

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

In the Matter of: )  
**Closed Captioning of Internet** )  
**Protocol-Delivered Video** )  
**Programming** ) MB Docket No. 11-154  
**Closed Captioning of Video** ) CG Docket No. 05-231  
**Programming;** )  
**Telecommunications for the** )  
**Deaf, Inc. Petition for** )  
**Rulemaking**

**Reply Comments of**

**Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)**  
**National Association of the Deaf (NAD)**  
**Hearing Loss Association of America (HLAA)**  
**Association of Late-Deafened Adults (ALDA)**  
**Cerebral Palsy and Deaf Organization (CPADO)**  
**Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)**  
**Technology Access Program at Gallaudet University (TAP)**

*via electronic filing*  
March 5, 2014

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## Summary

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Cerebral Palsy and Deaf Organization (CPADO), and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), collectively, “Consumer Groups,” joined by the Technology Access Program at Gallaudet University (TAP), respectfully reply to the comments filed in response to the Commission’s *Public Notice* in the above-referenced docket.<sup>1</sup> The Commission’s recent pronouncements in the *Caption Quality Order* underscore the CVAA’s clear requirement that video clips be captioned. The comments in this proceeding underscore that the Commission’s hope that voluntary clip captioning efforts would fulfill the CVAA’s promise has not come to fruition, and that requiring video programmers to caption video clips is both necessary and achievable. We therefore urge the Commission to ubiquitously require the captioning of clips, rejecting the loopholes requested by some commenters in this proceeding, within a reasonable timeframe of no more than one year.

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<sup>1</sup> *Media Bureau Seeks Comment on Application of the IP Closed Captioning Rules to Video Clips*, MB Docket No. 11-154, 28 FCC Rcd. 16,699 (Dec. 13, 2013) (“*Public Notice*”).

## Discussion

### I. **Covering video clips under the Commission’s IP captioning rules is necessary to ensure the continuing promise of equal access to video programming for all Americans under the CVAA and the 1996 Act.**

Chairman Tom Wheeler emphasized in the Commission’s adoption of television closed caption quality standards late last month that “reliable and consistent access to news and information for deaf and hard of hearing communities is a *right*.”<sup>2</sup> The Commission’s landmark *Caption Quality Order* continued a long-standing march down the path toward the promise of equal access to television programming enshrined in the Telecommunications Act of 1996 (“1996 Act”) and the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”).

Yet, as Commissioner Jessica Rosenworcel noted, the Commission still “must address the way we will watch [television] going forward.”<sup>3</sup> Indeed, “[t]elevision viewing is changing fast” in the migration to IP-delivered programming, and the Commission’s closed captioning policies “must keep pace” to vindicate the civil rights of millions of Americans who are deaf or hard of hearing.<sup>4</sup>

In the *Caption Quality Order*, the Commission broadly acknowledged the importance of maintaining equal access through closed captions in a rapidly evolving video

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<sup>2</sup> *Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc. Petition for Rulemaking, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking*, CG Docket No. 05-231, PRM-11-CG (Feb. 24, 2014) (“*Caption Quality Order*”), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0224/FCC-14-12A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A1.pdf); Statement of Chairman Tom Wheeler, at 1, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0224/FCC-14-12A2.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A2.pdf) (emphasis original).

<sup>3</sup> *Caption Quality Order*, Statement of Commissioner Jessica Rosenworcel, at 1, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0224/FCC-14-12A4.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A4.pdf).

<sup>4</sup> *Id.*

programming marketplace. Commissioner Mignon Clyburn noted the importance of refreshing the Commission’s captioning policy “to reflect the technological and societal changes which have transpired.”<sup>5</sup> Commissioner Ajit Pai commended the value of bringing the Commission’s captioning rules “into the 21st century.”<sup>6</sup> Finally, Commissioner Michael O’Rielly lauded “build[ing] upon th[e] foundation” of the Commission’s more than 16 years of experience in developing closed captioning rules.<sup>7</sup>

While the Commission’s 2012 order requiring closed captioning for video programming delivered via Internet Protocol (“IP”) “made good” on the CVAA’s promise of equal access to the next generation of full-length programming, Commissioner Rosenworcel emphasized that the *IP Captioning Order* “fell short for television video clips”—a shortcoming that the Commission “need[s] to fix”:

[O]ur accessibility policies must be about more than just how we watch now—they must be about the future. And the future of viewing, for all of us, including the deaf and hard of hearing, will involve more than gathering around the traditional television screen for programs of uniform 30- or 60-minute length. It will involve many screens, with more television programming sliced and diced into smaller increments, for later viewing online.<sup>8</sup>

Commissioner Rosenworcel’s message was clear: covering video clips under the Commission’s captioning rules is critical to achieving and maintaining equal access to video programming for Americans who are deaf or hard of hearing.

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<sup>5</sup> *Caption Quality Order*, Statement of Commissioner Mignon L. Clyburn, at 1, *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0224/FCC-14-12A3.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A3.pdf).

<sup>6</sup> *Caption Quality Order*, Statement of Commissioner Ajit Pai, at 1, *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0224/FCC-14-12A5.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A5.pdf).

<sup>7</sup> *Caption Quality Order*, Statement of Commissioner Michael O’Rielly, at 1, *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0224/FCC-14-12A6.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A6.pdf).

<sup>8</sup> *Caption Quality Order*, Statement of Commissioner Rosenworcel, at 1.

## II. The CVAA requires video clips to be captioned.

As we have outlined in our petition for reconsideration of the *IP Captioning Order* and other filings in this proceeding, covering video clips under the Commission's captioning rules is not only sound public policy, it is unambiguously required by the CVAA and necessary to avoid an impermissibly arbitrary and capricious result.<sup>9</sup> Unfortunately, some commenters continue to urge the Commission to undermine the clear application of the CVAA's requirements to video clips by engaging in procedural chicanery or substituting misinterpretations of the CVAA's legislative history for its plain text.<sup>10</sup>

We have rebutted these meritless arguments in detail in our prior filings.<sup>11</sup> In lieu of rehashing them again here, we simply urge the Commission to follow Congress's plain intent in enacting the CVAA as concisely articulated by its drafters, Senator Mark Pryor and Senator Edward Markey:

When we wrote the CVAA, it was our intent that full-length programming that has been broadcast on television with captions after the effective date of the Commission's rule be shown with captions when the programming is delivered using IP even if such programming is shown on the Internet in segments and even when some but not all segments are posted online.<sup>12</sup>

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<sup>9</sup> *E.g.*, *Petition for Reconsideration of TDI, et al.*, MB Docket No. 11-154, at iv, 1-17 (Apr. 27, 2012), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017032686>; Reply of TDI, et al., MB Docket No. 11-154, at 1-9, available at <http://apps.fcc.gov/ecfs/document/view?id=7021923411> ("*TDI Reply*").

<sup>10</sup> *See, e.g.*, *Comments of DIRECTV, LLC*, MB Docket No. 11-154, at 1-2 (Feb. 3, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521070848> ("*DIRECTV Comments*"); *Comments of National Association of Broadcasters ("NAB")*, MB Docket No. 11-154, at 11-16 (Feb. 3, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521070863> ("*NAB Comments*"); *Comments of the Digital Media Association ("DiMA")*, MB Docket No. 11-154, at 2-5 (Feb. 3, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521070904>.

<sup>11</sup> *See generally, e.g.*, *TDI Reply*.

<sup>12</sup> *Ex Parte of Senator Mark Pryor and Senator Edward J. Markey*, MB Docket No. 11-154, at 1 (Dec. 6, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7520961170>; *see*

Nothing in the lengthy record in this proceeding remotely refutes the undeniable reality that Congress both intended video clips to be captioned and vested the Commission with the responsibility to ensure that video programmers met this basic obligation to their customers who are deaf or hard of hearing.

### **III. The Commission has afforded video programmers ample opportunity and sufficient time to voluntarily caption video clips.**

Notwithstanding Congress's plain intent, the Commission has given programmers multiple chances over the span of more than two years to voluntarily cover video clips in the absence of a formal requirement to do so. In the January 2012 *IP Captioning Order*, the Commission "encourage[d] the industry to make captions available on all TV news programming that is made available online, even if it is made available through the use of video clips."<sup>13</sup> The Commission warned, however, that "[i]f [it] find[s] that consumers who are deaf or hard of hearing are not getting access to critical areas of programming, such as news, because of the way the programming is posted (e.g., through selected segments rather than full-length programs), [the Commission will] reconsider this issue to ensure that our rules meet Congress's intent to bring captioning access to individuals viewing IP-delivered programming."<sup>14</sup>

After Consumer Groups presented detailed findings in May 2013 demonstrating that the industry had largely failed to deliver on the promise of voluntarily captioning video clips in nearly a year and a half, the Commission nevertheless gave programmers another chance by deferring a final decision on whether to cover clips for six months until the end

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*also Ex Parte of Senator Mark Pryor and Senator Edward J. Markey*, MB Docket No. 11-154, at 1 (Jan. 10, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021753144>.

<sup>13</sup> *IP Captioning Order*, 27 FCC Rcd. at 818, ¶ 48.

<sup>14</sup> *Id.*

of 2013—nearly two years after the adoption of the *IP Captioning Order*.<sup>15</sup> In the *IP Captioning Order on Reconsideration*, the Commission noted its “expect[ation] that entities subject to the IP closed captioning rules will have developed more efficient processes to handle captioning of live and near-live programming, including news clips that are posted on websites” and “thus . . . that these entities voluntarily will caption an increased volume of video clips, particularly news clips.”<sup>16</sup> The Commission noted that it would “monitor industry actions with respect to captioning of video clips” and that if the record developed as part of the *Public Notice* “demonstrate[d] that consumers are denied access to critical areas of video programming due to lack of captioning of IP-delivered video clips, [the Commission] may reconsider [its] decision on this issue.”<sup>17</sup>

Unfortunately, some commenters in this proceeding now urge further delay in this proceeding without regard to the record developed over the past two years since the *IP Captioning Order*. In particular, one commenter urges the Commission to issue another notice of proposed rulemaking that would ask precisely the same questions already posed in the Commission’s *Public Notice*—to which the *Consumer Groups May 2013* and *February 2014 Reports* replied in great detail.<sup>18</sup>

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<sup>15</sup> *Closed Captioning of Internet Protocol-Delivered Video Programming, Order on Reconsideration and Further Notice of Proposed Rulemaking*, MB Docket No. 11-154, 28 FCC Rcd. 8785, 8803-04, ¶ 30 & nn.124-125 (June 14, 2013) (“*IP Captioning Order on Reconsideration*”) (citing *Closed Captioning of Internet Protocol-Delivered Video Programming, Report and Order*, MB Docket No. 11-154, 27 FCC Rcd. 787, 816-18, ¶¶ 44-48 (Jan. 13, 2012) (“*IP Captioning Order*”); *Report of TDI, et al.*, MB Docket No. 11-154, at ii-iii, 5-13, 18-20 (May 16, 2013) (“*Consumer Groups May 2013 Report*”), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017341205>).

<sup>16</sup> *Id.* at 8804, ¶ 30.

<sup>17</sup> *Id.*

<sup>18</sup> See *DiMA Comments* at 2, 8-9. See generally *Consumer Groups May 2013 Report; Comments of TDI, et al.*, MB Docket No. 11-154 (Feb. 3, 2014) (“*Consumer Groups February 2014 Report*”), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017587315>.

We urge the Commission to decline these invitations to needlessly delay recognizing the civil rights of Americans who are deaf or hard of hearing in the name of rebuilding a record that already exists. In the *Caption Quality Order*, Commissioner Pai expressed concern over the Commission’s delay in acting on a well-established record, noting that a lengthy delay in that proceeding not only denied people who are deaf or hard of hearing “the fair and timely hearing they deserved” but forced the Commission “to work from a less-than-current record.”<sup>19</sup> Commissioner Pai emphasized that allowing a record to go stale, as commenters now urge, “isn’t the way [the Commission] should do business.”<sup>20</sup>

We agree. Video programmers have received ample notice from the Commission and the deaf and hard of hearing community that captioning video clips is a critical priority and had sufficient time to make substantial voluntary progress towards doing so. Moreover, the record demonstrates that progress has not materialized.

#### **IV. Video programmers have provided little evidence of meaningful efforts to adequately captioned video clips on a voluntary basis.**

Although we have remained skeptical that voluntary captioning efforts can fulfill the CVAA’s promise of equal access to video clips, we have nevertheless heeded Chairman Wheeler’s admonition to “give it a try” by examining in good faith the extent to which voluntary captioning has actually materialized.<sup>21</sup> To do so, we have painstakingly conducted—at great strain on the limited time and resources of non-profit organizations and legal clinics—two detailed reports on the state of captioning on IP-delivered programming that focus specifically on the delivery of video clips. These reports demonstrate that voluntary progress toward captioning clips has simply not materialized to the extent the Commission—and consumers—hoped it would.

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<sup>19</sup> *Caption Quality Order, Statement of Commissioner Pai*, at 1.

<sup>20</sup> *Id.*

<sup>21</sup> *C.f. Caption Quality Order, Statement of Chairman Wheeler*, at 1.

In the first report, filed in May 2013, we observed that a substantial majority of video clips, as well as clip-like segments that together constituted full-length programming subject to the Commission’s rules, were not being captioned:

[T]he vast majority of segments and clips that we observed were provided without captions. Specifically, 76% of our observations of videos that we suspected constituted [covered] segments found uncaptioned programming, including 70% of our observations of news segments and 93% of our observations of non-news segments. . . . 87% of our observations of video clips found uncaptioned programming, including 77% of our observations of news clips and 90% of our observations of non-news clips.<sup>22</sup>

Acknowledging the *Consumer Groups May 2013 Report* in the *IP Captioning Order on Reconsideration*, the Commission nevertheless expressed hope that voluntary captioning of clips would increase following the passage of the March 2013 deadline for captioning IP-delivered live and near-live programming.<sup>23</sup> Accordingly, we generated a second report, filed in February 2014, that again observed a majority of clips and segments—including news clips—being delivered without captions.<sup>24</sup>

In addition to preparing these reports, we supported the motion of video programmers to extend the comment deadlines in the proceeding in the hope that it would “provide additional time for stakeholders to provide more detailed and thorough information in response to the Commission’s inquiry.”<sup>25</sup> We did so in good faith reliance

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<sup>22</sup> *Consumer Groups May 2013 Report* at iii, 9-13.

<sup>23</sup> *IP Captioning Order on Reconsideration*, 28 FCC Rcd. at 8803-04, ¶ 30 n125 (citing *Consumer Groups May 2013 Report* at ii-iii, 5-13, 18-20).

<sup>24</sup> *Consumer Groups February 2014 Report* at v, 8-12.

<sup>25</sup> *Support for NAB’s Motion for Extension of Time of TDI, et al.*, MB Docket No. 11-154, at 1 (Jan. 21, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521067185>.

on the programmers' promise that more time would allow them to "conduct a more thorough review" of captioning practices for video clips.<sup>26</sup>

Unfortunately, the comments of those programmers and others in this proceeding offer little evidence that would serve to rebut the findings in our reports—or quantifiable evidence of efforts toward meeting the Commission's repeated admonitions to programmers to begin voluntarily captioning their content. For example, the National Association of Broadcasters ("NAB") claims in a heading that "Broadcasters Are Captioning Online Video Clips Without A FCC Requirement"—but offers no details beyond vague, conclusory, and anecdotal claims of "great strides" toward captioning that are unfortunately inconsistent with our actual observations.<sup>27</sup> Alas, NAB dedicates less space in its comments to quantifying or explaining any actual efforts by broadcasters to caption video clips or describing any of its own efforts to measure that captioning than it does to speculative criticisms of our earlier report and baseless procedural critiques of our petition.<sup>28</sup> The National Cable and Telecommunications Association ("NCTA") similarly provides only a handful of anecdotal examples that suggest little, if any, systematic progress toward captioning clips.<sup>29</sup> Finally, DIRECTV and the Digital Media Association ("DiMA") focus almost entirely on the difficulty of captioning clips and offer no meaningful evidence that programmers are acting to caption clips.<sup>30</sup>

Programmers are in a far better position than consumers and viewers to identify the extent to which they have engaged in systematic efforts to caption clips. Their relative

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<sup>26</sup> See *Motion for Extension of NAB*, MB Docket No. 11-154, at 2 (Jan. 17, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521066457>.

<sup>27</sup> See *NAB Comments* at 3-10.

<sup>28</sup> See *id.* at 12-16.

<sup>29</sup> See *Comments of National Cable and Telecommunications Association ("NCTA")*, MB Docket No. 11-154, at 3-5 (Feb. 3, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521070914>.

<sup>30</sup> See *DIRECTV Comments* at 1-4; *DiMA Comments* at 5-7.

silence on that score speaks volumes—and underscores our observations that the Commission’s hope that programmers would caption their clips simply has not come to fruition in the absence of a formal requirement to do so.

**V. The record in this proceeding demonstrates that captioning clips is technologically feasible and economically achievable.**

While the record is largely devoid of evidence of systematic voluntary clip captioning efforts, it is replete with complaints about barriers to doing so. NAB, NCTA, DIRECTV, and DiMA all assert that captioning clips is technically difficult and economically burdensome.<sup>31</sup>

However, our observations—and programmers’ anecdotes—suggest that video programmers with the inclination to caption their clips have little difficulty in overcoming whatever barriers to doing so might exist. In particular, both our report and NCTA’s and NAB’s comments indicate that a limited subset of programmers are able and willing to caption most or all of their clips—even where other programmers similarly situated in size and operation have failed to do so.<sup>32</sup> These examples rebut programmers’ speculative claims that requiring clip captioning would pose untenable technical or economic obstacles—and instead suggest that many programmers are simply choosing not to caption their clips because the Commission’s rules do not require it.

**VI. The Commission should require ubiquitous clip captioning within a reasonable timeframe.**

The record in this proceeding makes clear that voluntary efforts to caption clips, while possible, have not materialized. We believe it is time for the regulatory “see-saw” to shift in the direction of covering clips under the Commission’s IP captioning rules and for

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<sup>31</sup> See e.g., *id.*; *NAB Comments* at 3; *NCTA Comments* at 5-6.

<sup>32</sup> See *Consumer Groups January 2014 Report* at v, 8-12, 17-18; *NAB Comments* at 7-10; *NCTA Comments* at 3-5.

the Commission to follow Commissioner Rosenworcel’s admonition to fix this critical shortcoming in the Commission’s implementation of the CVAA.

Moreover, we urge the Commission to decline DiMA’s invitation to promulgate a clip captioning rule riddled with unjustifiable and arbitrary loopholes that would unnecessarily deny consumers who are deaf or hard of equal access to video clips. In particular, the Commission should reject a five-minute threshold for clips—an antiquated threshold for advertising derived in a context with no relationship to video clips more than a decade and a half ago.<sup>33</sup>

The Commission should also reject DiMA’s call to limit the coverage of clips to news programming.<sup>34</sup> While equal access to news programming is a cornerstone of the CVAA’s promise, it would be absurd and arbitrary to conclude that the civil rights of viewers who are deaf or hard of hearing are confined to the newsroom and do not extend to the critical cultural, informational, and economic opportunities that stem from non-news programming.<sup>35</sup> DiMA’s distinction, for example, would deny children who are deaf or hard of hearing equal access to the developmental opportunities of educational programming and veterans with combat-related hearing loss access to entertainment programming as they recover from injuries sustained during service.

Finally, the Commission should reject DiMA’s calls to (a) exempt video players that play clips from the user configuration requirements of Rule 79.103(c) and (b) to apply clip captioning requirements only prospectively.<sup>36</sup> The Commission urged voluntary clip captioning for more than two years on the premise that voluntary efforts would provide

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<sup>33</sup> See *DiMA Comments* at 9-10.

<sup>34</sup> See *id.* at 11-12

<sup>35</sup> *C.f. IP Captioning Order on Reconsideration*, 28 FCC Rcd. at 8804, ¶ 30 n.129 (“We note that news is only one type of programming that may be made available online through video clips.”).

<sup>36</sup> See *DiMA Comments* at 12, 13-14.

viewers who are deaf or hard of hearing equal access to clips without the need for regulation. The Commission should not reward the inaction of player designers and programmers at the expense of the CVAA’s promise of equal access, and should continue to require full compliance with Rule 79.103(c)’s critical requirements for all players and adopt rules covering “archival” video clips—just as the Commission did with full-length programming.<sup>37</sup>

Nevertheless, we acknowledge and agree in principle with DiMA’s call for a reasonable phase-in period.<sup>38</sup> While we believe that two years is too long in light of the more than three years that programmers have had to prepare for captioning clips since Congress enacted the CVAA, we would support a one-year phase-in period and urge the Commission to proceed quickly toward that end.

Respectfully submitted,

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<sup>37</sup> See 47 C.F.R. § 79.4(b)(4).

<sup>38</sup> See *DiMA Comments* at 13.

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