

Before the
Federal Communications Commission
Washington, DC

In the Matter of:)
)
Closed Captioning of Video)
Programming) CG Docket No. 05-231
) PRM-11-CG
Telecommunications for the)
Deaf, Inc. Petition for)
Rulemaking)

Comments of

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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)
California Coalition of Agencies Serving the
Deaf and Hard of Hearing (CCASDHH)
American Association of the Deaf-Blind (AADB)
Speech Communication Assistance by Telephone (SCT)
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Summary

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), the Cerebral Palsy and Deaf Organization (CPADO), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), the American Association of the Deaf-Blind (AADB), and Speech Communication Assistance by Telephone (SCT), collectively, “Consumer Groups,” and the Technology Access Program at Gallaudet University (TAP), respectfully submit these comments on the *Further Notice of Proposed Rulemaking* in the above-referenced docket.¹

Because the *Order* leaves a critical gap in responsibility for compliance with *its* landmark quality standards, we urge the Commission to build a thorough, focused record that facilitates a rapid resolution of this matter by assigning responsibility for adherence to the quality standards to *some* entity. In determining who that entity should be, the Commission should evaluate responsibility models on how well they incentivize high-quality captioning, aid the complaint process, and facilitate enforcement.

Applying that framework, we urge the Commission to reject a VPO-centric model and to extend its VPD-centric responsibility model to the quality standards unless the record developed in this proceeding conclusively demonstrates the merits of a divided VPD/programmer model. If the Commission chooses to adopt a divided model, it should consider holding VPDs and programmers jointly and severally liable on a trial basis, and should refrain from making any changes to non-quality rules in this proceeding.

¹ *Closed Captioning of Video Programming*, 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*” and “*FNPRM*”), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0313/FCC-14-12A1.pdf.

Discussion

I. **The Commission must act quickly to ensure that *some* entity bears responsibility for ensuring the quality of captions for all covered programming.**

The Commission's landmark *Caption Quality Order* and associated *FNPRM* continue 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"). We wholeheartedly commend the Commission's adoption of specific quality standards for closed captions, including accuracy, synchronicity, completeness, and placement.² Implemented properly, these standards will play a critical role in overcoming more than a decade of pervasive quality problems that have denied Americans who are deaf or hard of hearing the ability to experience television programming on equal terms.³

While the promise of these standards is undeniable, the *Order* leaves open a critical element of their implementation: who will bear responsibility for complying with them? Currently, the answer is "no one." As amended by the *Order*, Rule 79.1 merely requires video programming distributors ("VPDs") to "exercise best efforts to obtain a certification" from each of their video programmers that the programmer's programming satisfies the Commission's quality standards, that the programmer is following "Best Practices" for ensuring caption quality, or that the programmer is exempt from the closed captioning rules.⁴ The identities of programmers choosing not to provide quality certifications will be added to a publicly accessible database, but neither VPDs, programmers, video programming providers ("VPPs"), video programming owners

² See *Caption Quality Order* at ¶¶ 26-33; 47 C.F.R. § 79.1(j)(2).

³ See *Caption Quality Order* at ¶¶ 15-25.

⁴ 47 C.F.R. § 79.1(j)(1).

(“VPOs”), nor any other entity currently faces liability for failing to abide by the quality standards or best practices.⁵

So long as the Commission’s standards remain effectively unenforceable, we fear that the promise of quality captions will remain illusory. More than a decade of experience with poor-quality captions, illustrated in painful depth by the extensive record in this proceeding, has undeniably shown that enforceable rules are the only viable path toward the quality necessary to ensure equal access.⁶

Accordingly, we commend the Commission’s decision to rapidly and specifically address the issue of responsibility in the *FNPRM*, and urge the Commission to adopt its proposal to extend responsibility for compliance with the *Order*’s quality standards.⁷ As Chairman Wheeler notes, the *Order* is a “work in progress,” and as Commissioner Pai notes, quickly developing “a focused, well-reasoned record on which to resolve the critical issue of responsibility” is “needed to complete” the *Order*.⁸

In extending responsibility for compliance, we urge the Commission to act quickly and decisively, bearing in mind the critical need for *some* category of entities—whether VPDs, VPPs, programmers, VPOs, or some combination thereof—to bear responsibility for ensuring the quality of captions. While the question of which category of entities should bear responsibility is of course critical—and likely controversial—we urge our industry colleagues to resist the temptation to engage in a protracted battle over the

⁵ See 47 C.F.R. § 79.1(j)(1)(iii)

⁶ See, e.g., *FNPRM* at ¶¶ 15-17.

⁷ See *FNPRM* at ¶ 123.

⁸ *Caption Quality Order*, Statement of Chairman Tom Wheeler, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A2.pdf; Statement of Commissioner Ajit Pai, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0224/FCC-14-12A5.pdf

question's resolution or to raise inflammatory and unproductive arguments.⁹ Such tactics could result in unconscionable delays in implementing responsibility for compliance with the quality standards—a loss for Americans who rely on captioning and a win for no one. Instead, we urge all commenters to heed Commissioner Pai's admonition to work together to build a thorough, focused record on the questions in the *FNPRM* that facilitates a rapid resolution and meaningful progress toward equal access.

II. The Commission should evaluate responsibility models on the extent to which they incentivize high-quality captioning, aid the complaint process, and facilitate enforcement.

In determining how to assign responsibility for adherence to the quality standards, the Commission should maintain the promise of equal access to video programming as a north star. While all responsibility models will necessarily impact certain entities in the video programming chain, the ultimate measure of a model should be the extent to which it leads to the maximal provision of high-quality captions for Americans who are deaf or hard of hearing over the long term.

Thus, in determining which responsibility model best serves the goal of equal access, the Commission should evaluate the extent to which the model:

- a) Incentivizes the appropriate entities in the video programming ecosystem to provide high-quality captions;
- b) Minimizes the burden and accelerates the resolution of consumer complaints; and
- c) Permits swift and decisive enforcement action to determine non-compliance.

The Commission should ensure that its chosen responsibility model satisfies all of these criteria to the maximal extent possible.

⁹ *C.f. Closed Captioning of Internet Protocol-Delivered Video Programming*, Report and Order, 27 FCC Rcd. 787, 798-804, ¶¶ 15-25 (Jan. 13, 2012).

III. The record in this proceeding does not yet justify shifting from a VPD-centric model.

The *FNPRM* suggests that the Commission favors shifting responsibility to video programmers, defined as “entities that provide video programming that is intended for distribution to residential households including, but not limited to, broadcast or non-broadcast television networks and the owners of such programming.”¹⁰ The *FNPRM* also raises the possibility of assigning responsibility to VPOs, similar to the approach the Commission adopted in its Internet Protocol (“IP”) captioning rules.¹¹ More generally, the *FNPRM* cites to the “greater efficiencies” of “placing responsibilities on entities best positioned to fulfill the Commission’s rules.”¹² The *FNPRM* also raises the possibilities of extending responsibility jointly and severally for multiple parties and of extending responsibility to non-quality captioning rules.¹³

We urge the Commission to reject a VPO-centric model based on its dubious record of success in the IP captioning context. Instead, the Commission should extend its VPD-centric responsibility model to the quality standards unless the record developed in this proceeding conclusively demonstrates the merits of a divided VPD/programmer model. If the Commission chooses to adopt a divided model, it should consider holding VPDs and programmers jointly and severally liable on a trial basis to facilitate flexibility and generate more data about the merits of the model. Finally, the Commission should refrain from making any changes to non-quality rules in this proceeding.

¹⁰ See *FNPRM* at ¶ 123; 47 C.F.R. § 79.1(a)(9).

¹¹ *Id.* at ¶¶ 125-126

¹² *Id.* at ¶ 130.

¹³ *Id.* at ¶ 127.

A. The Commission should reject a VPO-centric model for the quality standards.

Our experience with the Commission's IP captioning rules leaves us extremely skeptical that shifting responsibilities to VPOs for ensuring caption quality will incentivize high-quality captioning, aid the complaint process, or facilitate enforcement. For example, the divided VPD/VPO model led Amazon.com, a prominent VPD, to respond to the complaint of several Consumer Groups about widespread caption problems with Amazon's programming with finger-pointing and subterfuge, blaming VPOs for many of the problems with captioning but refusing to identify them publicly.¹⁴ The complaint has now remained pending for more than 16 months with little resolution.

We have little faith that assigning some responsibility to VPOs will yield better results in the context of quality standards when a VPD/VPO model has failed to facilitate rapid complaint resolution and enforcement in the context of simply creating and delivering captions. Accordingly, we urge the Commission to dispense with the possibility of importing this model to the quality context.

B. The record does not yet demonstrate that a divided VPD/programmer model would better incentivize high-quality captioning than a VPD-centric model.

In contrast to our strong opposition to a VPD/VPO model, we acknowledge the appeal of model that shifts some responsibility for adherence to the quality standards to video programmers. However, we have strong reservations about shifting responsibility from VPDs, who have always retained responsibility and liability for compliance with the Commission's television captioning rules, to another class of entity.¹⁵ There is no doubt that the Commission possesses the authority to extend responsibility for adherence to

¹⁴ *See generally* Letter from Blake E. Reid to Susan Kimmel, Disability Rights Office (Dec. 11, 2013), *available at* <http://apps.fcc.gov/ecfs/document/view?id=7520961650>.

¹⁵ *See FNPRM* at ¶ 122.

quality standards to VPDs, and it should do so absent more compelling evidence than currently exists in the record that extending responsibility to video programmers will better incentivize high-quality captioning, aid the complaint process, or facilitate enforcement.

The Commission's long-standing VPD-centric model is a market-based approach to allocating responsibility, leaving VPDs *legally* responsible for captioning under the assumption that they can adequately shift liability from non-compliance to the parties that *actually* implement the captions through contract and indemnification. The VPD-centric model not only holds the promise of facilitating sufficient incentives for the provision of captions by the appropriate party, but leaves the Commission out of the business of micromanaging relationships between various entities in the video programming chain.

More importantly, the model guarantees that both consumers and the Commission can easily identify the party legally responsible for caption problems and promises that complaints can be filed with minimal burden to consumers and resolved quickly. Moreover, the model provides a simple enforcement mechanism: the Commission need only determine whether captions were delivered to the consumer pursuant to the rules, and if not, hold the VPD responsible, leaving the VPD and other entities up the chain to sort out the source of the problem in the context of an indemnification proceeding.

We acknowledge the VPD-centric system is not perfect. In a recent meeting, we agreed with representatives of Comcast that while VPDs are in the best position to address equipment-related problems, programmers are better positioned in practice to ensure the quality of their programs' captions—a common-sense proposition. Relatedly, we acknowledged that holding video programmers legally responsible for ensuring quality indirectly through contract and indemnification is undoubtedly less efficient than holding them directly responsible for compliance.

However, as our experience with the IP captioning rules has shown, dividing responsibility between multiple parties adds complexity to the complaint resolution and enforcement processes. Given the Commission’s limited enforcement resources, we fear that assigning responsibility for the quality standards to video programmers rather than to VPDs may ultimately water down the complaint and enforcement processes to the point that a divided responsibility model provides video programmers with *worse* incentives to provide high-quality captions than a VPD-centric model.

We remain open to the possibility that comments filed in response to the *FNPRM* will provide more detailed support for a divided VPD/video programmer responsibility model. We understand that Comcast will be offering a proposal that differs significantly from the proposal discussed in the *FNPRM* and look forward to evaluating it—and the contrary perspectives of other commenters—in our reply comments.¹⁶ Given the high stakes and critical importance of caption quality, however, we urge the Commission to extend its tried-and-true VPD-centric model to the context of quality absent substantial evidence that a divided responsibility model will better incentivize high-quality captioning, aid the complaint process, and facilitate enforcement.

C. To evaluate the viability of a divided VPD/programmer model, the Commission could hold VPDs and programmers jointly and severally responsible for adherence to the quality standards.

While we cannot endorse a divided responsibility model for quality standards based on the current record in this proceeding, we would cautiously support the Commission’s proposal to hold VPDs and programmers jointly and severally responsible for quality if implemented on a trial basis of one year.¹⁷ Doing so would afford the Commission the flexibility to experiment with involving video programmers in the complaint process and

¹⁶ *See id.* at ¶¶ 125-26.

¹⁷ *See id.* at 127.

holding video programmers directly accountable for failing to deliver high-quality captions, while retaining the backstop of enforcement of the rules against VPDs if the complaint and enforcement processes prove untenable. After a trial period, the Commission could then re-evaluate with better data whether responsibility should be split between VPDs and programmers or instead allocated exclusively to VPDs on a more permanent basis.

D. The Commission should refrain from adopting any changes to non-quality television captioning rules at this time.

Finally, the *FNPRM* inquires whether “any changes to the apportionment of these responsibilities [should] apply generally to all captioning obligations, or only to the newly adopted captioning quality rules.”¹⁸ The *FNPRM* seeks no input as to the ramifications of implementing a wholesale change to the bedrock television captioning rules, and making any changes to the model for basic captioning responsibility in this context would gamble with the civil rights of Americans who are deaf or hard of hearing with little regard to basic tenets of administrative procedure.

Should the Commission wish to revisit the basic allocation of responsibility in context other than quality, it should do so, if at all, in separate proceeding with more careful and comprehensive consideration of the impact of such a change on the captioning ecosystem. To whatever extent the Commission determines that a non-VPD-centric responsibility model is appropriate for quality, addressing the responsibility model for non-quality rules at a later date will bring the benefit of experience with and data from the new model. Thus, we strongly urge the Commission to leave any changes to non-quality captioning rules off the table in this proceeding.

¹⁸ *Id.*

Respectfully submitted,

/s/

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