

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Accessibility of User Interfaces, and Video	)	MB Docket Nos. 12-108
Programming Guides and Menus; Accessible	)	12-107
Emergency Information, and Apparatus	)	
Requirements for Emergency	)	
Information and Video Description:	)	
Implementation of the Twenty-First	)	
Century Communications and Video	)	
Accessibility Act of 2010	)	

**REPLY COMMENTS OF THE  
ALLIANCE FOR COMMUNICATIONS  
DEMOCRACY**

James N. Horwood  
Tillman L. Lay  
SPIEGEL & MCDIARMID LLP  
1333 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 879-4000

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The Alliance for Communications Democracy (“ACD”) submits these comments in reply to the opening comments filed in response to the Further Notice of Proposed Rulemaking in this proceeding.<sup>1</sup>

## INTRODUCTION AND SUMMARY

In its opening comments, ACD responded directly to the questions raised in the *FNPRM* concerning requiring MVPDs to provide adequate program description of PEG programming on their video programming guides (“VPGs”). ACD explained why the Commission has legal authority under the CVAA,<sup>2</sup> as well as its ancillary Title I authority, to impose such a requirement.<sup>3</sup> ACD also furnished evidence demonstrating that including PEG program description information on VPGs is technically feasible and should impose no significant cost burden on MVPDs.<sup>4</sup>

Industry’s opening comments opposing such a requirement, in contrast, fell well short of the mark. As we show in Part I below, the arguments challenging the Commission’s legal authority to require MVPDs to provide the same type of program description information for PEG channels as they routinely do for other channels rest on an improperly narrow view of the Commission’s authority and are contrary to the goals of the CVAA. And as we point out in Part II below, the industry commenters provided only unsupported rhetoric, not evidence, in response

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<sup>1</sup> Report and Order (“*R&O*”) and Further Notice of Proposed Rulemaking (“*FNPRM*”), FCC 13-138, *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*, MB Docket Nos. 12-108, 12-107, 28 FCC Rcd. 17,330 (2013).

<sup>2</sup> Pub. L. No. 111-260, §§ 204(a) and 205(a), 124 Stat. 2774, 2775 (2010) (“CVAA”), *codified at* 47 U.S.C. §§ 303(aa) and 303(bb).

<sup>3</sup> Comments of the Alliance for Communications Democracy at 3-7, Feb. 18, 2014, *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108 (“ACD Comments”).

<sup>4</sup> *Id.* at 7-9, Exs. 1, 2.

to the *FNPRM*'s request (§ 44) for information on the technical feasibility and costs to implement PEG program descriptions on their VPGs.

**I. INDUSTRY'S CHALLENGE TO THE COMMISSION'S AUTHORITY TO IMPOSE A PROGRAM DESCRIPTION REQUIREMENT FOR VPGs IS UNAVAILING.**

DISH Network,<sup>5</sup> NCTA,<sup>6</sup> and Verizon<sup>7</sup> argue that the Commission lacks authority to request them to provide program descriptions in their VPGs. They are wrong.

**A. Industry Is Wrong in Suggesting that the CVAA or the Cable Act Bar the Commission for Requiring Program Descriptions in VPGs.**

DISH, NCTA and Verizon each point to the statement in the *R&O* (§ 75) reciting the argument that Section 205 of the CVAA “does not impose requirements with regard to what substantive information must appear in the on-screen text.”<sup>8</sup> As an initial matter, they ignore the sentences preceding and following that passage in the *R&O* (§ 75), which state that the Commission is *not* “decid[ing] this issue at this time” (*id.*).

More fundamentally, industry commenters fail to come to grips with the fact that MVPDs' failure to provide program-specific information for PEG channels on VPGs disparately, and adversely, impacts visually-impaired subscribers.<sup>9</sup> If, as industry contends,<sup>10</sup> the Commission were powerless to construe the CVAA terms “video programming guides” and

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<sup>5</sup> Comments of DISH Network L.L.C. and EchoStar Technologies L.L.C. at 7-8, Feb. 18, 2014, *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108 (“DISH Comments”).

<sup>6</sup> Comments of the National Cable & Telecommunications Association at 2-4, Feb. 18, 2014, *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108 (“NCTA Comments”).

<sup>7</sup> Comments of Verizon and Verizon Wireless on *Further Notice of Proposed Rulemaking* at 8-10, Feb. 18, 2014, *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108 (“Verizon Comments”).

<sup>8</sup> DISH Comments at 7; NCTA Comments at 3; Verizon Comments at 8.

<sup>9</sup> ACD Comments at 5-6.

<sup>10</sup> NCTA Comments at 3 & n.9.

“video programming information” to ensure that they provide sufficient information so that, when made audibly accessible, they actually provide useful information to the visually impaired, the CVAA would be emptied of all meaning.

But the Commission clearly has such authority. If the Commission has authority to construe the terms of 47 U.S.C. § 332(c)(7), notwithstanding its specific provision for court, rather than FCC, remedies and the absence of any explicit FCC rulemaking authority with respect to Section 332(c)(7),<sup>11</sup> then the Commission surely has authority to construe the meaning of “video programming guide” and “video programming information” in the CVAA, which unlike Section 332(c)(7), also specifically empowers the Commission to adopt implementing regulations.

NCTA (at 3) and Verizon (at 9) also assert that requiring program descriptions in VPGs would run afoul of Section 624(f)(1) of the Communications Act, which bars the Commission from “impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in this title.” 47 U.S.C. § 544(f)(1). But this argument is doubly flawed. First, the “content of cable services” referred to in Section 624(f)(1) is just that: the content of the cable services offered over a cable system. A description of programming in a VPG is nothing but a description of cable service; it is not the content of the cable service itself. Second, because Section 205(b) of the CVAA gives the Commission authority to construe the CVAA’s terms and to implement the requirements of the CVAA, Congress has given the Commission the authority to define what constitutes an adequate “video programming guide” and adequate

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<sup>11</sup> *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013).

“video programming information” for purposes of the CVAA, and that authority, which post-dates Section 624(f)(1), trumps any inconsistency in Section 624(f)(1).<sup>12</sup>

In the end, all that ACD asks is that MVPDs be prohibited from singling out and selectively refusing to permit some programmers, like PEG channels, from providing the type of VPG program descriptions for their channels that MVPDs routinely permit almost all other channel programmers to provide for their channels on MVPDs’ systems. Given the unique importance of adequate program description to the visually impaired,<sup>13</sup> permitting MVPDs to pick and choose which channels that they will permit to have program descriptions and which they will not would eviscerate the CVAA’s requirement that VPG information be audibly accessible to the visually-impaired.

**B. Verizon’s First Amendment Argument Is Misguided.**

Verizon (at 9-10) claims that requiring MVPDs to permit programmers to provide program description information for MVPDs’ VPGs raises First Amendment concerns. Verizon is mistaken. In *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 430-32 (9th Cir. 2014) (“*CNN*”), the Ninth Circuit rejected CNN’s analogous First Amendment challenge to a state law requiring CNN to close caption its CNN.com website. Like the closed captioning requirement at issue there, a VPG program description requirement would unquestionably serve the federal government’s “legitimate and substantial interests in preventing discrimination and ensuring equal access to the [visually-impaired].” *Id.* at 431. Further, like a captioning requirement, a VPG program description requirement “would not significantly

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<sup>12</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>13</sup> ACD Comments at 4-7 and sources cited therein.

interfere with program content.”<sup>14</sup> Program description merely identifies the content of programming that the MVPD already carries on its system, an identification that the record makes plain is critical to enable visually-impaired subscribers to locate that programming on an MVPD’s system.<sup>15</sup> Moreover, MVPDs do not even generate VPG program descriptions; programmers do, and they are typically submitted directly to the MVPD’s third-party VPG vendor.<sup>16</sup>

## **II. INDUSTRY COMMENTERS FAILED TO RESPOND TO THE *FNPRM*’S REQUEST FOR EVIDENCE ABOUT THE FEASIBILITY AND COST OF VPG PROGRAM DESCRIPTIONS.**

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The *FNPRM* (§ 144) sought “comment from industry members on any technical issues that MVPDs may face in complying with a requirement to include specific information in [VPGs] and menus, and in particular whether it is technically feasible for operators to provide this specific information for PEG or other programs.” The *FNPRM* (*id.*) also sought information on “the costs that would be incurred by MVPDs . . . to comply with such a requirement.”

Industry failed to respond meaningfully to the *FNPRM*’s requests. To be sure, NCTA (at 4-5) and Verizon (at 9-11) claim that, due to the regional nature of their systems, inserting PEG program description information for all of the various PEG channels within the region would impose unspecified additional costs and inconvenience on them. But they provided no factual evidence supporting their assertions, only generalized rhetoric.

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<sup>14</sup> *Id.* at 432 (quoting *Gottfried v. FCC*, 655 F.2d 297, 311 n.54 (D.C. Cir. 1981), *rev’d on other grounds*, *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1983)). *Accord In re Closed Captioning of Internet Protocol-Delivered Video Programming*, 27 FCC Rcd. 787, 804 (2012) (“closed captioning requirements implicate the First Amendment only marginally at best”); *In re Implementation of Video Description of Video Programming*, 15 FCC Rcd. 15230, 15255 (2000), *clarified*, 16 FCC Rcd. 1251 (2001), *vacated in part, rev’d in part on other grounds*, *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

<sup>15</sup> ACD Comments at 5-7.

<sup>16</sup> *Id.* at 9, Ex. 2 at 3-4; NCTA Comments at 4.

ACD, in contrast, supplied evidence demonstrating the technical and cost feasibility of MVPD inclusion of PEG program descriptions in VPGs. It pointed to evidence already in the record of locations where cable operators are in fact providing PEG program descriptions in their VPGs.<sup>17</sup> ACD also supplied an additional specific example of this practice: PEG program listings on Comcast’s VPG in San Jose.<sup>18</sup> And finally, ACD provided a report prepared by an engineer, which concluded that there are no significant technical or cost barriers to video service providers’ inclusion of PEG program description information in their VPGs.<sup>19</sup> In particular, the report analyzed the very scenario raised in NCTA’s and Verizon’s comments—provision of PEG program description information in VPGs where the MVPD’s system covers a larger regional area—and found that “[a] requirement that a cable operator provide full VPG functionality to PEG access channels within a service area is minimal when viewed in light of the several hundred channels carried on a typical cable system and on a typical VPG.”<sup>20</sup>

In short, the record before the Commission points to but one conclusion: The benefits to the visually-impaired of providing PEG program information on VPGs far outweighs any cost or burden on MVPDs of providing that program information.

### **CONCLUSION**

For the foregoing reasons and those set forth in ACD’s opening comments, the Commission should require cable operators and other MVPDs that carry PEG programming to provide in their VPGs program description information on PEG programming equivalent to the

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<sup>17</sup> ACD Comments at 7-8 & nn.14, 15.

<sup>18</sup> *Id.* at 8-9, Ex. 1.

<sup>19</sup> *Id.* at 9, Ex. 2.

<sup>20</sup> *Id.*, Ex. 2 at 3.

program description information that they make available in their VPGs for other video programming channels.

Respectfully submitted,

*/s/ James N. Horwood*

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James N. Horwood  
Tillman L. Lay  
SPIEGEL & MCDIARMID LLP  
1333 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 879-4000

*Counsel for the Alliance For  
Communications Democracy*

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