

**Before the
Federal Communications Commission
Washington, DC 20054**

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

**Reply Comments of the
American Foundation for the Blind**

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Once again, the American Foundation for the Blind (AFB) congratulates the leadership and staff of the Federal Communications Commission (FCC or Commission) for the extraordinary work that continues to be invested in the proper implementation of the historic Twenty-First Century Communications and Video Accessibility Act (CVAA). We also appreciate this opportunity to offer comments in reply to a variety of issues and concerns that have been raised by commenters in this docket. It is our firm belief that the present proceeding is a uniquely important one in the long list of CVAA-related proceedings inasmuch as nothing less than the future use and enjoyment by people with disabilities of TV and other video programming, equipment and content that has become so ubiquitous in our social and cultural life, is at stake. Unless the Commission gives unequivocal and appropriate voice to Congress's intent to fundamentally transform the technology industry's delivery of fully accessible video programming equipment to their customers who are blind or visually impaired, a prime objective of the CVAA, the intended revolution in the video programming experience of people with disabilities will be thwarted.

We would direct the Commission's attention to the myriad comments of consumers, filed in this proceeding, expressing frustration with their experience using video programming technologies and their manifest desire for much-needed change. If nothing else, these scores of impassioned pleas clearly demonstrate both the need for change that the CVAA was intended to affect and the breadth of national attention to this issue that will not go away once this proceeding is concluded. Indeed, advocacy to level the technological playing field is only in its relative infancy, and a refusal by the Commission to answer the CVAA's clear call for a more accessible world cannot and will not be allowed to stand. With that, let us turn to some of the primary issues discussed in this proceeding.

Section 205 Applies to MVPD-Provided Equipment

In its NPRM, the Commission proposes to read the accessibility obligations of section 205 of the CVAA to apply exclusively to equipment made available to customers by multichannel video programming distributors (MVPDs). We agree and urge the Commission to preserve this approach in the final rule. While Congress, admittedly, did not make it easy to divine the meaning of sections 204 and 205, the complexity of these provisions neither renders them

unmanageable nor invites the mischief proposed by some commenters. Read in its entirety, section 205 is clearly not meant to apply to a wide array of parties but is rather assiduous in dealing with those situations in which a person with a disability has a previously-existing relationship with an MVPD.

For example, section 205(b)(2) is careful to empower the Commission to exempt certain small MVPDs from the section 205 accessibility obligations. There would be no reason for Congress to create a mechanism to allow some MVPDs to avoid the accessibility obligations of section 205 if they were not the obvious target of such obligations. Section 205(b)(3) further clarifies that an MVPD can “only” be required to meet its section 205 accessibility obligations “with respect to navigation devices that it provides to a requesting blind or visually impaired individual.” This provision naturally raises the question of what other possible equipment might Congress have made MVPDs responsible for. Could Congress have required MVPDs to make accessible equipment available to customers even if MVPDs provided no equipment of any kind to any of their customers? Could Congress have required, in section 205, that so-called navigation devices made available for retail sale but which are not in any way provided by a given MVPD be nevertheless accessible? The answer to both of these questions is conceivably yes, but such obligations would be quite difficult for an MVPD, or any other entity for that matter, to comply with if they themselves are not in a position to control the accessibility of equipment offered by others.

MVPDs maintain the customer relationship and generally control the choice of navigation equipment, which is why we agreed, albeit reluctantly, to the “upon request” language of section 205. Consumers cannot possibly be expected to know who to contact or how or where to make such a contact to request equipment from consumer product manufacturers.

No, section 205 is clearly neither meant nor written to apply to entities beyond MVPDs and to the equipment they otherwise make available to their customers. Section 205(b)(4) is particularly interesting in that such provision takes great pains to say that, in implementing section 205 through regulations, the Commission must permit entities to comply with the section 205 obligations by allowing such entities to supply customers with a host of alternative options to the standard navigation device ordinarily provided to all customers. These alternatives may include “software, a peripheral device, specialized consumer premises equipment, a network-based service or other solution.” If section 205 is to apply to equipment not made available by MVPDs themselves but is to apply to equipment offered for retail sale, the Commission would be endorsing the notion that such commercially available equipment need not be made accessible and available to a customer with vision loss but could be merely substituted for some other mechanism of the entity’s choosing. Clearly we have run far afield of the letter and spirit of the CVAA if we allow this approach to stand.

At heart, however, the problem with interpretations of section 205 that would apply it to equipment beyond that which is directly provided by cable and satellite systems is that such interpretations are disingenuous. These interpretations require all of us to believe that if Congress had really meant to limit section 205 to MVPD-provided equipment, they would have simply said so in section 205(a) and would not have repeatedly made reference to the responsibilities of the “entity” that is providing navigation devices. However, are we really

expected to believe that the term “entity” that is frequently used in section 205 is broader than an MVPD but is only to be stretched just far enough to include virtually the entire video-related consumer electronics marketplace but no one else?

To be absolutely clear about this, should the Commission adopt some broader interpretation of section 205 that improperly extends its reach beyond MVPD-provided equipment, we demand that the Commission’s Report and Order describe in exhaustive and authoritative terms why the Commission would arbitrarily and capriciously include non-MVPD-provided equipment made commercially available by manufacturers but fail to include, as the plain language of section 205 would seem to require, equipment provided by any entity whatsoever. After all, there is nothing about section 205 that would even hint that its extension beyond MVPDs should only be limited to manufacturers. Indeed, the fact that MVPDs themselves are not manufacturers of navigation devices is of no moment in section 205. In fact, section 205(a) is clear to put the burden of providing accessible equipment and/or software on MVPDs whether or not they are the equipment’s manufacturer.

Thus, the only relevant criterion in section 205 in determining whether there is an accessibility obligation in play, at least if we are going to approach section 205 in a manner that departs from the Commission’s proposed approach in the NPRM, is whether an entity is providing equipment. If any entity is providing equipment, under such an approach, that entity must offer accessible equipment or alternative solutions. In real world terms, hotels, nursing homes, bars, or any other entity that makes navigation devices (which naturally include most television equipment in the view of some commenters) available to their customers must provide accessible equipment upon the request of a customer who is blind or visually impaired. Indeed, a person who is blind who wishes to acquire a navigation device from a local charity, Good Will for instance, would have the option to request that Good Will provide an accessible device. Is the Commission truly prepared to receive and entertain complaints against virtually any conceivable entity that provides navigation devices to determine whether its offering of accessible equipment was not achievable? We doubt it.

Alternative Approaches

We do recognize that the tremendous pressure that is being brought to bear by some technology industry interests may, in spite of the absurd results that would ensue, force the Commission to apply section 205 more broadly than intended. In the event that their expansive reading is being taken seriously, we urge the Commission to recognize that, however any of us may read sections 204 and 205 together, there is no necessary reading that requires the Commission to categorize a single piece of equipment as either a navigation device or a section 204-covered apparatus. Some industry commenters, and even the Commission itself as reflected in paragraph 17 of the NPRM, are in error in asserting that a given piece of equipment cannot fall within the scope of both Sections 204 and 205. It is obviously true that Section 204 specifically provides that, in applying the section's requirements on apparatus, the term "apparatus" does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules. However, this language is clearly meant to merely indicate that navigation device requirements are to be governed by Section 205 and not 204. This language does not mean that a given piece of equipment cannot, in fact, be a Section 204-covered apparatus and a section 205-covered navigation device. Moreover, Section 204 is concerned with the accessibility of "appropriate built-in apparatus functions," whereas section

205 is concerned with the accessibility of "on-screen text menus and guides provided by navigation devices."

The CVAA itself, and the Commission's own rules demonstrate that, while various provisions of the Communications Act require very specific things of very carefully defined categories of equipment, a given piece of equipment may, and quite frequently does, fall within multiple provisions of law. In the CVAA Title I context, for example, Section 716(f) provides that the various core requirements of Section 716 "shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of Section 255 on the day before the date of enactment of the Twenty-First Century Communications and Video Accessibility Act of 2010. Such services and equipment shall remain subject to the requirements of Section 255." In applying this provision, the Commission rightly held that the manufacturer of a given piece of equipment that offers Section 255-covered telephony would continue to be obligated to ensure accessibility in accordance with Section 255. But the Commission also made it clear that, if such manufacturer added advanced communications services to that given piece of equipment, such as electronic messaging, those advanced services are required to be accessible in accordance with Section 716 of the CVAA. The fact that such equipment still offers 255-covered telephony does not somehow shelter the included advanced services from the reach of the CVAA.

Thus, applying this reasoning to the present proceeding, if a given piece of equipment receives or displays video programming, the Section 204-covered "appropriate built-in apparatus functions" must be accessible. If that given piece of equipment also happens to meet the Commission's definition of a navigation device, that does not mean that there are no apparatus accessibility obligations in play; it means that the extent to which that piece of equipment is a navigation device, such extent falls under the requirements of Section 205. Putting it more simply, a given piece of equipment can be an apparatus and a navigation device with corresponding and distinct obligations attaching to each/both of those two legal categories. In short, Section 204 says exactly the opposite of what some industry commenters suggest. The "upon request" access requirements pertaining to on-screen text menus and guides cannot be applied to apparatus; apparatus must have appropriate built-in apparatus functions that are accessible as a matter of course. While we do not necessarily propose that the Commission adopt the alternative approach we have described because we are persuaded that the Commission's express intention to apply Section 205 only to MVPD-provided navigation devices is the correct way to implement Section 205, we are simply noting that it is most certainly not without precedent to interpret and apply two distinct and carefully partitioned provisions of law to the same piece of equipment. Indeed, it may be necessary and mandatory to so apply them.

In any case, whatever regard the Commission might give our foregoing analysis, we implore the Commission to recognize that none of us are in an unsolvable dilemma here. Clearly advocates for people with disabilities read sections 204 and 205 one way, and forceful advocates for certain industry interests read them differently. Much of the disagreement relates to the definition of navigation devices set out in the Commission's rules in section 76.1200 and the reference to such definition in sections 204 and 205. If we cannot solve the dilemma that some interests are forcing us to wrestle with by taking the approaches we have described above, another approach that we would urge the Commission to consider is to undertake revision of section 76.1200 itself through a further notice of proposed rulemaking that would

amend the current navigation device definition for the limited purpose of sorting out the application of sections 204 and 205. Specifically, section 76.1200(c) could be revised to read, “devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems (provided that, for the sole purpose of applying the requirements of sections 303(aa) and 303(bb) of the Act, this term shall only pertain to such devices and equipment provided by multichannel video programming distributors to their customers).” Taking this approach would ensure that any alleged vagueness about the division, overlap or mutual exclusivity of sections 204 and 205 can be resolved. Again, while we are not specifically calling upon the Commission to undertake such rulemaking in that we are persuaded that section 205 is already limited to MVPD-provided equipment, we are merely offering the Commission various approaches that clearly illustrate that the solution to this purported dilemma is well within reach.

Equipment Functionality

The Commission very generously offers in the NPRM to require that all section 204-covered functions must be accessible, and of course we support this proposal. The carve-out for diagnostic and related functions should be clarified a bit, however. The criterion should not be what a given control or function does but whether customers generally, and customers who are blind or visually impaired in particular, are expected to make use of it. Not infrequently, customers are asked by diagnosticians to perform certain equipment tests or to actuate this or that control when trouble shooting problems. Generally speaking, if a control or function is made available to all customers generally, there should be a presumption that people who are blind or visually impaired, just like all other customers, may be expected, and possibly required, to use it.

This having been said, it is critical that the Commission, at a minimum, require that section 204-covered equipment must offer people who are blind or visually impaired the full array of accessible controls that allow them to make full use of equipment to enjoy video programming of all kinds. The VPAAC articulated this array of accessible features in the so-called list of eleven essential functions. It is our belief that there is no disagreement among industry and consumer advocates that the eleven essential functions are both necessary and legally appropriate. We certainly understand the concerns of some that if a given piece of equipment does not offer a specific feature, such as the ability to control volume, then it is not necessary for an accessible volume control to be added to that equipment. We think it would be appropriate for the Commission to simply make note of the fact that the requirement to make the eleven essential functions accessible does not impose an obligation on a manufacturer to add features or functions to the equipment that the manufacturer would not otherwise offer to customers generally.

The Commission should likewise note that the eleven essential functions are descriptive of what equipment may be able to do without regard to how the equipment does it. So, no matter what technology is used to actuate a given function, if the function is at all within the eleven essential functions, such function must be accessible. The fact that a given piece of equipment does not offer a physical manipulable volume control but merely requires a user to issue some sort of visual command is irrelevant; such control must nevertheless be accessible. Moreover, the Commission should be sure to note that the eleven essential functions are inclusive of a

user's ability to launch apps, including third-party apps or similar features. While we believe that the list of eleven functions as developed by the VPAAC does encompass the ability to launch apps, we think it is critical that the Commission endorse this concept. A user who is blind or visually impaired must be able, like all other users, to call up a particular application and launch it. This is certainly true of apps of the user's own choosing that offer video programming of one kind or another. In an age where access to video programming will involve ever more links in a chain, it is essential that users who are blind or visually impaired are able to call up and launch those links in the chain. In asking for this clarification, we of course recognize that the accessibility of third-party apps is not, all other things being equal, not the CVAA-related responsibility of manufacturers. Such app accessibility must be reached in an alternative way and/or addressed to the apps' creators.

Reasonable Comparability

With regard to how the Commission should implement the section 204/205 concept that closed captioning and video description controls must be reasonably comparable to a single control of some kind, such as a button or icon, we appreciate the Commission's express intent to require a so-called single step user operation. This approach will ensure that consumers have the kind of ready access to the indispensable accessibility features of captioning and description that the CVAA was meant to bring into regular and easy use. It is particularly important that description control be made as easy to reach and manipulate as possible given that, unlike a SAP user who wishes to turn on Spanish language programming, a user with vision loss will regularly be activating and deactivating description. There are, after all, a limited number of hours of described programming during a given week. What is more, in the event of an emergency, users with vision loss cannot be expected to navigate a complex maze of menus just for the privilege of accessing the SAP-delivered emergency information required by the CVAA.

Whatever the notion of reasonable comparability means, however, at a minimum, it must mean something different than is commonly in place today, otherwise there would have been no purpose to Congress's specification that captioning and description controls be readily reached. The idea proposed by some commenters that the same number of steps required of a person without disabilities be the criterion for judging the number of steps required of a user who is blind or visually impaired must be dismissed out of hand. The truth is that there is no comparability between those users who have vision to navigate the complexity of on-screen menus or other controls and those who do not. Since the "same number of steps" standard is in effect what we are living with today and which Congress has clearly rejected, the requirement must certainly be stronger than some might suggest. We believe that the Commission can either require the single step approach it has proposed or, at a minimum, expect equipment to offer a simple straightforward mechanism that is, like a button, key or icon, self-evident and that also requires minimal, if any, consultation with any accompanying documentation or on-board guidance. The captioning and description controls must be located and understood with ease by someone who is using the equipment without vision.

Upon Request

There are a host of issues of concern to the vision loss community about the application of the "upon request" provisions of section 205. At bottom, however, these concerns revolve around

the ability of a consumer to identify the entity, corporate office, or even a particular individual to whom such request must be made. These concerns are magnified exponentially when we contemplate that section 205 will be read to encompass entities beyond MVPDs because, at least in the MVPD context, the consumer is likely to have a better idea about how and where requests are properly made. We believe that it is essential, certainly if section 205 remains limited to MVPD-provided equipment but most especially if it is not, to require entities to publically, frequently, widely and obviously make known to all customers with and without disabilities the means for making requests for accessible equipment and the specific person, office or entity to whom such requests are to be made. Such requests cannot be required to be in writing under section 205; the statute does not allow requests to be restricted only to written requests. However, we recognize that consumers would be smart to memorialize their requests in writing. The Commission should make it clear that requests are to be accepted verbally, in person, by phone, via electronic messaging, or through any other means of the customer's choosing so long as such request is placed with the person, office or entity clearly identified.

Finally, we note that there has been some discussion about the eligibility criteria for obtaining accessible equipment upon request. We want to be crystal clear with the Commission that any effort to impose eligibility criteria, documentation requirements, or any other such burdensome mandate on consumers would be an insult and is utterly unacceptable. Neither MVPDs or equipment manufacturers have any competence to judge the validity or the determinations of medical professionals or anyone else with expertise in assessing whether someone does in fact have a visual impairment. Given that they do not possess this competency, it would merely be a pointless paper chase to permit MVPDs or other entities to collect paperwork they do not know how to evaluate. What is more, any eligibility criteria or documentation requirement that the Commission may entertain must only be implemented in the context of section 205(b)(4)'s requirement that accessible equipment be made available at no additional charge. Specifically, entities would need to be prepared to cover all costs related to medical, clinical, diagnostic or other determinations of eligibility. To not impose such a requirement would mean that customers who are blind or visually impaired would incur costs they would otherwise not have to cover simply for the privilege of obtaining accessible equipment and services. We believe that the request for accessible equipment must be accepted by an entity as prima facie evidence of the need and eligibility for accessible equipment.