

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Accessibility of User Interfaces, and Video
Programming Guides and Menus

MB Docket No. 12-108

COMMENTS OF MONTGOMERY COUNTY, MARYLAND

Harash (Sonny) Segal,
Chief Information Officer & Director
Dieter Klinger, Chief Operating Officer
Department of Technology Services
Montgomery County, Maryland
101 Monroe Street, 13th Floor
Rockville, MD 20850

Gail A. Karish
BEST BEST & KRIEGER LLP
2855 East Guasti Road, Suite 400
Ontario, CA 91761
Telephone: (909) 989-8584
Fax: (909) 944-1441

Mitsuko R. Herrera, Cable & Broadband
Communications Administrator
Marjorie Williams, Franchise Manager
Office of Cable and Broadband Services
Montgomery County
100 Maryland Avenue, Suite 250
Rockville, MD 20850

Counsel for Montgomery County

July 15, 2013

SUMMARY

Montgomery County applauds the Commission's efforts to fulfill its mandate under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") to make user interfaces and menus on digital video programming apparatuses, and video programming guides and menus provided on navigation devices accessible to people who are blind or visually impaired and to simplify the means of activating accessibility features such as closed captioning. The County has a strong interest in the outcome of this proceeding, as a public entity concerned about the needs of its residents who will be directly impacted by the Commission's rules, as a franchising authority responsible for protecting the interests of more than 260,000 video programming subscribers, and as a supplier of local community programming on numerous public access, educational, and governmental ("PEG") channels that are carried by the three wireline multichannel video programming distributors ("MVPDs") serving County residents.

The County's comments in this proceeding are guided by one fundamental principle – that the accessibility requirements must be implemented fully and meaningfully. From the County's perspective full and meaningful implementation of the accessibility requirements means, the Commission should:

- Adopt interpretations of the scope of Sections 204 and 205 that ensure that each MVPD is required to comply with the accessibility requirements for all navigation devices and applications (software) it offers as part of its service, and that each MVPD provides any channel and program information needed by third party applications such as tv-anywhere (cable programming delivered via Internet-enabled devices to cable subscribers) or retail CableCARD navigation devices.

- Ensure all current and future user functions are made accessible which will require that each user function is defined to include sufficient information to make the accessibility meaningful. In particular, that means that the “Channel / Program Selection” and “Display Channel / Program Information” functions of video programming guides and menus must be required to carry a minimum level of information (the channel name, the program name, and clear identification of the accessibility options for the program), whenever that program information is made available to the service provider.

- Adopt its “one step” proposal for activating accessibility features such as closed captioning and video description.

- Apply the achievability standard previously developed by the Commission in the *ACS Order* to any “achievability” claims made under Section 204 or 205.

- Require MVPDs to make all types of devices with accessibility options available to subscribers, notify subscribers at the point of sale and at least annually of the availability of devices with accessibility functions, permit subscribers to request an accessible device in any way they can now request a change in equipment, and to provide the device within a precise time period (*e.g.*, within seven or fourteen days of a request).

The County believes that the Commission has ample direct statutory authority, and to the extent necessary, can exercise ancillary authority to achieve these important accessibility objectives.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE COMMISSION SHOULD INTERPRET THE SCOPE OF SECTION 204 AND 205 TO ENSURE THAT MVPDS HAVE ACCESSIBILITY OBLIGATIONS WITH RESPECT TO ALL MVPD VIDEO SERVICES IRRESPECTIVE OF HOW THEY ARE ACCESSED	5
III. THE COMMISSION MUST INTERPRET THE REQUIREMENTS OF THE CVAA TO ENSURE THAT ALL CURRENT AND FUTURE FUNCTIONS ARE MADE ACCESSIBLE IN A MEANINGFUL WAY	7
A. The Accessibility Rules Should Apply to All Current and Future Functions.....	8
B. The Commission Must Define the “Channel / Program Selection” and “Display Channel / Program Information” Functions to Make Them Meaningfully Accessible	9
1. The Commission Should Adopt Definitions of the “Channel / Program Selection” and “Display Channel / Program Information” Functions That Include Baseline Information About the Channel, the Program and Accessibility Options.....	9
2. The Commission Has Ample Legal Authority to Impose These Requirements	13
a. The Commission has direct authority under the CVAA to implement this requirement	14
b. To the Extent it may be Necessary, the Commission also has sufficient ancillary authority to implement these requirements.....	16
C. The Commission Should Adopt Its One Step Proposal For Activating Accessibility Features	18
IV. THE COMMISSION SHOULD BE INFORMED BY ITS ANALYSIS IN THE ACS ORDER WHEN EVALUATING ACHIEVABILITY CLAIMS CONCERNING COMPLIANCE WITH SECTION 204 AND 205	19
V. THE COMMISSION SHOULD IMPOSE CLEAR RULES TO ENSURE PERSONS IN NEED OF ACCESSIBLY DEVICES ARE MADE AWARE OF THEIR OPTIONS AND RECEIVE THE DEVICES IN A TIMELY MANNER	20
VI. CONCLUSION.....	21

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Accessibility of User Interfaces, and Video
Programming Guides and Menus

MB Docket No. 12-108

COMMENTS OF MONTGOMERY COUNTY, MARYLAND

Montgomery County, Maryland (the “County”) submits these comments in the above captioned rulemaking proceeding (“NPRM”) to express its support for the important accessibility goals of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), and to urge the Commission to adopt rules that fully and meaningfully implement the requirements of Sections 204 and 205 of the CVAA to ensure accessibility of user interfaces and video programming guides and menus.

I. INTRODUCTION

Montgomery County has a strong interest in the outcome of this proceeding. The County is concerned as a government entity that has the responsibility to address the general public health and human services needs of the County’s most vulnerable children, adults and seniors – *i.e.*, persons who will be directly impacted by the Commission’s rules. In addition, the County has an interest in the outcome as a cable franchising authority¹ and as a supplier of local

¹ Montgomery County acts as the franchise administrator for over a quarter of million cable subscribers served by three wireline cable service providers within Montgomery County – Comcast, RCN and Verizon. In addition to serving as the Local Franchising Authority for the County, pursuant to contracts between the County and 18 municipalities, the County has also been designated by these municipalities to administer and manage each of their cable franchises on their behalf. These municipalities are Chevy Chase Village, Chevy Chase Village Section 3, Chevy Chase Village Section 5, City of Rockville, City of Takoma Park, Town of Barnesville, Town of Brookeville, Town of Chevy Chase, Town of Chevy Chase View, Town of Garrett

community programming on public access, educational, and governmental (“PEG”) channels that are carried by the three wireline MVPDs serving County residents.² The County annually appropriates \$130,000 to close caption programming for three PEG channels and appropriates over \$11 million annually to support operations and equipment to create local programming aired on a total of eleven PEG channels.³

The NPRM to implement Sections 204 and 205 of the CVAA directs the Commission to make user interfaces and menus on digital video programming apparatuses, as well as video programming guides and menus provided on navigation devices, accessible to people who are blind or visually impaired and to simplify the means of activating accessibility features such as closed captioning.

The County’s comments in this proceeding are guided by one fundamental principle – that the accessibility requirements must be implemented fully and meaningfully. The County’s

Park, Town of Glen Echo, Town of Kensington, Town of Laytonsville, Town of Poolesville, Town of Somerset, Village of Martin's Addition, Village of North Chevy Chase, Washington Grove (“Participating Municipalities”).

² The County and Participating Municipalities have eleven local public access, educational and governmental (“PEG”) channels. These are *community access channels* Access19 and the Montgomery Channel; *educational access channels* Montgomery County Public Schools (MCPS), Instructional Television (ITV) and Montgomery College Television (MC-ITV), University of Maryland University College (UMUC-TV), and the University of Maryland (UMTV); and *government access channels* County Cable Montgomery (CCM), Montgomery Municipal Channel (MMC), Rockville 11, and Takoma Park City TV.

³ These local community media channels provided over 10,000 hours of first run programming in 2012. This included more than 2,500 hours of locally produced programming, more than 600 hours of closed captioned programming, and more than 5,000 hours of foreign language programming in Spanish, Arabic, Cambodian, Chinese, Farsi, French, Italian, Korean, Portuguese, Punjabi, Turkish, and/or Vietnamese. In 2012, County residents volunteered over 13,600 hours to create local community media programming.

Commission on People with Disabilities⁴ has expressed to the County regarding the importance of:

- Broad requirements to provide real accessibility from the moment the devices are turned on until they are turned off.
- Ensuring that all equipment and services have the accessibility features available to all users.
- Having an easily located tactile button to turn accessibility features on and off.

Thus, from the County's perspective, full and meaningful implementation of the accessibility requirements means the Commission should:

- Adopt interpretations of the scope of Sections 204 and 205 that ensure that each MVPD is required to comply with the accessibility requirements for all navigation devices and applications (software) it offers as part of its service, and that each MVPD provides any channel and program information needed by third party applications such as tv-anywhere (cable programming delivered via Internet-enabled devices to cable subscribers) or retail CableCARD navigation devices.
- Ensure all current and future user functions are made accessible which will require that each user function is defined to include sufficient

⁴ The Commission on People with Disabilities advises Montgomery County government officials (both the County Council and the County Executive) on the needs and concerns of the County's residents who have psychiatric, developmental, physical or sensory disabilities and on the coordination and development of policies for people with disabilities. For more information on the activities of this Commission on People with Disabilities, see its website available here: <http://www.montgomerycountymd.gov/HHS-Program/ADS/CPWD/CPWDIndex.html> (last accessed July 15, 2013).

information to make the accessibility meaningful. In particular, that means that the “Channel / Program Selection” and “Display Channel / Program Information” functions of video programming guides and menus must be required to carry a minimum level of information (the channel name, the program name, and clear identification of the accessibility options for the program), whenever that program information is made available to the service provider.

- Adopt its “one step” proposal for activating accessibility features such as closed captioning and video description.
- Apply the achievability standard previously developed by the Commission in the *ACS Order* to any “achievability” claims made under Section 204 or 205.
- Require MVPDs to make all types of devices with accessibility options available to subscribers, to notify subscribers at the point of sale and at least annually of the availability of devices with accessibility functions, to permit subscribers to request an accessible device in any way they can now request a change in equipment, and to provide the device within a precise time period (*e.g.*, within seven or fourteen days of a request).

The County believes that the Commission has ample direct statutory authority, and to the extent necessary, can exercise ancillary authority, to achieve these important accessibility objectives.

II. THE COMMISSION SHOULD INTERPRET THE SCOPE OF SECTION 204 AND 205 TO ENSURE THAT MVPDS HAVE ACCESSIBILITY OBLIGATIONS WITH RESPECT TO ALL MVPD VIDEO SERVICES IRRESPECTIVE OF HOW THEY ARE ACCESSED

The Commission has asked for comment on several issues related to possible alternative interpretations of the scope of Sections 204 and 205.⁵ Consistent with the objective of the CVAA to ensure consumers with disabilities have better access to the video services offered by MVPDs,⁶ the County believes the touchstone for the Commission in considering alternative interpretations of the statutory language should be what reasonable interpretation would best ensure that the accessibility obligations necessary to achieve the statute's accessibility goals are imposed on MVPDs.

Today, MVPD-supplied navigation devices connected to television sets are the primary way that viewers access MVPD video programming. Regardless of which alternative interpretation of Sections 204 and 205 is adopted, the NPRM is clear that MVPD-supplied navigation devices should be covered by the accessibility requirements.⁷

However, the NPRM recognizes that the traditional mode of watching video programming is rapidly changing. MVPDs are increasingly offering alternative means of viewing video programming on devices other than television sets.⁸ The rules must ensure that

⁵See NPRM ¶¶ 6-29.

⁶Senate Committee on Commerce, Science, and Transportation, *Twenty-First Century Communications and Video Accessibility Act of 2010*, Report 111-386 (11th Congress, 2d Session) at 1 (“The purpose of S. 3304 is to update the communications laws to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access video programming.”)

⁷See NPRM ¶ 19 and 21 (discussing whether Section 205 should apply to navigation devices beyond those provided by MVPDs).

⁸*In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Report (rel. July 20, 2012) at ¶ 21 (“Although MVPDs have traditionally delivered video programming to television sets, some

persons with accessibility needs can enjoy these advanced video services. Thus, in response to the Commission's query at paragraph 24 of the NPRM, the County submits that the accessibility rules should also apply to all MVPD-supplied video applications that can be downloaded to third party devices (such as tablets, personal computers or smartphones) irrespective of whether those MVPD-supplied applications fully or partially replicate a subscriber's video service, or whether they work inside or outside the home, or whether the video programming is being delivered by the MVPD to the MVPD application over the MVPD's network or over a different Internet Service Provider's network. And, in response to the Commission's query at paragraph 33 of the NPRM, the County submits that, consistent with the goals of the CVAA and with the Commission's obligation under Section 629 of the Communications Act, 42 U.S.C. § 549 to promote a competitive, retail market in navigation devices, MVPDs should be made responsible, to the extent necessary (assuming the information is not available from another source), for making channel and program information available to third party applications such as those on retail CableCARD devices. This approach best fulfills the mandate of the CVAA generally, and is also consistent with the Commission's approach for advanced communications services providers under the CVAA.⁹

MVPDs are moving beyond the television and delivering video programming to computer screens, tablets, and smartphones. The expansion of MVPD's delivered video programming from television to other stationary and mobile devices – generally known as TV Everywhere – represents a new opportunity for MVPDs that may affect their business models and competitive strategies.” (citations omitted))

⁹See *In the Matter of 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; Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213, WT Docket No. 96-198, CG Docket No. 10-145, Report and Order and Further Notice of Proposed Rulemaking (rel. Oct. 7, 2011), ¶ 14 (“We also conclude that providers of advanced communications services include all entities that offer advanced

Finally, the same principle should apply to alternative means of compliance. At paragraph 40 of the NPRM, the Commission seeks comment on the proper interpretation of the statutory provision that allows providers the option to deploy a separate solution (rather than an integrated one). The Commission asks whether that language should be interpreted to mean that a separate solution would have to have the same functionality as a built-in solution, and that it must be provided by the entity providing the device, rather than requiring the customer to seek out a solution from a third party. The County agrees with this approach as it is consistent with the principle discussed above, that all means of accessing the video services should be treated the same in terms of accessibility.

III. THE COMMISSION MUST INTERPRET THE REQUIREMENTS OF THE CVAA TO ENSURE THAT ALL CURRENT AND FUTURE FUNCTIONS ARE MADE ACCESSIBLE IN A MEANINGFUL WAY

Congress long ago recognized that industry could not be relied upon to voluntarily add closed captioning to all of its programming and in the *Telecommunications Act of 1996* mandated that the Commission implement rules imposing such requirements on a broad array of programming. As a result, the Commission adopted rules that require certain video programming to be closed captioned.

Congress enacted the CVAA recognizing that accessibility regulations needed to be updated to address new technologies and to allow persons with disabilities to better access video

communications services in or affecting interstate commerce, including resellers and aggregators. Such providers include entities that provide advanced communications services over their own networks, as well as providers of applications or services accessed (i.e., downloaded and run) by users over other service providers' networks. Consistent with our approach for manufacturers of equipment, we find that a provider of advanced communications services is responsible for the accessibility of the underlying components of its service, including software applications, to the extent that doing so is achievable. A provider will not be responsible for the accessibility of components that it does not provide, except when the provider relies on a third-party solution to comply with its accessibility obligations.”), and ¶¶ 85-88.

programming. To ensure the goals of the CVAA are fully achieved, the Commission must enact appropriately framed rules; it cannot leave to the voluntary efforts of the MVPDs the interpretation of what are the appropriate standards.

A. THE ACCESSIBILITY RULES SHOULD APPLY TO ALL CURRENT AND FUTURE FUNCTIONS

The County agrees with the Commission’s tentative conclusions in paragraph 36 of the NPRM that the eleven “essential” functions identified by the Video Programming Accessibility Advisory Committee (“VPAAC”) should be considered representative and not exhaustive, and that V-chip and parental controls should be added.¹⁰ To do otherwise would unduly narrow the application of the CVAA to a subset of user functions deemed “essential” by an advisory committee asked to recommend “standards, protocols, and procedures” used to enable functions to be accessible but not tasked with determining which functions should be accessible.¹¹ This

¹⁰NPRM, ¶¶ 31 and 32.

¹¹ Among other things, pursuant to CVAA Subsections 201(e)(2)(F) and (H), the VPAAC was required to make the following recommendations:

(F) With respect to user interfaces, a recommendation for the standards, protocols, and procedures used to enable the functions of apparatus designed to receive or display video programming transmitted simultaneously with sound (including apparatus designed to receive or display video programming transmitted by means of services using Internet protocol) to be accessible to and usable by individuals with disabilities.

(H) With respect to video programming guides and menus, a recommendation for the standards, protocols, and procedures used to enable video programming information and selection provided by means of a navigation device, guide, or menu to be accessible in real-time by individuals who are blind or visually impaired.

The recommendations appear in *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 Guides and Menus* (April 9, 2012) (“VPAAC Report”).

would be inconsistent with the legislative intent of the CVAA which does not limit the functions that should be made accessible.¹²

B. THE COMMISSION MUST DEFINE THE “CHANNEL / PROGRAM SELECTION” AND “DISPLAY CHANNEL / PROGRAM INFORMATION” FUNCTIONS TO MAKE THEM MEANINGFULLY ACCESSIBLE

As noted above, the VPAAC produced a report identifying certain user functions that should be made accessible. At paragraph 31 of the NPRM, the Commission invited commenters to define these terms more specifically if the descriptions do not provide adequate guidance. The County believes that, at least with respect to two of the user functions identified by the VPAAC – the “Channel / Program Selection” and “Display Channel / Program Information” functions – more detailed definitions are needed for clarity and to ensure access to these functions is meaningful.

1. The Commission Should Adopt Definitions of the “Channel / Program Selection” and “Display Channel / Program Information” Functions That Include Baseline Information About the Channel, the Program and Accessibility Options

MVPDs should be required to include channel and programming description information and information on accessibility options in programming guides *for all channels*, including local programs and channels, for the purpose of promoting accessibility.

The VPAAC identified “Channel / Program Selection” and “Display Channel / Program Information” among the essential functions covered by CVAA.¹³ The VPAAC also commented that devices with this function may provide high level channel or program descriptions and titles

¹² The only limitations in the statute are that the Commission may not specify technical requirements for meeting the accessibility requirements, 47 U.S.C. § 617(e), and entities responsible for compliance may be excused only if compliance is not achievable (as defined in the CVAA). That an accessibility requirement may require “reasonable effort or expense”, as determined by the Commission, does not mean compliance is not achievable. 47 U.S.C. § 617(g).

¹³ VPAAC Report at 10-11.

as well as more detailed channel or program information such as plot descriptions, actors, and accessibility options (*e.g.* presence of closed captioning or video description).¹⁴

Concerning the need for real-time program-specific information about the availability of accessibility options, the VPAAC identified a common problem faced by many users dependent on accessibility functions:

Often it is impossible to determine the accessibility of a program (whether it provides captioning or video description) until after watching a set of previews and/or advertisements. This can lead to frustration on the part of users dependent on such capabilities as they attempt to locate programming that meets their accessibility needs.¹⁵

The VPAAC also identified a solution to this problem:

A more accessible and usable solution for deaf or hard of hearing and blind or vision impaired users would provide clear identification of the accessibility options that are available for a program prior to viewing, such as labeling the program as having captions and/or video description within the mechanism used to display channel / program information.¹⁶

Among its recommendations, the VPAAC proposed that a universal symbol be used to identify the control mechanism for closed captioning.¹⁷

Consumer Groups commenting on the Report supported the VPAAC's position that a solution was needed to ensure that users are made aware of their accessibility options for a program *prior* to viewing the program. To that end, the Consumer Groups stated:

The Consumer Groups encourage the Commission to propose requiring that there be a mechanism for users who are deaf or hard of hearing to visually identify whether a program is accessible or not before starting the program. In order for this mechanism to be

¹⁴ VPAAC Report at 11.

¹⁵ VPAAC Report at 18.

¹⁶ *Id.*

¹⁷ VPAAC Report at 19.

clear and effective, we encourage the Commission to require video programming distributors to identify their closed captioned programs using a universal symbol for closed captioning.¹⁸

The most logical place for such a symbol to appear would be where the VPAAC identified labeling should appear in its Report, that is “labeling the program as having captions and/or video description within the mechanism used to display channel / program information.”¹⁹

Implicit in the above discussion about accessibility labeling is the idea that *there is something informative to the user being labeled.* That is, the labeling solution identified by VPAAC and endorsed by the Consumer Groups will only work successfully to alleviate users’ frustration over the inability to locate and select video programming that meets their accessibility needs prior to viewing if the accessibility label is attached to high level program descriptions or titles. Put another way, users need to know both what the program is and whether it is accessible to make meaningful video program choices. The accessibility goal can only be achieved if the Commission defines the user functions “Channel / Program Selection” and “Display Channel / Program Information” more explicitly, establishing a baseline of channel, program and accessibility information available on these functions.

Although many user interfaces, guides and menus include high level program descriptions or titles, they do not always do so on a consistent basis for all channels, and MVPDs are not required to provide this information on their guides. As a result, the variability in the

¹⁸ *In re Media Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Second VPAAC Report: User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of The National Association of the Deaf (NAD), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Association of Late-Deafened Adults, Inc. (ALDA), Hearing Loss Association of America (HLAA) and the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) (filed June 8, 2012) at 5 (citations omitted).

¹⁹ *See supra* note 12.

level of detail noted by the VPAAC exists, and in some instances the MVPD provides no program or channel information at all.

Montgomery County, its agencies and affiliates, and Participating Municipalities program eleven public access, educational and governmental (PEG) channels that appear on wireline MVPD systems in the County. The County submits the channel name and individual program description information for the MVPDs by using the third-party vendor Rovi. Rovi uses an Internet-based platform to receive and distribute program information to video service providers.²⁰ The County regularly inputs the schedule information and description of the program. The Rovi system requires 24-hour advanced notice (meaning that program information can be changed for the following day but not for the current day) and can include information up to six weeks in advance. There is a 150 character limit for each program description. The Rovi guide however does not include an option to label as program as closed captioned using the “CC” logo.

Although the County makes this channel and program information available to all three wireline MVPDs through Rovi, one operator, Verizon, has refused to carry the names of the County’s PEG channels and information describing the programs carried on the PEG channels on its programming guides.²¹ Instead, the PEG programming is listed as a random multi-hour block of “local programming” or something equally generic. Adding an accessibility label to this generic description would not alleviate user frustrations. Users would still not know what

²⁰ Rovi claims more than 130 million viewers use their guide technology through service provider offerings. See About Rovi, available at <http://www.rovicorp.com/company/about/profile.htm> (last accessed July 15, 2013).

²¹ The Rovi website lists Verizon, Comcast, Cox, Time Warner Cable, Dish Networks and DirecTV among its current customers. See Rovi’s select list of customers available at: <http://www.rovicorp.com/company/about/customers.htm> (last accessed July 15, 2013). The County’s third wireline MVPD is also a Rovi customer.

program is accessible without viewing it. In instances where only some of the PEG channel programming in the random multi-hour block is accessible, a generic title with an accessibility label may actually misinform users. Thus, the County believes it is imperative that user interfaces and video programming guides and menus which display channel and program information include, *for all channels*, both high level channel and program descriptions and titles, as well as a symbol identifying the programs with accessibility options (closed captioning and video description).

Such requirements would address the need for video programming to indicate at the outset whether it comes with accessibility options such as closed captions or video description. As discussed above, this need has been identified by both the technical committee advising the Commission on implementation of the CVAA, and consumer groups representing the disability community. Such a requirement would also ensure that users are provided with the baseline minimum amount of program information required to make the actual selection of video programming with accessibility options possible. It would provide users with information upfront in a manner that is consistent with the objectives of the Commission's "one step" proposal for activating accessibility functions, discussed further *infra*.

2. The Commission Has Ample Legal Authority to Impose These Requirements

At paragraph 36 of the NPRM, the Commission specifically asks: "Does Section 205 provide us authority to require that MVPDs provide programming description information in programming guides for local programs and channels for the purpose of promoting accessibility?" The County submits that the CVAA provides the Commission with ample authority to require user interfaces and video programming guides or menus to identify both the

video programming through high level channel and program descriptions and titles, and whether the video programming has accessibility options.

a. The Commission has direct authority under the CVAA to implement this requirement.

As noted earlier, Sections 204 and 205 of the CVAA direct the Commission to make user interfaces and video programming guides and menus on devices used for the display or selection of video programming accessible to people with disabilities. In the County’s view, the County’s proposal that covered entities be required to provide a baseline minimum level of channel, program and accessibility information on program guides and menus fits squarely within the Commission’s authority. It would be consistent with the Commission’s mandate to implement the CVAA based on the expert advice and recommendations of its advisory committee (the VPAAC) and the community of users that depend on these video accessibility functions, and with the exercise of its authority as an expert agency to define ambiguous terms in the CVAA.²²

The CVAA does not define the key terms such as “user interface”, “video programming guides and menus”, and “video programming information”, nor does it define their “functions” that must be made accessible. As discussed earlier, the VPAAC did recommend a set of functions “considered essential to the video consumption experience,”²³ and these included both “Channel / Program Selection” and “Display Channel / Program Information”. In discussing these functions, the VPAAC noted that “on-screen guides and menus used to browse available A/V content can take many different forms”²⁴ and that the amount of program information

²² *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

²³ Report at 8.

²⁴ *Id.* at 10.

provided can vary widely in level of detail.²⁵ It would be well within the Commission’s authority to address these ambiguities in the terms employed by the statute by defining what these terms mean. For example, it would be reasonable to interpret the term “video programming information” to include information such as the title of a program and whether it is closed captioned, as well as to interpret a “video programming guide” intended to “enable video programming information and selection” to be one that contains a baseline level of information about the programming that can be selected through the use of the guide.

Further, requiring a baseline of information would be consistent with the existing definition of “accessible” in Section 6.3(a) of the Commission’s rules which requires that “[a]ll 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” be available in visual and in auditory form.²⁶ At paragraph 37, the Commission notes that onscreen text menus and guides must be “accompanied by audio output” and “audibly accessible in real-time”, and asks for comment on whether it should use its definition of “accessible” contained in Section 6.3(a) of its rules for guidance as to what “accessible” means. The County submits that using this definition is appropriate and supports the view that “Channel / Program Selection” and “Display Channel / Program Information” user functions require further detailed definitions. As demonstrated above, a baseline minimum level of channel, program and accessibility information *is necessary* for users with disabilities to operate and use the programming guides and menus.

²⁵ *Id.* at 11.

²⁶ *See* 47 C.F.R. § 6.3(a)(2).

b. To the Extent it may be Necessary, the Commission also has sufficient ancillary authority to implement these requirements

Even if the Commission were to take the view that the CVAA does not give it sufficient *direct* jurisdiction to impose these program description and labeling requirements as accessibility obligations, the County believes it is well within the Commission’s *ancillary* jurisdiction to impose them. Jurisdiction may be asserted by the Commission when it is “reasonably ancillary to the effective performance of [its] various responsibilities.”²⁷

This would not be the first time the Commission exercised its ancillary authority to effectively implement an accessibility statute. More than a dozen years ago, when the Commission adopted rules to implement Section 255 of the *Communications Act*, 47 USC § 255, to make telecommunications services accessible, the Commission also exercised its ancillary authority to include within the accessibility requirements two non-telecommunications services – voicemail and interactive menus.²⁸ The Commission exercised its ancillary authority to include these features because it was convinced that these two non-telecommunications services were “critical to making telecommunications accessible and usable by people with disabilities”²⁹ and because, having been charged by Congress to ensure that telecommunications services and equipment are accessible and usable by persons with disabilities, the Commission could not “carry out meaningfully the accessibility requirements”³⁰ or “fully achieve that objective without

²⁷ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

²⁸ *See* 47 CFR Part 7.

²⁹ *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities* (WT Docket No. 96-198) Report And Order And Further Notice Of Inquiry, 16 FCC Rcd 6417, 6455 (1999), ¶ 93.

³⁰ *Id.*

this limited use of [its] ancillary jurisdiction.”³¹ The Commission found that “these two discrete information services are both so integral to the use of telecommunications services today that, if inaccessible and unusable, the underlying telecommunications services that sections 255 and 251(a)(2) have sought to make available will not be accessible to persons with disabilities in a meaningful way.”³² In that circumstance, the Commission used its discretion “so as to ensure that the implementation of section 255 is not thwarted,”³³ based on its view that “inaccessible and unusable voicemail and interactive menus operate in a manner that can render the telecommunications service itself inaccessible and unusable.”³⁴ In the course of exercising its ancillary jurisdiction, the Commission defined the term “interactive menu.”³⁵ More recently, in 2007, the Commission again exercised its ancillary authority to extend the same telecommunications accessibility requirements (including voicemail and interactive menus) to voice over internet protocol (VOIP) services.³⁶

By contrast to this earlier legislation, in the CVAA, Congress has already decided that user interfaces and video programming guides and menus are essential to making video services accessible and it has given the Commission direct responsibility to make them accessible. Exercising ancillary authority to impose the suggested baseline minimum information

³¹ *Id.*

³² 16 FCC Rcd at 6458, ¶ 100.

³³ 16 FCC Rcd at 6460, ¶ 103.

³⁴ 16 FCC Rcd at 6461, ¶ 107.

³⁵ 47 CFR § 7.3(e).

³⁶ *In the Matters of IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, WC Docket No. 04-36; WT Docket No. 96-198; CG Docket No. 03-123; CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275 (2007).

requirements for the guides and menus would simply ensure that this responsibility is performed meaningfully and in a manner that fully achieves Congress' accessibility objective by requiring essential program and accessibility information to appear on the user interfaces and video programming guides and menus.

Finally, whether imposed under direct statutory authority or ancillary authority, these requirements would also respect the *limits* on Commission authority under Sections 204 and 205 by *not* specifying the technical standards, protocols, procedures, and other technical requirements for meeting these requirements.

C. THE COMMISSION SHOULD ADOPT ITS ONE STEP PROPOSAL FOR ACTIVATING ACCESSIBILITY FEATURES

At paragraphs 42 and 43 of the NPRM, the Commission notes that the CVAA requires a mechanism comparable to a button, key or icon for activating closed captioning, and that industry and consumer groups on the VPAAC could not agree whether this should be a physical button (advocated by consumer groups) or “reasonably comparable to physical button” (advocated by industry). The Commission’s proposal is that whatever this mechanism is, it must be able to activate the closed captioning feature immediately in a single step. The County agrees. The Commission also asks whether this requirement should apply to video description as well,³⁷ whether accessibility features should include activation of the audible output of the onscreen guide,³⁸ and whether the Commission should require accessibility functions on first level of menus.³⁹ The County supports all of these proposals as reasonable interpretations, consistent with the goals of the CVAA. And finally, the County submits, in response to the Commission’s query in paragraph 49 of the NPRM, that the Commission’s one step proposal

³⁷ NPRM, ¶ 46.

³⁸ NPRM, ¶ 47.

³⁹ NPRM, ¶ 48.

does give maximum flexibility required by statute because the “one step” requirement focuses on function not on the particular technical set up for the one step activation.

IV. THE COMMISSION SHOULD BE INFORMED BY ITS ANALYSIS IN THE ACS ORDER WHEN EVALUATING ACHIEVABILITY CLAIMS CONCERNING COMPLIANCE WITH SECTION 204 AND 205

The County supports the Commission’s proposal that it should be informed by its analysis in the *ACS Order* when evaluating evidence offered to prove that compliance with Section 204 or 205 was not achievable.⁴⁰ The County believes the *ACS Order* takes an appropriate approach to considering what is achievable. For example, the County agrees with the Commission’s conclusion that “if an accessibility feature has been implemented for competing products or services, we find that such implementation may serve as evidence that implementation of the accessibility feature is achievable. To ignore such evidence would deprive the Commission of a key element of determining whether achievability is possible.”⁴¹ The County also agrees with the Commission’s approach to considering the economic impacts of compliance, by comparing the costs of compliance with the total gross revenues of the entire enterprise.⁴²

⁴⁰See NPRM, ¶ 39.

⁴¹See *In the Matter of 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; Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, CG Docket No. 10-213; WT Docket No. 96-198; CG Docket No. 10-145, 26 FCC Rcd 14557 at 14611, ¶ 129 (citations omitted) (“*ACS Order*”).

⁴²See *ACS Order*, 26 FCC Rcd at 14612, ¶ 132 (“We find that to determine the ‘economic impact of making a product or service accessible on the operation of the manufacturer or provider,’ it will be necessary to consider both the costs of making a product or service accessible and an entity's total gross revenues. Consistent with the *Section 255 Report and Order*, we will consider the total gross revenues of the entire enterprise and will not limit our consideration to the gross revenues of the particular subsidiary providing the product or service.” (citations omitted)).

V. THE COMMISSION SHOULD IMPOSE CLEAR RULES TO ENSURE PERSONS IN NEED OF ACCESSIBLY DEVICES ARE MADE AWARE OF THEIR OPTIONS AND RECEIVE THE DEVICES IN A TIMELY MANNER

In this section, the County responds to the Commission’s requests for comments on its proposals concerning MVPD timeliness in responding to requests for accessible devices, the form requests should take, whether MVPDs should have to notify subscribers of the option, and whether the accessibility features should be available on all classes of navigation devices.⁴³

The County submits that rather than proposing that MVPDs respond to requests in a “reasonable time”, the Commission should impose a specific time period such as seven or fourteen days. Establishing a precise time period will assist subscribers and providers by eliminating any uncertainty as to what is “reasonable”.

Concerning the form that a request for an accessible device can take, the Commission should require MVPDs to permit subscribers to request the device in any manner that they may now order any other MVPD-supplied equipment.

The County submits that MVPDs should be required to notify subscribers of the option of obtaining the accessible equipment at the time of subscription, and annually thereafter. The annual reminders are useful because the subscriber’s need for accessible equipment can develop over time. These can be accomplished with bill inserts or separate electronic notices for electronic autopay customers, and such annual notices should be provided in accessible formats, such as Braille.

Finally, the County believes that all classes of navigation devices should have accessibility features. There is no basis for requiring only a subset of available devices have the

⁴³See NPRM, ¶¶ 50-53.

accessibility features. Persons with disabilities deserve the same range of choices for video equipment as the general public.

VI. CONCLUSION

For all of the above reasons, the County urges the Commission adopt rules implementing Section 204 and 205 of the CVAA consistent with the proposals submitted in these Comments.

Harash (Sonny) Segal
Chief Information Officer & Director
Dieter Klinger, Chief Operating Officer
Department of Technology Services
Montgomery County, Maryland
101 Monroe Street, 13th Floor
Rockville, MD 20850

Mitsuko R. Herrera, Cable & Broadband
Communications Administrator
Marjorie L. Williams, Franchise Manager
Montgomery County, Maryland
Office of Cable and Broadband Services
100 Maryland Avenue, Suite 250
Rockville, MD 20850

July 15, 2013

51059.00048\8077237.2

Respectfully submitted,


Gail A. Karish
Best Best & Krieger LLP
2855 East Guasti Road, Suite 400
Ontario, CA 91761

Gail.Karish@BBKlaw.com
Telephone: (909) 989-8584
Fax: (909) 944-1441

Counsel for Montgomery County, Maryland