

**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
)	
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)	MB Docket No. 12-107
)	

OPPOSITION TO PETITION FOR RECONSIDERATION

The National Cable & Telecommunications Association (“NCTA”)¹ hereby submits its opposition to the Petition for Reconsideration filed by the National Association of the Deaf et al. (“Petitioner”) in the above-captioned proceedings.² Petitioner requests that the Commission reconsider allowing voice and gesture controls as compliant mechanisms for activating the closed captioning on navigation devices pursuant to Section 205 of the CVAA.³ Contrary to its claims, Petitioner had adequate notice of this issue in the rulemaking, and its Petition is otherwise procedurally defective. Moreover, the relief that Petitioner seeks is contrary to the express terms of the CVAA and would stifle innovation to the detriment of consumers. The Petition should be denied.

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$210 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 27 million customers.

² See Petition for Rulemaking filed by Nat’l Ass’n of the Deaf *et al.*, MB Dkt. Nos. 12-107, 12-108 (Jan. 20, 2014) (“Petition”); see also FCC, Public Notice, *Petitions for Reconsideration of Action in Rulemaking Proceeding*, MB Dkt. Nos. 12-107, 12-108; Rep. No. 2996 (Jan. 24, 2014).

³ See Petition at 2.

I. PETITIONER HAD ADEQUATE NOTICE ABOUT PROPOSALS TO ALLOW VOICE AND GESTURE CONTROLS, AND ITS PETITION IS OTHERWISE PROCEDURALLY DEFECTIVE.

In implementing Section 205 of the CVAA, the Commission determined that voice and gesture controls would be compliant mechanisms for activating closed captioning.⁴ Petitioner contends that it did not have adequate notice that the Commission was considering voice and gesture controls, and that had such notice been provided, it would have objected.⁵ An examination of the record, however, proves otherwise. Petitioner had sufficient notice of this issue, and, in essence, uses its Petition to reprise arguments previously rejected by the Commission.

To satisfy notice requirements under the Administrative Procedures Act, the final rule adopted must be a logical outgrowth of an issue raised in a Notice of Proposed Rulemaking such that interested parties should have anticipated that the change from the proposed rule was possible, and thus reasonably should have filed comments during the rulemaking period.⁶ Pleadings filed in response to a Notice of Proposed Rulemaking may factor into the analysis of whether the final rule was a logical outgrowth of the agency's proposal.⁷

The Commission clearly satisfied this notice standard with respect to its decision to allow voice and gesture controls. The Notice of Proposed Rulemaking ("NPRM") in this docket asked

⁴ See *In re Accessibility of User Interfaces, and Video Programming Guides and Menus, 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*, Report & Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 ¶ 81(2013) ("Order"). Section 205 requires a mechanism for activating closed captioning in navigation devices. See *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751, 2774 ("CVAA"). The Commission's rules on activation track the language of Section 205 of the CVAA. See 47 C.F.R. § 79.109(b); see also CVAA § 205(a).

⁵ See Petition at 4-5.

⁶ See, e.g., *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (internal citations and quotation marks omitted).

⁷ See *AFL-CIO v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (noting that it would be strange for a party commenting on changes to a regulation to later complain that it had inadequate notice of the possibility that the regulation might change).

broad questions about, among other things, the most effective means of implementing the activation requirements in Sections 204 and 205, and whether the Commission should impose different activation requirements for different types of apparatus.⁸ The NPRM also sought proposals for alternate methods of activating closed captioning.⁹

The comments filed in response to the NPRM clearly show that the use of voice and gesture controls for activating closed captioning was raised in response to the NPRM, and thus should have been anticipated by Petitioner. In particular, at least four commenters, including CEA, DirecTV, ITIC, and NCTA, proposed voice and gesture controls as a means of activating closed captioning.¹⁰ Thus, the record evidence rebuts Petitioner's contention that the issue of whether voice and gesture controls would be compliant mechanisms for activating closed captioning was never raised in the notice-and-comment phase of the rulemaking. Moreover, Petitioner did not provide an adequate reason as to why it failed to raise its objections on this issue in a timely manner in its reply comments, or even in later *ex parte* filings. The

⁸ *See In re Accessibility of User Interfaces, and Video Programming Guides and Menus; 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*, Notice of Proposed Rulemaking, 28 FCC Rcd 8506 ¶ 43 (2013) (“NPRM”).

⁹ *See id.* ¶ 44.

¹⁰ *See* CEA Comments at 20 (“Even more significantly, some devices do not include any buttons but instead rely on voice or gesture recognition to activate and deactivate certain features, which for some users may be better accessibility solutions than a designated physical button.”); DirecTV Comments at 8-9 (“Thus, a user could access this [closed captioning] 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.”); ITIC Comments at 7 (“[S]ome devices do not have buttons at all, but rather, rely either on touch interfaces, gestures or voice commands. Indeed, voice control may provide greater accessibility than physical buttons for individuals who are blind or visually-impaired.”); NCTA Comments at 14-15 (“[O]perators may eventually deploy devices with gesture recognition that will revolutionize accessibility.”). Unless otherwise indicated, all comments cited herein were filed in MB Dkt. No. 12-108 on July 15, 2013 and reply comments were filed on August 7, 2013.

Commission’s rules generally bar consideration of petitions for reconsideration in such circumstances.¹¹

The Petition is also procedurally defective because it simply reargues a proposal rejected by the Commission. The National Association of the Deaf et al. (“NAD”) argued in its comments that a button, key, or icon was the *only* permissible activation mechanism for closed captioning or other accessibility features.¹² The Commission expressly – and properly – rejected NAD’s approach in the *Order*.¹³ By asking the Commission to eliminate voice and gesture controls, the Petition appears to reargue NAD’s prior proposal that activation mechanisms be limited to physical controls (i.e., a dedicated button, key, or icon). However, the Commission’s rules specify that petitions for reconsideration that “rely on arguments that have been fully considered and rejected by the Commission in the same proceeding” “plainly do not warrant consideration” and may be dismissed or denied.¹⁴

II. THE COMMISSION CORRECTLY DECIDED THAT VOICE AND GESTURE CONTROLS ARE COMPLIANT MECHANISMS FOR ACTIVATING CLOSED CAPTIONING.

Assuming *arguendo* that the Commission considers the Petition notwithstanding its procedural infirmities, the Commission should reject the Petition on substantive grounds.

¹¹ See 47 C.F.R. §§ 1.429(b)(1)-(3), (1)(2) (stating that petitions for reconsideration that rely on facts or arguments not previously presented to the Commission will be denied unless the petitioner can show that it failed to do so because of changed circumstances, the facts or arguments were previously unknown until after the last opportunity to present them to the Commission, or the public interest so requires).

¹² See NAD *et al.* Comments at 8-11 (contemplating only a button, key, or icon to activate closed captioning); Letter from Andrew S. Phillips, Policy Counsel, NAD, to Marlene H. Dortch, Secretary, FCC, at 2 (Aug. 1, 2013) (“The CVAA’s mandate is clear: *covered apparatuses must have a dedicated button, key, or icon* that can be easily identified.”) (emphasis in original); see also Comments of Maggie Tonkinson at 1; Comments of Dorothy Walt at 1; Wireless RERC Reply at 5-6 (stating that a “minimal step accessibility button, key, and/or icon” should be included on navigation devices).

¹³ See *Order* ¶ 82; see also discussion *infra* Section II.

¹⁴ 47 C.F.R. § 1.429(1); see also *In re Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, Second Memorandum Opinion & Order, 28 FCC Rcd 4995 (2013) (denying a petition for reconsideration that was “largely a rehash of previous filings”).

Petitioner asserts that the Commission failed to adequately justify its decision to allow for the use of voice and gesture controls, contending that the Commission’s approach is inconsistent with the CVAA’s mandate that activation mechanisms must be reasonably comparable to a button, key, or icon.¹⁵ Petitioner is incorrect.

The Commission’s decision is firmly grounded in the express language of the CVAA and is fully justified. As the Commission correctly noted in its *Order*,¹⁶ Section 205 does not dictate a particular activation mechanism for the required accessibility features, but instead allows for any number of mechanisms that are “*reasonably comparable* to a button, key, or icon.”¹⁷ Section 205 further provides that the Commission “*shall permit [MVPDs] maximum flexibility* in the selection of means for compliance.”¹⁸ Consistent with Congress’s flexibility mandate, the Commission adopted an approach that allows covered entities to “continue to develop innovative compliance solutions, without being precluded from using a particular technology to achieve an activation mechanism that is ‘reasonably comparable to a button, key, or icon.’”¹⁹ Furthermore, in determining whether an activation mechanism is “reasonably comparable to a button, key, or icon,” and consistent with the legislative history accompanying the CVAA, the Commission said it would consider “the simplicity and ease of use of the mechanism.”²⁰ Pursuant to this

¹⁵ See Petition at 3.

¹⁶ See *Order* ¶¶ 80-83.

¹⁷ CVAA § 205(a).

¹⁸ CVAA § 205(b)(5). The legislative history further underscores Congress’s intent that the Commission provide for flexibility in its rules. See H.R. Rep. No. 111-563, at 32 (2010) (“It is the Committee’s intent that these provisions allow providers of navigational devices great flexibility in meeting these requirements”); S. Rep. No. 111-386, at 15 (2010) (same).

¹⁹ *Order* ¶ 80.

²⁰ *Id.* ¶ 81 (noting that the committee reports accompanying the CVAA indicated Congress’s intention to “ensure ready access to these features by persons with disabilities”).

framework, the Commission listed voice and gesture controls as examples of reasonably comparable mechanisms given their simplicity and ease of use.²¹

It bears noting that Petitioner’s preferred approach – i.e., precluding the use of voice and gesture controls while requiring the use of a dedicated button, key, or icon – would be contrary to the CVAA and congressional intent. As the Commission concluded in the *Order*, such an approach “would be inconsistent with the ‘maximum flexibility’ granted to covered entities in determining the means of compliance.”²² In this regard, the Commission explained that “if Congress had intended for the only permissible activation mechanism to be a button, key, or icon, as some advocate, we expect that Congress would have expressly stated this.”²³ Moreover, contrary to NAD’s position in the rulemaking, “[t]he statute does not require that the mechanism be activated from the same location as the volume control or other primary controls.”²⁴

III. ADOPTION OF THE PETITION WOULD STIFLE INNOVATION AND HARM CONSUMERS.

Petitioner contends in a conclusory manner that accepting voice and gesture controls as compliant mechanisms will greatly reduce access to video programming for certain individuals with specific accessibility needs.²⁵ For example, Petitioner asserts that the deaf and hard-of-hearing would not be able to utilize voice commands, while persons with multiple disabilities

²¹ *See id.* ¶ 81.

²² *Id.* ¶ 82.

²³ *Id.*; *see also supra* note 18 (citing to legislative history). In fact, prior versions of the CVAA would have required “inclusion of a button on the remote control of such apparatus designated for activating the closed captioning function and the inclusion of ‘closed captions’ and ‘video description’ on the top tier of the on-screen menu of such apparatus.” *See, e.g.*, Twenty-first Century Communications and Video Accessibility Act of 2008, H.R. 6320, 110th Cong. § 204(a) (as introduced by Rep. Markey on June 19, 2008). Congress declined to adopt this approach and instead provided that access could be achieved through any “reasonably comparable” mechanism.

²⁴ *Order* ¶ 82.

²⁵ *See* Petition at 3-4.

(such as those who are deaf and have cerebral palsy) would not be able to use the gesture commands either.²⁶

Petitioner appears to be proceeding from an assumption that video devices would rely *solely* on voice and gesture controls to activate closed captioning. However, voice and gesture controls currently are envisioned as *incremental* features that hold the promise of *expanding* the range of consumers who can access closed captioning through MVPD-supplied navigation devices. Voice and gesture controls will likely be features offered in addition to the current-generation methods for activating closed captioning as well as other activation methods now in development, such as programmable buttons on remote controls or icons on touch-screen devices. Thus, as a practical matter, the Commission's decision to permit voice and gesture controls will not likely prevent MVPD customers from relying on other means to activate closed captioning.

In contrast, a flat prohibition on voice and gesture controls would have a chilling effect on innovation to the detriment of all consumers, including those who are deaf or hard-of-hearing or have multiple disabilities. Today, voice and gesture controls are on the cutting-edge of new technological innovations in consumer devices,²⁷ and other innovative solutions that have yet to be developed, or even imagined, are sure to come. As we noted in our comments, "operators

²⁶ See *id.*

²⁷ See, e.g., Jeff Baumgartner, *Veveo Extends 'Conversational' Search to Third-Party Platforms*, Multichannel News, June 4, 2013 (indicating that MVPDs are introducing voice-based control and search features), available at <http://www.multichannel.com/distribution/veveo-extends-%E2%80%98conversational%E2%80%99-search-third-party-platforms/143640>; Jeff Baumgartner, *Comcast Brings Voice Control to X1 Remote*, Multichannel News, May 29, 2013, available at <http://www.multichannel.com/distribution/comcast-brings-voice-control-x1-remote/143551>; Mike Farrell, *DirecTV Adds Voice Search to Repertoire*, Apr. 23, 2013 (explaining that MVPDs have begun to offer voice recognition features and that AT&T has a product that enables the vision or hearing impaired to control their TVs with voice commands and hand gestures), available at <http://www.multichannel.com/satellite/directv-adds-voice-search-repertoire/142882>.

may eventually deploy devices with gesture recognition that will revolutionize accessibility.”²⁸

Rather than cabin such technological innovations, as Petitioner requests, the Commission should stay its course and continue to allow these technologies to develop.²⁹

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Reconsideration.

Respectfully submitted,

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²⁸ NCTA Comments at 14-15.

²⁹ Such flexibility is particularly warranted given the Commission’s broad application of Section 205 to *all* navigation devices manufactured after the effective date of the rules. *See Order* ¶¶ 2, 17-23 (clarifying that Section 205 applies to devices manufactured with a CableCARD slot or other conditional access technology, including set-top boxes, digital cable-ready TVs, devices with pre-installed MVPD applications, and cable modems); *see also* 47 C.F.R. § 76.1200(c).

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that on the 18th day of February, 2014, I caused the foregoing Opposition to Petition for Reconsideration of the National Cable & Telecommunications Association to be served by postage pre-paid mail on the following:

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