

January 28, 2014

via electronic filing

Marlene H. Dortch
Secretary, Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation
Closed Captioning Quality · CG Docket No. 05-231 · PRM-11-CG**

Dear Ms. Dortch,

On January 24, 2014, Claude Stout of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Andrew Phillips of the National Association of the Deaf (NAD), Lise Hamlin of the Hearing Loss Association of America (HLAA), and Cheryl Heppner of the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN) (collectively, “Consumer Groups”), Dr. Christian Vogler of the Technology Access Program at Gallaudet University (TAP), and Blake Reid of the Samuelson-Glushko Technology Law & Policy Clinic at Colorado Law (TLPC) discussed pending Commission action in the above-referenced matters with Greg Hlibok, Karen Peltz Strauss, Eliot Greenwald, Caitlin Vogus, and Suzy Rosen Singleton of the Consumer and Governmental Affairs Bureau and Steven Broeckaert, Michelle Carey, Diana Sokolow, and Mary Beth Murphy of the Media Bureau. On January 27, 2014, Mr. Reid and Mr. Greenwald again discussed the same matters.

We commended the Commission’s groundbreaking progress toward implementing closed caption quality standards, an issue that has remained of critical importance to the deaf and hard of hearing community for more than 15 years. In general, we support the Commission’s proposed approach of providing a core set of closed captioning quality standards in a report and order, issuing a declaratory ruling on areas where clarifications of the Commission’s existing rules are necessary, and building a record on additional topics in a further notice of proposed rulemaking. However, we recommend that the Commission adopt particular courses of action with respect to the Electronic Newsroom Technique, the distinction between pre-recorded and “near-live” programming and improvements to rebroadcast live and near-live programming, and recordkeeping requirements for caption quality.

Electronic Newsroom Technique (ENT)

First, we are uncertain that the “enhancements” to the Electronic Newsroom Technique (“ENT”) proposed by the National Association of Broadcasters (“NAB”) will ultimately provide viewers who are deaf or hard of hearing with sufficient access to critical news programming that would otherwise be captioned in real time, and urge the

Commission to approach NAB's recommendations with caution.¹ While we look forward to viewing NAB's forthcoming demonstration of these enhancements, we urge the Commission to carefully examine the enhancements to ensure that they adequately serve the goal of equal access embedded in the Telecommunications Act of 1996 ("1996 Act")—and reject the continued use of ENT if not. In doing so, we urge the Commission to heed its own conclusions that "[ENT] is not ideal," that its use should "by far be the exception rather than the general rule," and that the use of ENT eventually should be phased out altogether—a conclusion reached more than 15 years ago about a technology that has not materially improved since.²

If the Commission chooses not to phase out ENT altogether, we urge the Commission to abide by its own determination that "that only those entities that are so small or who present unusual circumstances will be permitted to continue to use [ENT] because [real-time] closed captioning would be an economic burden."³ There is no evidence on the record in this proceeding to support the continued use of ENT by broadcast affiliates in all markets outside the top 25 and national non-broadcast networks serving 50% or less of all homes.⁴ For example, as members of the Commission conceded during our discussion, there are assuredly stations outside the top 25 markets for whom providing real-time captioning instead of ENT would not impose an economic burden. To the extent that the Commission concludes that ENT should continue to be permissible, it should limit the use of ENT to only those broadcast affiliates and non-broadcast networks on which real-time captioning would pose a demonstrable, untenable economic burden. Without further evidence of systemic economic burden on a large class of entities, the Commission should require entities to establish economic burden through the existing individual waiver process.⁵

Should the Commission continue to permit ENT, we further recommend that the Commission modify the "safe harbor" enforcement mechanisms proposed by NAB.⁶ In particular, we recommend that an entity referred to the Enforcement Bureau for continuing non-compliance with the Commission's quality standards *automatically* have their eligibility for the safe harbor revoked, rather than requiring an additional violation

¹ See, e.g., *Ex Parte of NAB*, CG Docket No. 05-231, at 4-5 (January 23, 2014), <http://apps.fcc.gov/ecfs/document/view?id=7521067468> ("*NAB Ex Parte*").

² *Closed Captioning and Video Description of Video Programming*, Order on Reconsideration, MM Docket No. 95-176, 13 FCC Rcd. 19,973, ¶¶ 35, 36, 40 (Oct. 2, 1998).

³ *Id.* at ¶ 40.

⁴ See 47 C.F.R. § 79.1(e)(1).

⁵ See 47 C.F.R. § 79.1(f).

⁶ *NAB Ex Parte* at 2.

after the commencement of the enforcement proceeding.⁷ We believe that three strikes, rather than four, are more than sufficient for the Commission to determine that a non-compliant entity should be required to migrate from ENT to real-time captioning.

Finally, should the Commission continue to permit ENT, we would urge the Commission to do so only for a short period and to re-evaluate its ongoing use thereafter. Specifically, we would recommend authorizing the continuing use of ENT for a period no longer than one year, and to set for the end of that period a proceeding to assess the continuing use of ENT and proceed with a timed phase-out if ENT still does not facilitate the equal access to video programming required by the 1996 Act.

Distinguishing Pre-Recorded from Near-Live Programming and Improving the Quality of Rebroadcast Live and Near-Live Programming

Next, we agree in principle with the Commission's tentative approach of requiring offline captioning for pre-recorded programming and permitting the use of real-time captioning for live and "near-live" programming. However, we again urge the Commission to draw a bright line between near-live and pre-recorded programming that limits the utilization of real-time captioning to situations where offline captioning is logistically or technically infeasible.⁸

In particular, we recommend that the Commission adopt a different approach than the one adopted in the ongoing Internet Protocol ("IP") captioning proceeding. In that proceeding, the Commission determined that "near-live" programming is programming performed and recorded less than 24 hours prior to air."⁹ However, in the IP captioning context, the Commission defined the term "near-live" only for the purpose of identifying an appropriate schedule of deadlines for its IP captioning rules, and clarified that its definition "appl[ied] *solely* to [its] regulation of IP closed captioning."¹⁰ The Commission did not consider the critical issue presented here: whether programming performed and recorded less than 24 hours prior to air *could* be captioned offline instead of in real-time.¹¹ Indeed, we believe that it can be.

⁷ *See id.*

⁸ *See Ex Parte of TDI, et al.*, CG Docket No. 05-231, at 4-5 (Jan. 15, 2014), <http://apps.fcc.gov/ecfs/document/view?id=7521065991>.

⁹ 47 C.F.R. § 79.4(a)(8).

¹⁰ *See Closed Captioning of Internet-Delivered Video Programming*, Notice of Proposed Rulemaking, MB Docket No. 11-154, 26 FCC Rcd. 13,734-13,739-40, ¶ 10 (Sept. 19, 2011); *Closed Captioning of Internet-Delivered Video Programming*, Report and Order, 27 FCC Rcd. 787, 821, ¶ 54 (Jan. 13, 2012) ("*IP Captioning Order*") (emphasis added).

¹¹ *See IP Captioning Order*, 27 FCC Rcd. at 823-24, ¶¶ 57-58.

Accordingly, we recommend that the Commission presumptively limit “near-live” programming to programming recorded and performed less than double its length prior to air—e.g., two hours before the airing of a one-hour program—and deem “pre-recorded” all programming recorded and performed more than double its length prior to air. For “near-live” programming, we also recommend that the Commission require the use of offline captioning where doing so is achievable, and that VPDs delivering near-live programming using real-time captions maintain records of the reason that offline captioning is not achievable, which in turn must be presented in response to a complaint that the captions have errors or quality problems. We believe this approach would best balance the need for caption quality with feasibility.

We also recommend that the Commission require programming captioned in real-time that is re-broadcast at a later time to be re-captioned using an offline method if the rebroadcast occurs within double the programming’s length after it airs—i.e., two hours after the airing of a one-hour program.¹²

Recordkeeping Requirements

Lastly, we urge the Commission to adopt comprehensive documentation and recordkeeping for the provision of captions to ensure that responsible entities are accountable for compliance with the Commission’s quality standards. While we acknowledge that consumer complaints play an important role in enforcing the Commission’s captioning rules, viewers who are deaf or hard of hearing cannot identify quality problems in many cases because they cannot hear discrepancies between programs’ audio tracks and the corresponding captions. Quality problems nevertheless deny viewers who are deaf or hard of hearing equal access to video programming and should not be ignored simply because consumers lack sufficient information to file a detailed complaint, and the entities responsible for creating captions should retain accountability for their accuracy and completeness. Moreover, we believe that reporting requirements would provide the public with critical documentation of the video programming industry’s ongoing progress and efforts toward improving the quality of captions in general, researching, developing, and implementing technical improvements to overcome delays and errors in live captioning, refining best practices, and addressing complaints.

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Please don’t hesitate to contact me if you have any questions regarding this filing.

¹² *C.f.* Broadcasting Regulatory Policy CRTC 2012-362, at App’x, ¶ 5, available at <http://www.crtc.gc.ca/eng/archive/2012/2012-362.htm> (describing the Canadian Radio-television and Telecommunications Commission’s policy for rebroadcast programming).

Respectfully submitted,

/s/

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Cc:

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