

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Accessibility of User Interfaces, and Video Programming Guides and Menus)	MB Docket No. 12-108
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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
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To: The Commission

**COMMENTS OF
DISH NETWORK L.L.C. AND ECHOSTAR TECHNOLOGIES L.L.C.**

EchoStar Technologies L.L.C. (“EchoStar”) and DISH Network L.L.C. (“DISH”) submit these comments regarding the further notice of proposed rulemaking in the above-captioned proceedings (“*Further Notice*”).¹ EchoStar and DISH support the goals of the *Further Notice* and Sections 204 and 205 of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) and recognize the importance of ensuring that consumers have access to communications technology.²

EchoStar and DISH urge the Commission to balance the goal of increasing access with the need to promote flexibility to innovate and compete. To provide consistency and avoid confusion within the industry, the Commission should rely on its well-established definition of “usable” for purposes of implementing Section 204 of the CVAA. The Commission also should

¹ *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 (2013) (“*Order*” and “*Further Notice*”).

² Pub. L. No. 111-260, §§ 204-205, 124 Stat. 2751, 2773-76 (2010) (“CVAA”). *See also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010).

avoid extending the requirements of Sections 204 and 205 beyond the classes of equipment and accessibility features specifically identified in those provisions. Rigid and overly prescriptive standards will deter the adoption of next-generation solutions that can serve the needs of individuals with disabilities more effectively, and at lower cost. All consumers, including individuals seeking increased accessibility, benefit when the Commission refrains from adopting regulations that unnecessarily restrain innovation.

I. THE COMMISSION SHOULD RELY ON THE DEFINITION OF “USABLE” IN SECTION 6.3(I) OF THE RULES TO IMPELEMENT THE USABILITY REQUIREMENTS OF SECTION 204 OF THE CVAA

The Commission should rely on its existing definition of “usable,” as laid out in Section 6.3(l) of the rules, to implement the usability requirements of Section 204 of the CVAA.³ As the *Further Notice* recognizes, the definition of “usable” in Section 6.3(l) is “well established,” and the Commission has relied on this definition in other CVAA contexts.⁴ Relying on the same definition in the Section 204 context will provide a consistent standard that affords clarity and predictability to covered entities as they proceed with their implementation efforts, “reduc[ing] ... the potential for misunderstanding” and “the regulatory cost of compliance.”⁵

In addition, this approach will promote the Commission’s objective of increased access to video programming while avoiding overly prescriptive regulatory requirements and maintaining the flexibility intended by Congress. In crafting the CVAA, Congress recognized that flexibility

³ See *Further Notice*, 28 FCC Rcd at 17413-14, ¶ 138.

⁴ *Id.*

⁵ *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*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14605-06, ¶ 115 (2011).

is paramount in rapidly evolving technologies and business models.⁶ Thus, the Commission must be careful not to unduly constrain companies' flexibility as it resolves the remaining issues in this proceeding.

The additional information, documentation, and training requirements proposed in the *Further Notice* are unnecessary and redundant, and should not be adopted.⁷ The Commission can ensure access to information, documentation, and product support by individuals who are blind or visually impaired simply by relying on its existing definition of "usable," which expressly requires that individuals with disabilities have access to product information, documentation, and technical support provided to individuals without disabilities.⁸ No additional requirements are needed to implement Section 204.

Similarly, there is no need for the Commission to adopt analogous rules to implement Section 205, which focuses on the availability of audibly accessible multichannel video programming guides and menus and the means for activating built-in closed captioning capability on navigation devices.⁹ Contrary to the *Further Notice*, additional information, documentation, and training requirements are not "necessary" to ensure that audibly navigation devices are available to requesting blind and visually impaired individuals and that access to built-in closed captioning is provided through a mechanism that is "reasonably comparable to a button, key, or icon."¹⁰ The rules that the Commission adopted to implement Section 205

⁶ See, e.g., CVAA §§ 104, 205(b)(4), (5) (codified at 47 U.S.C. §§ 617(a)(2), (b)(2), 619(b), and 303 note) (relating to industry flexibility); see also H.R. REP. NO. 111-386, at 24, 27, 30-32 (2010) (stating that covered entities should have great flexibility to implement the CVAA's requirements).

⁷ See *Further Notice*, 28 FCC Rcd at 17414, ¶ 139.

⁸ See 47 C.F.R. § 6.3(l); see also *id.* § 14.21(c).

⁹ See CVAA § 205(a) (codified at 47 U.S.C. § 303(bb)).

¹⁰ See *Further Notice*, 28 FCC Rcd at 17414-15, ¶ 139.

already impose requirements regarding the manner in which information about accessible navigation devices is made available to individuals with disabilities, as well as the means for blind and visually impaired individuals to request accessible navigation devices.¹¹ Accordingly, the Commission should not adopt additional requirements for navigation devices.

II. THE CVAA DOES NOT AUTHORIZE A MANDATE ON MECHANISMS FOR CLOSED CAPTION DISPLAY SETTINGS

The CVAA directs the Commission to require a mechanism for activating closed captioning, but not for configuring the captioning display. Indeed, contrary to the *Further Notice*,¹² Sections 204 and 205 of the CVAA do not allow the Commission to impose requirements on the means for users to access closed caption display settings. Section 205 requires that navigation devices include a means for accessing built-in closed captioning capability “through a mechanism [that] is reasonably comparable to a button, key, or icon designated for *activating* the closed captioning, or accessibility features.”¹³ Similarly, Section 204 requires covered digital apparatus to provide access to built-in “closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for *activating* the closed captioning or accessibility features.”¹⁴ The plain language of these provisions requires a “reasonably comparable” means for *activating* closed captioning (and video description in the case of Section 204 digital apparatus) on covered devices — *i.e.*, turning those features on and off.¹⁵

¹¹ See 47 C.F.R. § 79.108(a)(5), (d).

¹² See *Further Notice*, 28 FCC Rcd at 17415-16, ¶¶ 140-42.

¹³ CVAA § 205(a) (codified at 47 U.S.C. § 303(bb)(2)) (emphasis added).

¹⁴ *Id.* § 204(a) (codified at 47 U.S.C. § 303(aa)(3)) (emphasis added).

¹⁵ See *id.* §§ 204(a), 205(a).

However, the phrase “activating the closed captioning” does not encompass the configuration of closed caption display settings. Under the CVAA, covered digital apparatus and navigation devices must have the capability merely to *display* closed captioning. The statute does not require these devices to include the specific caption display features specified in the Commission’s rules.¹⁶ As indicated in the *IP Captioning Order*, the Commission adopted these caption display features “absent any guidance in the statute or legislative history,” citing a non-binding recommendation from an advisory committee that the online captioning experience replicate the television experience.¹⁷ Because the CVAA does not mandate inclusion of these closed caption display features, it would not make sense for the statute to require a “reasonably comparable” means for accessing these features. The configuration of closed caption display settings is beyond the scope of the CVAA’s required mechanism, and the Commission should not impose such a requirement with respect to these features.

III. SECTION 303(u)(1)(C) DOES NOT AUTHORIZE A COMMISSION MANDATE ON THE MEANS FOR ACCESSING THE SECONDARY AUDIO STREAM FOR EMERGENCY INFORMATION

The CVAA does not provide statutory authority to require apparatus to provide access to the secondary audio stream used for audible emergency information via any specified mechanism.¹⁸ Section 303(u)(1)(C) of the Act, which codifies a requirement imposed by Section

¹⁶ See *id.* § 203(a) (codified at 47 U.S.C. § 303(u)(1)(A), (z)(1)) (requiring that certain “apparatus” include “closed caption decoder circuitry or capability designed to display closed-captioned video programming”).

¹⁷ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 852-53, ¶ 112 (2012) (citing First Report of the Video Programming Accessibility Advisory Committee: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, at 13, available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf).

¹⁸ *Further Notice*, 28 FCC Rcd at 17418, ¶ 146.

203 of the CVAA, requires only that Section 203 apparatus “have the capability to decode and make available emergency information . . . in a manner that is accessible to individuals who are blind or visually impaired.” It does not make any reference to the mechanism used to access the secondary audio stream on Section 203 apparatus.¹⁹ In contrast, Sections 204 and 205 of the CVAA direct the Commission to ensure that access to built-in closed captioning capability on covered devices (and also video description on Section 204 digital apparatus) is available through a mechanism that is “reasonably comparable to a button, key, or icon.”²⁰ If Congress had intended for the Commission to require that access to the secondary audio stream for audible emergency information on apparatus covered by Section 203 be available via a mechanism “reasonably comparable to a button, key, or icon,” or any other specified mechanism, Congress would have stated so.

The absence of a “reasonably comparable” mechanism requirement in Section 203 precludes the Commission from imposing such a requirement in that context. The plain language of Section 203 places no restriction on the means by which covered devices make available audible emergency information.²¹ Moreover, courts have recognized that application of the *expressio unius est exclusio alterius* canon is appropriate where, as here, “one can be confident that a normal draftsman when he expressed ‘the one thing’ would have likely considered the alternatives.”²² Because Congress specifically required a mechanism reasonably

¹⁹ 47 U.S.C. § 303(u)(1)(C).

²⁰ CVAA §§ 204(a), 205(a) (codified at 47 U.S.C. § 303(aa)(3), (bb)(2)).

²¹ *See id.* § 203(a) (codified at 47 U.S.C. § 303(u)(1)(C)).

²² *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 999 (D.C. Cir. 2013) (quoting *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998)); *see also Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 421 (D.C. Cir. 2009) (stating “the general presumption that an omission is intentional where Congress has referred to something in one subsection but not in another”).

comparable to a button, key, or icon in Sections 204 and 205, it is reasonable to presume that Congress likely considered requiring such a mechanism in Section 203 as well. Congress did not do so in Section 203, however, and consequently the statute restricts the Commission from requiring such a mechanism in the Section 203 context.

IV. THE CVAA DOES NOT PROVIDE THE COMMISSION AUTHORITY TO IMPOSE REQUIREMENTS ON THE CONTENTS OF VIDEO PROGRAMMING GUIDES AND MENUS

The CVAA does not grant the Commission authority to require “high level channel and program descriptions and titles” and other information in video programming guides and menus provided by navigation devices.²³ Section 205 of the CVAA contains all of the accessibility requirements that the statute imposes on multichannel video programming guides and menus, and none of those requirements governs the underlying content in those guides and menus.²⁴ As stated in the *Order*, Section 205 “requires that *if* there is text in a menu or program guide on the screen, then *that text* must be audibly accessible,” if achievable.²⁵ Section 205 does not impose requirements with regard to what substantive information must appear in the on-screen text.²⁶

Moreover, the CVAA contains a number of provisions that express Congress’s intent to preserve industry flexibility,²⁷ and Section 205 explicitly directs the Commission to “provide the maximum flexibility” to covered entities to select the manner of compliance with the

²³ *Further Notice*, 28 FCC Rcd at 17417, ¶ 144.

²⁴ *See* CVAA § 205 (codified at 47 U.S.C. § 303(bb) and note).

²⁵ *Order*, 28 FCC Rcd at 17377, ¶ 75.

²⁶ *Id.*

²⁷ *See supra* note 6.

requirements in that section.²⁸ Dictating the contents of video programming guides and menus would contravene these objectives.

V. THE COMMISSION SHOULD NOT IMPOSE ADDITIONAL NOTIFICATION REQUIREMENTS ON MVPDS AND EQUIPMENT MANUFACTURERS

The *Further Notice* asks whether additional notification requirements should be applied to MVPDs and equipment manufacturers.²⁹ Such action is unnecessary, as the FCC has already imposed notification requirements on MVPDs that are sufficient to inform consumers. The Commission’s rules already require MVPDs to “clearly and conspicuously inform consumers about the availability of accessible navigation devices”³⁰ and “provide notice on their official websites about the availability of accessible navigation devices.”³¹ In addition, the Commission has tentatively concluded that equipment manufacturers should also “prominently display accessibility information on their official websites.”³² Any additional notification requirements for MVPDs and equipment manufacturers may increase costs, which could negatively impact consumer access to next generation technology.

²⁸ CVAA § 205(b)(4).

²⁹ See *Further Notice*, 28 FCC Rcd at 17419-20, ¶¶ 148, 150.

³⁰ 47 C.F.R. § 79.108(d)(1).

³¹ *Id.* § 79.108(d)(2).

³² *Further Notice*, 28 FCC Rcd at 17419, ¶ 150.

VI. CONCLUSION

EchoStar and DISH share the Commission’s goal of facilitating increased access to video programming on navigation devices and digital apparatus as provided in the CVAA. However, the statute requires that any new regulations preserve industry flexibility, as this will enable innovation that benefits all consumers, including those with disabilities. Therefore, the Commission should avoid imposing requirements that are not specifically mandated by the plain language of the CVAA.

Respectfully submitted,

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