplated that there would be some navigation devices that are *not* supplied to requesting subscribers that would *not* have to comply with the accessibility requirements. Here again, the Commission must honor the flexibility that Congress incorporated into the statute.

The better approach would be to allow each MVPD the flexibility to determine which navigation device(s) it will offer with the accessibility features required under Section 205. Depending upon the cost and complexity of implementation, some may incorporate such features into every model of navigation device. Others may choose to make available devices at various price points or with various major feature groups. In any case, MVPDs must be given the flexibility to determine how best to make their services available to visually impaired consumers.

¹⁵ CVAA Section 205(b)(3).

3. Compliance Using Software, Peripheral Devices, Specialized Equipment, or Other Solutions

Congress directs the Commission to permit (but not require) the entity providing the navigation device to a requesting blind or visually impaired individual to comply with the audible menu requirement through the “use of software, a peripheral device, specialized consumer premises equipment, a network-based service, or other solution,” and to “provide the maximum flexibility to select the manner of compliance” in its implementing regulations.¹⁶ Here again, the flexibility set forth in the statute can greatly benefit the visually impaired.

For example, it may be that navigation devices with access to a broadband connection are best served by a cloud-based service that translates text into speech. However, those devices that do not have broadband access would not be able to take advantage of such a solution, and so may require a peripheral device instead. Or it may be that set-top boxes with different capabilities require different types of software or specialized consumer premises equipment. MVPDs should be allowed to develop any number of solutions to optimize the viewer’s experience while complying with the CVAA’s requirements.

Naturally, the flexibility provided by Congress in this regard is not without limits. Section 205 thus provides that, if an entity chooses to comply using one of these solutions, it must provide that solution at no additional charge and within a reasonable time to a requesting blind or visually impaired individual.¹⁷ DIRECTV agrees with the Commission’s tentative conclusion that such a solution must be provided by the entity providing the navigation device, rather than requiring the customer to seek out such a solution from a third party.¹⁸ The

¹⁶ CVAA Section 205(b)(4)(A).

¹⁷ *Id.* at Section 205(b)(4)(B).

¹⁸ *See Notice*, ¶ 40.

Commission should, however, make clear that MVPDs may require reasonable documentation of disability from a requesting subscriber to substantiate that she is blind or visually impaired as a condition to providing such a solution. This approach would mirror that found appropriate for those subscribers to whom DIRECTV must provide, upon request and at no additional cost, a set-top box model capable of providing aural emergency information.¹⁹

B. Flexibility for Mechanisms Reasonably Comparable to a Button, Key, or Icon

Just as with the various audible guide requirements, Congress directed the Commission to permit “maximum flexibility”²⁰ with respect to Section 205’s second requirement for providing access to closed captioning capability in a manner reasonably comparable to a button, key, or icon. From DIRECTV’s perspective, a “single-step” requirement such as that discussed in the *Notice* would be inconsistent with such flexibility.²¹

As the VPAAC recognized, an MVPD could comply with this requirement in any number of ways. For example, closed captioning “might be accessed directly through a dedicated control or a control that can be configured; included in a suite of accessibility options that can be

¹⁹ See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 28 FCC Rcd. 4871, ¶ 44 and n.191 (2013) (establishing reasonable documentation requirement, and opining that “documentation from any professional or service provider (e.g., a social worker) with direct knowledge of the individual’s disability would be reasonable documentation from any professional or service provider (e.g., a social worker) with direct knowledge of the individual’s disability would be reasonable”). See also *Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals*, 26 FCC Rcd 5640, ¶¶ 31-32 (2011) (“requiring individuals seeking equipment under the NDBEDP to provide verification from any practicing professional that has direct knowledge of the individual’s disability,” who “must be able to attest to the individual’s disability”).

²⁰ CVAA Section 205(b)(5) (directing the Commission to “permit the entity providing the navigation device maximum flexibility in the selection of means for compliance”).

²¹ See *Notice*, ¶ 43.

configured and then accessed as a group; triggered automatically through recognition of a registered user known to the device; or many other possible mechanisms.”²² Thus, a user could access this functionality by simultaneously pressing two specified keys on the remote control. Alternatively, the user could shake a hand-held device or swipe her fingers across a touchscreen device, interact with a device that responds to voice commands, or even interact with a device that detects motion patterns.

Not all of these possibilities (not to mention alternatives yet to be imagined) would be “activated in a single step.”²³ Enshrining a “single step” design limitation at this early stage, as the Commission now proposes, could thus inhibit more intuitive and functional solutions for viewers who want closed captioning. A better approach would be something along the lines proposed by NCTA and endorsed by CEA.

When dedicated physical buttons are used to control volume and/or channel selection, the controls for access to closed captions . . . must also be reasonably comparable to physical buttons, comparable in accessibility to those provided for control of volume or channel selection.²⁴

In any event, the Commission should not require MVPDs to obtain prior approval of their chosen mechanism from the Commission before building it into a navigation device,²⁵ but should instead make available a process for securing such a determination for those MVPDs that want it. Such a regime would allow those who propose to implement a particularly novel or unconventional strategy for compliance to gain the regulatory imprimatur necessary to proceed,

²² *VPAAC Second Report: User Interfaces* at 16.

²³ *Notice*, ¶ 43.

²⁴ *VPAAC Second Report: User Interfaces* at 20.

²⁵ *See Notice*, ¶ 44.

but allow those with a more mainstream approach not to burden themselves or the Commission with a pre-approval proceeding.

C. Phase-In Schedule

The Commission should also show flexibility by adopting the phase-in schedule proposed by the VPAAC. Section 205 provides that the Commission shall provide affected entities with not less than three years to begin placing in service devices with audibly accessible text menus and guides, and not less than two years to begin placing in service devices with a mechanism for accessing closed captioning reasonably comparable to a button, key, or icon. The VPAAC recommended that these minimum phase-in periods be adopted, but that they run from the date of publication in the Federal Register rather than from the date of adoption.²⁶ DIRECTV supports the Commission's tentative conclusion to adopt the VPAAC recommendation.²⁷

II. THE COMMISSION MUST RESPECT CONGRESS'S CHOICE TO IMPOSE DIFFERENT ACCESSIBILITY REQUIREMENTS ON NAVIGATION DEVICES THAN ON DIGITAL APPARATUS

Yet another set of statutory interpretation questions relate to the content of the CVAA's accessibility obligations themselves. In other words, setting aside issues of flexible implementation, what exactly must "digital apparatus" and "navigation devices" do?

Here, DIRECTV believes that the legal issues are quite straightforward. Congress specifically made the two categories of "digital apparatus" and "navigation devices" mutually exclusive.²⁸ The Commission therefore *must* respect any statutory differences between the two provisions. Below, we first discuss the Commission's legal authority in this area generally. We

²⁶ VPAAC *Second Report: User Interfaces* at 15.

²⁷ Notice, ¶ 57.

²⁸ See 47 U.S.C. § 303(aa)(4) ("in applying this subsection the term 'apparatus' does not include a navigation device").

then discuss two specific areas in which the obligations imposed by Congress upon digital apparatus and navigation devices differ in significant ways: (1) the functions that must be made accessible; and (2) the functions subject to the “button or icon” requirement.

A. The Commission Must Recognize the Limitations on Its Authority to Impose Requirements on Navigation Devices

The Commission, like all agencies, is a creature of Congress. Thus, “an agency literally has no power to act . . . unless and until Congress confers power upon it.”²⁹ As the D.C. Circuit has made clear, “[a]n agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress.”³⁰ As such, any regulations adopted by the Commission must reflect the specific choices made by Congress, as revealed by the statutory text.

The Commission’s past experience with video description on traditional television is particularly relevant in this regard. As part of the Telecommunications Act of 1996, Congress dealt with both closed captioning and video description. However, it treated the two technologies quite differently. Specifically, Section 713 of the 1996 Act required the Commission to adopt closed captioning regulations and establish compliance deadlines, and established exemptions from those rules.³¹ By contrast, it merely defined video description and required the Commission to prepare a report to Congress.³² Nonetheless, the Commission

²⁹ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

³⁰ *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (“MPAA”). *See also id.* at 806 (“The FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue.”).

³¹ *See* 47 U.S.C. § 613(b)-(e).

³² *See id.* at § 613(f)-(g).

adopted rules mandating that certain video programmers supplement certain television programming with video description.³³

Upon review, the D.C. Circuit reversed and vacated the Commission's video description requirements. The *MPAA* court started by analyzing the structure of the statute, noting that “[s]tatutory provisions *in pari materia* normally are construed together to discern their meaning.”³⁴ It contrasted the affirmative mandate to adopt closed captioning rules with the direction merely to undertake studies on video description and concluded that, when the relevant provisions of Section 713—“all addressed to video programming accessibility—are construed together, a strong argument can be made that Congress meant *not* to authorize the Commission to mandate video description.”³⁵ Given this straightforward statutory construction, even the Commission did not claim to have authority to regulate video description under the 1996 Act's provisions.³⁶

Thus, the Commission cannot ignore the differing choices Congress made in crafting Sections 204 and 205, two provisions of a single statute that deal with similar objectives for mutually exclusive categories of equipment. In several instances, an explicit grant of authority with respect to one class of device is altered or omitted altogether with respect to the other class of device. Had Congress wished to have both classes regulated in the same way, it could have

³³ See *Implementation of Video Description of Video Programming*, 15 FCC Rcd. 15230 (2000), *recon.*, 16 FCC Rcd. 1251 (2001).

³⁴ *MPAA*, 309 F.3d at 801-02 (citing cases).

³⁵ *Id.* at 802 (emphasis added).

³⁶ *Id.* at 800. The Commission instead invoked 47 U.S.C. § 151, which gives it the authority to regulate “interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.” The *MPAA* court rejected that argument as well. See *id.* at 802-04.

covered them both in a single section, or used identical language in companion sections where appropriate. The juxtaposition of differing terms within two adjacent sections of the same statute is a clear sign that Congress in fact intended to authorize different outcomes. This is consistent with the *expressio unius* canon of statutory construction, which holds that “to express or include one thing implies the exclusion of the other, or of the alternative.”³⁷ While application of this canon is not robotic, the D.C. Circuit has found “its use is appropriate when ‘one can be confident that a normal draftsman when he expressed “the one thing” would have likely considered the alternatives that are arguably precluded.’”³⁸ In this case, there can be no doubt that Congress, in enacting a statute devoted to accessibility with separate and differing provisions specifically applicable to the mutually exclusive categories of digital apparatus and navigation devices, demonstrated its intent by including authority over some matters with respect to the former while omitting it from the latter.

B. The Commission Cannot Expand the List of Accessibility Functionalities for Navigation Devices Beyond Those Used for “Display or Selection” of Multichannel Video Programming

Section 205 mandates accessibility of certain on-screen text menus and guides presented by navigation devices. Section 204 has a corresponding provision on this topic for digital apparatus. The two provisions are set out in pertinent part below.

³⁷ *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 n.5 (D.C. Cir. 2013).

³⁸ *Id.* at 999 (quoting *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)).

Section 204	Section 205
<p>“digital apparatus designed to receive or play back video programming . . . [must] be designed, developed, and fabricated so that <i>control of appropriate built-in apparatus functions</i> are accessible to and usable by individuals who are blind or visually impaired”</p> <p>“if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the [appropriate] functions of the apparatus . . ., <i>such functions shall be accompanied by audio output</i> that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired”³⁹</p>	<p>“<i>the on-screen text menus and guides</i> provided by navigation devices . . . <i>for the display or selection of multichannel video programming</i> are audibly accessible in real-time upon request by individuals who are blind or visually impaired”⁴⁰</p>

The first thing to note is that the requirement in Section 205 applies only to text menus and guides provided *for the display or selection of multichannel video programming*. This is much more specific and limited than the corresponding directive in Section 204, which extends to the control of all built-in apparatus functions that the Commission deems “appropriate.”

The Commission has nonetheless tentatively concluded that “*all of the user functions that are offered via on-screen text menus and guides should be accessible for navigation devices,*”⁴¹ just as it tentatively concluded that “the ‘appropriate’ functions that must be made accessible under Section 204 include *all* user functions of the device.”⁴² Although recognizing the difference in the language used by Congress in Sections 204 and 205, the Commission based its conclusion on the belief that “all of a navigation device’s user functions are activated via text

³⁹ 47 U.S.C. § 303(aa)(1) and (2) (emphasis added).

⁴⁰ *Id.* at § 303(bb)(1) (emphasis added).

⁴¹ *Notice*, ¶ 35 (emphasis added).

⁴² *Id.* at ¶ 30 (emphasis added).

menus and guides for the display or selection of multichannel video programming.”⁴³ In other words, the Commission contends that, because a navigation device is specifically designed for the display or selection of multichannel video programming, it has no functions unrelated to the display or selection of multichannel video programming.

Such a tautological argument does not accurately reflect the state of modern technology. Today, set-top boxes provided by MVPDs to their subscribers are no longer simple one-trick ponies designed solely to receive programming from the MVPD and enable a viewer to select and watch such programming in real time. For example, DIRECTV’s broadband-enabled equipment has a variety of capabilities that go well beyond traditional multichannel video programming. Subscribers can access Internet radio through Pandora or the wide variety of video content available from YouTube. They can also access their Facebook and Twitter accounts directly from the television, to share their own viewing experience or discover the experience of others. DIRECTV also offers a number of free “TV Apps” that enable viewers, among other things, to check the local weather, monitor sports scores, update fantasy football results, and view favorite pictures.⁴⁴ In the future, such equipment may have additional functions, including voice over Internet protocol, electronic messaging, and video conferencing;⁴⁵ the ability to access or play the latest video games; or monitoring and management of home security, home automation, home energy use, etc.

⁴³ *Id.*

⁴⁴ For a discussion of the capabilities of broadband-connected DIRECTV set-top boxes, *see* http://www.directv.com/technology/connected_home?lpos=Header:3.

⁴⁵ Section 104 of the CVAA establishes other accessibility requirements for such advanced communications services. *See* 47 U.S.C. § 617; *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd. 14557 (2011).

The Commission, of course, cannot ignore the statutory reference to “multichannel video programming.” Nor can it simply assume that all user functions offered via on-screen text menus and guides on a navigation device, or any newly-developed capabilities, must meet the accessibility requirements of Section 205,⁴⁶ especially given that these requirements will not go into effect for at least three years.⁴⁷ Rather, it must determine which functions or categories of functions on a navigation device properly relate to the display or selection of multichannel video programming.

The VPAAC identified a list of 11 functions as “essential to the video consumption experience” that it felt should be made accessible pursuant to Sections 204 and 205.⁴⁸ The *Notice* tentatively concludes that the identified functions are “representative, but not an exhaustive list of the categories of functions that a navigation device must make accessible.”⁴⁹ To the contrary, DIRECTV submits that the VPAAC list is overinclusive.

While the VPAAC list may identify “appropriate built-in apparatus functions” that should be made accessible on digital apparatus under Section 204, it includes functions that are not provided for the “display or selection” of programming targeted under Section 205. This is evident from the VPAAC Report itself, which provides a citation to Section 205 in support of only four items on the list.⁵⁰ This observation is confirmed by a review of the listed items. For

⁴⁶ *Notice*, ¶¶ 35-36.

⁴⁷ See CVAA Section 205(b)(6)(A)(ii).

⁴⁸ See *VPAAC Second Report: User Interfaces* at 8 (listing the following functions: (1) power on/off; (2) volume adjust and mute; (3) channel and program selection; (4) channel and program information; (5) configuration – setup; (6) configuration – closed captioning control; (7) configuration – closed captioning options; (8) configuration – video description control; (9) display configuration info; (10) playback functions; and (11) input selection).

⁴⁹ *Notice*, ¶ 36.

⁵⁰ See *VPAAC Second Report: User Interfaces* at 10-15.

example, while the “power on/off” function is a precursor to all other functions of a navigation device, it does not relate directly to the display or selection of programming. Similarly, the “volume adjust and mute” function relates to the audio aspect of programming, not the visual “display” or the selection.⁵¹ In addition, it is odd that a list of functions to be made accessible to those who are blind or visually impaired would include two items related to closed captioning – an accessibility feature that requires vision. The items on the list most directly relevant to the display or selection of programming are (1) channel and program selection, (2) channel and program information, (3) playback functions, and (4) input selection. DIRECTV endorses those items as the list of functions for which on-screen text menus and guides must be made audibly accessible under Section 205. Any additions to that list should be fully justified with respect to the “display and selection” criterion.

There is, moreover, one important caveat to the use of any list of functions the Commission might adopt: the requirement should only apply to the extent the navigation device offers the function and does so *through an on-screen text menu or guide*. In other words, the list should not become a set of required capabilities that all navigation devices must provide, even if not otherwise required by regulation or desired by consumers. Nor should the list require an MVPD to create an on-screen text menu or guide it would not otherwise include, solely for the purpose of making it audibly accessible. Section 205 clearly does not provide authority for the Commission to dictate equipment design in such a manner.

Finally, to the extent the Commission’s requests comment on whether it should apply the guidance contained in Section 6.3(a) of its rules to determine the accessibility of “other functions

⁵¹ As the VPAAC notes, “the change of volume level is generally considered a sufficient non-visual feedback mechanism for Volume Adjust and Mute functions.” *VPAAC Second Report: User Interfaces* at 10.

of an apparatus,”⁵² such guidance would not be applicable to navigation devices (as opposed to digital apparatus). Section 205 solely authorizes a requirement for audible accessibility of on-screen menus for blind and visually impaired viewers, and does not extend to providing such information for those with little or no color perception or with low vision and little or no hearing.

C. The Commission Cannot Require Use of a Mechanism Reasonably Comparable to a Button, Key, or Icon on Navigation Devices For Functions Other than Closed Captioning

Section 205 directs the Commission to allow the visually impaired to more easily access navigation devices with built-in closed captioning capability. Here again, Section 204 has a parallel but differently worded provision on this topic. The two provisions are set forth in pertinent part below for ease of comparison.

Section 204	Section 205
<p>“for [digital] apparatus equipped with functions described in paragraphs (1) and (2) [relating to receipt or playback of video programming] built in access to those closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features”⁵³</p>	<p>“for navigation devices with built-in closed captioning capability, that access <i>to that capability</i> through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features”⁵⁴</p>

While Section 204 targets both closed captioning and video description, Section 205 mentions only closed captioning. It specifically provides that “access to *that capability*” must be provided through a mechanism reasonably comparable to a button, key, or icon. As if to reinforce this point, Section 205 has another provision entitled “User Controls for Closed

⁵² Notice, ¶ 37.

⁵³ 47 U.S.C. § 303(aa)(4).

⁵⁴ *Id.* at § 303(bb)(2) (emphasis added).

Captioning.”⁵⁵ The legislative history of this section also refers only to a capability for closed captioning, while the discussion of Section 204 includes both closed captioning and video description.⁵⁶ Accordingly, the only tenable construction of the statute is that the obligation to develop a mechanism reasonably comparable to a button, key, or icon in Section 205 applies only with respect to closed captioning.

The passing reference to accessibility features at the end of this paragraph does not negate the clear intent expressed by Congress. It is merely descriptive of the mechanism to which the mandated mechanism must be reasonably comparable.⁵⁷ It does not expand the capabilities that the mandated mechanism must itself access. The mechanism must only provide “access to that capability” – *i.e.*, the “built-in closed captioning capability” mentioned three words earlier in the statute – in order to comply.

D. The FCC Cannot Apply Section 205 to MVPD-Provided Applications on Third-Party Devices

The *Notice* asks whether the requirements of Section 205 apply to applications and other software developed by MVPDs to enable their subscribers to access their services on third-party devices such as tablets, laptops, smartphones, and computers.⁵⁸ DIRECTV believes that this would be an impermissible extension of the statute. Section 76.1200 of the Commission’s rules (which is incorporated by reference into Section 205) defines “navigation devices” as “[d]evices such as converter boxes, interactive communications equipment, and other equipment used by

⁵⁵ CVAA Section 205(b)(5).

⁵⁶ See H.R. Rep. No. 563, 111th Cong., 2d Sess., at 31 (Jul. 26, 2010); S. Rep. No. 386, 111th Cong., 2d Sess., at 14-15 (Dec. 22, 2010).

⁵⁷ See *Notice*, ¶ 47.

⁵⁸ *Notice*, ¶ 24.

consumers to access multichannel video programming.”⁵⁹ The Commission has interpreted this term to encompass a broad array of “equipment used to access multichannel video programming or services offered over such systems.”⁶⁰ Accordingly, this concept – as defined in the Commission’s rules, interpreted by the Commission, and subsequently incorporated into Section 205 – relates to equipment, not free-standing software.

Moreover, the CVAA makes clear that the term “‘apparatus’ does not include a navigation device.”⁶¹ Accordingly, it would be improper for the Commission to base its implementing regulations on the view that a Section 204 digital apparatus (such as a tablet, laptop, or smartphone) could “include” a Section 205 navigation device in the form of an MVPD’s software application. Such a view would directly conflict with the regime of mutually exclusive regulatory obligations that Congress has established.

Congress’s choice in this regard is amply justified under the circumstances. An MVPD would face significantly greater challenges in providing Section 205’s accessibility features through applications running on a wide variety of operating systems and devices than it does with respect to a set-top box that is entirely under its own control, and could not properly be held liable for limitations in a third-party device. The level of coordination and cooperation required among the various MVPDs, manufacturers, and service providers involved in the provision of video services on third-party devices greatly increase the complexity of the task facing all parties seeking to comply with accessibility mandates. Congress chose to impose such mandates only

⁵⁹ 47 C.F.R. § 76.1200(c).

⁶⁰ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 13 FCC Rcd. 14775, ¶ 25 (1998)

⁶¹ 47 U.S.C. § 303(aa)(4). As the Commission has recognized, this makes “digital apparatus” and “navigation device” two mutually exclusive categories for purposes of Sections 204 and 205. *Notice*, ¶ 17 (“a device can be a Section 204 device or a Section 205 device, but not both”).

