

**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
)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”)¹ hereby responds to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.²

INTRODUCTION

The Commission’s authority in this area is limited. Section 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) directs the Commission to adopt requirements (1) making on-screen text menus and guides audibly accessible upon request by individuals who are blind or visually impaired, and (2) providing easy access to built-in closed captioning capability.³ In adopting such requirements, Section 205

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 *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 (2013) (“*Report & Order*” and “*Further Notice*” or “*FNPRM*”).

³ See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 205 (as codified in 47 U.S.C. § 303) (“CVAA”).

specifically prohibits the Commission from “specify[ing] the technical standards, protocols, procedures, and other technical requirements for meeting [the audibly accessible guide] requirement” and provides cable operators and other covered entities “maximum flexibility to select the manner of compliance [with the closed captioning mechanism obligation].”⁴

As explained herein, the additional requirements proposed in the *Further Notice* would impinge upon the flexibility Congress granted cable operators to implement Section 205 and should not be adopted. In particular, mandating the inclusion of specific public, educational, and governmental (“PEG”) programmer information in programming guides has no basis in the CVAA or elsewhere and would impose significant and unnecessary burdens on the industry. Likewise, adopting new requirements relating to accessing enhanced captioning features on navigation devices beyond access to captioning generally would unduly restrict compliance efforts and contravene Section 205. Finally, additional documentation, training, or multichannel video programming distributor (“MVPD”) notice requirements are unnecessary and unduly burdensome, and exceed the Commission’s mandate under the CVAA.

I. THE COMMISSION LACKS THE AUTHORITY TO SPECIFY THE INFORMATION THAT CABLE OPERATORS INCLUDE IN PROGRAMMING GUIDES.

In the *Further Notice*, the Commission seeks comment on whether it has authority to require MVPDs to include certain descriptive information in video programming guides and menus.⁵ Although it focuses mostly on program information for PEG channels, the *Further Notice* asks broadly about whether any requirement should apply to “all channels and programs included in a guide or menu.”⁶ It should not.

⁴ CVAA § 205(b)(4)(A).

⁵ See *FNPRM* ¶ 144.

⁶ *Id.*

We have previously demonstrated that the Commission does not have the authority under the CVAA to require a cable operator to include any particular information in its programming guides.⁷ The Commission agreed. As the *Report & Order* states, the CVAA requires only that certain information *already provided in on-screen text menus and guides* be made accessible:

Section 205 of the CVAA . . . does not govern the underlying content in the menus and guides. . . . [T]his section requires that if there is text in a menu or program guide on the screen, then that text must be audibly accessible, but it does not impose requirements with regard to what substantive information must appear in the on-screen text.⁸

Section 205 is not a license for the Commission to impose new burdens on cable operator guide data simply because data must be audibly accessible.⁹

The Communications Act likewise fails to provide this authority. Section 624(f) of the Act bars the Commission and franchising authorities from “impos[ing] requirements regarding the provision or content of cable services” except as expressly provided in Title VI.¹⁰ And nothing in Title VI grants the Commission the authority to require a cable operator to include any type of content in an on-screen text menu or guide.

Nor does the Commission have ancillary authority to adopt this requirement. Any Commission mandate to include information in a program guide can hardly be said to be “reasonably ancillary to the Commission’s effective performance of its statutorily mandated

⁷ See NCTA Comments at 11-12. Unless otherwise indicated, all comments cited herein were filed in MB Dkt. No. 12-108 on July 15, 2013.

⁸ *Report & Order* ¶ 75. Moreover, a requirement that information an MVPD chooses to provide as part of its programming guide be made audibly accessible is distinguishable from a mandate dictating the content of the programming guide itself, the latter of which would raise First Amendment concerns.

⁹ One party argued that the CVAA provides the Commission direct authority to mandate the provision of certain information in program guides because the Commission, as an expert agency, may define ambiguous terms in a statute (e.g., “video programming guides and menus” and “video programming information”) to include a baseline of information. See *Montgomery County, Maryland* Comments at 14-15. Even if these terms could be considered to be ambiguous, which they are not, defining them in such an expansive way would conflict with the statute’s more modest purpose that the Commission require, if achievable, that on-screen text menus and guides be audibly accessible.

¹⁰ See 47 U.S.C. § 544(f)(1).

responsibilities.”¹¹ The Commission’s statutory mandate is to ensure the *audible accessibility* of information already included in the guide – not to dictate the content of that guide. Proponents cannot use this provision to bootstrap new unrelated requirements, particularly given that ancillary jurisdiction is less likely where a regulation implicates content concerns.¹²

Even assuming that the Commission could find authority to act in this area, the burdens of such a mandate would greatly outweigh any ostensible benefits. Integrating any specific data about PEG channels into system-wide program guides poses unique challenges. A single cable system typically spans multiple different communities. In fact, a single integrated cable system often serves a dozen or more different franchise areas. And the number and content of PEG channels can vary from municipality to municipality. Unlike program guide information about the typical local broadcast station or national programming networks carried throughout a single cable system, information on PEG channel programming line-ups would need to be targeted to households within the relevant franchise area.

This would cause a significant – and costly – change in the manner in which program guide data is made available today. Cable operators typically work with outside program guide vendors to create the program information contained within the guide.¹³ The cable operator creates a “channel map” which is used in conjunction with the guide information and communicates to set-top boxes which channel is associated with the program displayed in the guide. Because there is typically a very limited number of channel maps in use within a system, attempting to incorporate franchise-specific PEG program data on a hyper-local basis would

¹¹ *American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

¹² *See, e.g., MPAA v. FCC*, 309 F. 3d 796 (D.C. Cir. 2002).

¹³ In addition to costs incurred by the cable operator for the significant operational changes such a mandate would require, local franchising authorities would also incur costs to incorporate their specific program descriptions within the third-party program guides used by the operator.

require the creation and use of substantially more channel maps within a cable system. This would entail complicated and costly changes, including, among other things, operational changes related to set-top control systems, billing system impacts, and physical modifications to the cable system's architecture. Forcing inclusion of PEG programming information would introduce significant complexity to system operations and would be highly resource intensive and burdensome, both initially during the architecture and configuration process, and also on an ongoing basis in managing the large number of channel maps and additional distribution equipment. For these and other reasons, the Commission should avoid any mandates in this area.

II. THE COMMISSION SHOULD NOT ADOPT ADDITIONAL REQUIREMENTS GOVERNING THE ACTIVATION OF ACCESSIBILITY FEATURES.

Section 205 requires that “for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key or icon designate for activating the closed captioning, or accessibility features”¹⁴

The Commission has already examined the scope of this provision, concluding that the access intended by this provision was to a mechanism that activated or deactivated closed captioning.¹⁵

The Commission should not expand this requirement to require a comparable mechanism to activate enhanced captioning features.¹⁶

The statutory text is limited, specifying that the mechanism requirement applies when activating “[closed captioning] capability.”¹⁷ Nothing in the statutory text suggests the same treatment is intended for activation of enhanced captioning display features such as font size,

¹⁴ 47 U.S.C § 303(bb)(2) (as amended by CVAA § 205(a)).

¹⁵ *See Report & Order* ¶ 85 (Section 303(bb)(2) “clearly applies to activation of closed captioning on navigation devices covered by Section 205.”).

¹⁶ *See FNPRM* ¶ 140 (asking whether Section 205 requires closed captioning settings such as “font, color, and size of captions” to be “activated via a mechanism similar to a button, key, or icon”).

¹⁷ 47 U.S.C. § 303(bb)(2) (as amended by CVAA § 205(a)).

color, and the like. There is no evidence that Congress in Section 205 had any such obligation in mind.

Moreover, mandating that operators design mechanisms for activating enhanced captioning display features would conflict with Congress's directive that the Commission provide MVPDs with "maximum flexibility" in this area,¹⁸ and would undermine, rather than advance, Section 205's intent to provide an easy captioning on/off mechanism.¹⁹ A subscriber that utilizes closed captioning may opt to change user settings only infrequently, so requiring a mechanism for the selection of additional menu features that are not commonly used risks making the activation process more complicated, not less. It should not be adopted.

The *Further Notice* also asks whether to require the provision of a similar "mechanism" to enable individuals who are blind or visually impaired to access emergency information that may be contained in a secondary audio stream.²⁰ However, the CVAA fails to provide such authority. Section 205 specifically references a "mechanism" for access to built-in closed captioning capability on navigation devices, and fails to provide generalized authority to require additional mechanisms.²¹ Section 203, upon which the *Further Notice* seeks comment, does not reference a mechanism at all. Under these circumstances, no additional authority to impose such a requirement can be inferred.²²

¹⁸ See CVAA § 205(b)(5).

¹⁹ Indeed, such an expansion of the requirement would make it less likely that an operator could use buttons on the limited space available on a remote control to activate captioning, if in so doing it would also be required to add at least one additional button dedicated to activating enhanced captioning display features.

²⁰ See *FNPRM* ¶¶ 145-47.

²¹ See 47 U.S.C § 303(bb)(2) (as amended by CVAA § 205(a)).

²² See *MPAA v. FCC*, 309 F.3d at 801 (explaining that "[s]tatutory provisions *in pari materia* normally are construed together to discern their meaning" (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972))). Congress clearly knew how to draft a provision requiring a mechanism. See *Report & Order* ¶ 142, n.551 (pointing out that both Sections 204 and 205 specifically reference a "mechanism"). Congress simply did not do so pursuant to Section 203.

In addition, while the *Further Notice* raises a concern about the ability of blind or visually impaired individuals to locate a secondary audio stream,²³ the audibly accessible menu provision is intended to address this concern. Blind or visually impaired cable customers will have audible access to on-screen material, including audible information about where to locate video description on the secondary audio stream.²⁴ And since the emergency information will be passed through on this same stream, no additional dedicated “mechanism” will be needed for blind or visually impaired customers to be able to readily locate it.

III. THE COMMISSION SHOULD NOT IMPOSE ADDITIONAL INFORMATION, DOCUMENTATION, TRAINING, OR MVPD NOTICE REQUIREMENTS.

Under the broad heading of “usability” requirements, the Commission asks whether it should impose “information, documentation, and training requirements” to implement Section 205.²⁵ It should not. Unlike Section 204, Section 205 does not include a “usability” provision.²⁶ In this context, the Commission therefore lacks the authority to impose an additional “usability” mandate.

Nor would it make sense to reflexively adopt these obligations given the types of changes to navigation devices mandated by Section 205. Because the requirements with respect to audible on-screen text menus and guides are only required “upon request,” necessary documentation and information can be targeted to customers requesting the device. Furthermore, the goal of the required mechanism for activation of closed captioning is simplicity – and if that

²³ *FNPRM* ¶ 145.

²⁴ *Report & Order* ¶ 58 (requiring certain “essential” functions including “Video Description Control: Function that allows the user to enable or disable the output of video description (i.e., allows the user to change from the main audio to the secondary audio stream that contains video description, and from the secondary audio stream back to the main audio”).

²⁵ *FNPRM* ¶ 139.

²⁶ Compare CVAA § 204(a) (requiring that covered apparatus be “accessible to and usable by”), with CVAA § 205(b)(1) (explaining that the Commission may “prescribe such regulations as are necessary to implement”).

goal is achieved, such formalized processes should be unnecessary. As a matter of course, information about using any new features of a navigation device would be readily available to consumers. No rule is necessary.

In addition, the rules already contemplate MVPD-provided notice of the availability of navigation devices with audible accessibility.²⁷ The new rules require that MVPDs: (1) clearly and conspicuously inform consumers about the availability of accessible navigation devices when providing information about equipment options in response to a consumer inquiry about service, accessibility, or other issues; and (2) prominently display accessibility information on their websites in a way that makes it available (and in an accessible format) to all current and potential customers of their products and services.²⁸ There is no reason to believe this notice will be insufficient.

CONCLUSION

For the foregoing reasons, the Commission should refrain from expanding its regulatory regime implementing Section 205 of the CVAA.

Respectfully submitted,

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²⁷ See Report & Order ¶¶ 133-34.

²⁸ See *id.* ¶ 134.