

Before the
Federal Communications Commission
Washington, DC

In the Matter of:)
Closed Captioning of Video)
Programming) CG Docket No. 05-231
Telecommunications for the) PRM-11-CG
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)
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)
Technology Access Program at Gallaudet University (TAP)

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Discussion

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 reply to comments on the *Further Notice of Proposed Rulemaking* (“*FNPRM*”) in the above-referenced docket, which raises the critical issue of apportioning responsibility for compliance with the Commission’s landmark closed caption quality standards.¹

In our initial comments on the *FNPRM*, we expressed concern that shifting responsibility from video programming distributors (“VPDs”) to video programming owners (“VPOs”) or video programmers could result in reduced incentives for compliance with rules, unnecessarily complicate the resolution of consumer complaints, and overtax the Commission’s limited enforcement resources.² While we remained open to the possibility of a new responsibility model, our subsequent review of comments on the *FNPRM* and meetings with industry colleagues leave us unpersuaded that a divided

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) (“*FNPRM*”), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0313/FCC-14-12A1.pdf.

² *Comments of TDI, et al.*, CG Docket No. 05-231, PRM-11-CG, at 4-7 (Apr. 28, 2014) (“*TDI Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100403>.

responsibility model will ultimately lead to better captions or advance the promise of equal access to video programming.³

More specifically, the record in this proceeding and our multistakeholder meetings have primarily served to illustrate the obvious: that most VPDs would prefer programmers or VPOs to bear responsibility for complying with the quality standards, while most VPOs and programmers would prefer VPDs to bear responsibility. While each class of entity no doubt has financial incentives to prefer that others remain responsible for compliance, there is little specific evidence in the record directed at the more important issues of how each approach might better provide incentives for better captioning, speed resolution of consumer complaints, or facilitate enforcement to deter non-compliance.⁴

Joint meetings between consumers, VPDs, and programmers are in the process of being scheduled, and we hope that they will yield further evidence that will illuminate the best path forward in this proceeding. But because the record lacks sufficient evidence at this point to depart from a VPD-specific responsibility model, we stand by our initial recommendations that the Commission (a) extend its existing practice by assigning responsibility for caption quality to VPDs or jointly and severally to VPDs and programmers and (b) not adopt any changes to non-quality television captioning rules.

I. The record in this proceeding is insufficient to warrant a departure from a VPD-specific responsibility model.

Nearly 15 years ago, the Commission laid out a series of cogent rationales for holding VPDs exclusively responsible for complying with the captioning rules, noting that:

- “Placing compliance obligations on [VPDs] will allow [the Commission] to monitor and enforce [captioning] rules more efficiently”;

³ *See id.* at 7.

⁴ *See id.* at 3.

- “By holding distributors responsible for captioning, there typically will be a single entity to which complaints must be addressed,”
- “[T]here will be no need for tracking the entities responsible for producing programs alleged to violate the rules”; and
- “[D]istributors will incorporate closed captioning requirements into their contracts with producers and owners, and that parties will negotiate for an efficient allocation of captioning responsibilities.”⁵

As we noted in our comments, this long-standing VPD-centric model is a sensible market-based approach to allocating responsibility, promising sufficient incentives for the provision of captions by the appropriate party, leaving the Commission out of the business of micromanaging relationships between various entities in the video programming chain, and guaranteeing that both consumers and the Commission can easily identify the party legally responsible for caption problems.⁶ 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.

While many VPDs unsurprisingly request a shift away from a VPD-centric responsibility model in their comments, none rebut the Commission’s long-standing rationales for the model in more than conclusory terms. VPDs uniformly argue that, in practice, VPOs and video programmers, and not VPDs, are the entities that are most

⁵ *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd. 3272, 3286-87, ¶¶ 27-28 (Aug. 22, 1997) (“*Closed Captioning Order*”).

⁶ *TDI Comments* at 6.

directly responsible for creating captions in the first instance.⁷ While undoubtedly true, that argument attacks a straw man; the Commission’s captioning rules plainly acknowledge and even presume that VPOs and programmers will be primarily responsible *in practice* for providing high-quality captions. The argument does not address the Commission’s long-standing conclusion that leaving VPDs *legally* responsible for complying with the rules will both provide better (albeit indirect) incentives for programmers to provide high-quality captions and ease the burden of resolving consumer complaints and enforcing the rules in the face of non-compliance.

Some VPDs nevertheless contend that a VPD-centric model unfairly leaves them in the position of policing the captioning practices of their VPO partners. For example, the American Cable Association (“ACA”) contends that a VPD-centric model “require[s] VPDs to play policeman to hundreds of programmers,” while Comcast contends that a VPD-centric model will force VPDs “to act as a middleman in resolving programmer-related issues.”⁸

⁷ See *Comments of the American Cable Association*, CG Docket No. 05-231, PRM-11-CG, at 4-5 (Apr. 28, 2014) (“*ACA Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100417>; *Comments of AT&T*, CG Docket No. 05-231, PRM-11-CG, at 3 (Apr. 28, 2014) (“*AT&T Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100348>; *Comments of Charter Communications, Inc., et al.*, CG Docket No. 05-231, PRM-11-CG, at 3-5 (Apr. 28, 2014) (“*Cable Distributor Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100353>; *Comments of Comcast Corporation and NBCUniversal*, CG Docket No. 05-231, PRM-11-CG, at 2-3 (Apr. 28, 2014) (“*Comcast Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100393>; *Comments of DIRECTV, LLC*, CG Docket No. 05-231, PRM-11-CG, at 5-6 (Apr. 28, 2014) (“*DIRECTV Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100345>; *Comments of Verizon*, CG Docket No. 05-231, PRM-11-CG, at 6-8 (Apr. 28, 2014) (“*Verizon Comments*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100372>.

⁸ *ACA Comments* at 4-5; *Comcast Comments* at 2-3; see also *Cable Providers Comments* at 7-10.

While those comments are no doubt correct, they do not address the underlying presumption of the Commission's VPD-centric model: that VPDs are in a better position to police the captioning practices of VPOs and programmers with whom they directly contract and interact with on a regular basis than the Commission itself. Shifting responsibility from VPDs to VPOs or programmers would simply transfer a burden currently shared among many video distributors across the country to the Commission's Enforcement Bureau. Unless the Commission can conclude that its limited enforcement resources dedicated to handling closed captioning complaints exceed the collective ability of all VPDs in America to enforce their contracts with their programming partners, it should be skeptical about this line of argument.

Some VPDs further contend that contractual remedies against VPOs and programmers, such as indemnification for violations of the captioning rules, are inefficient, insufficient, or impractical means of incentivizing VPOs to provide high-quality captions—a theoretical possibility that we acknowledged in our initial comments.⁹ However, we are concerned that no VPD has described even a single specific instance where it was unable to leverage a contractual provision to address a failure of a VPO to fulfill its contractual captioning obligations—much less provided comprehensive data on the extent to which this problem has manifested on a systemic basis over the 15-year history of the Commission's television captioning rules. In the face of this effectively empty record, the Commission should resist the urge to hastily conclude, as it did in the *IP Captioning Order*, that contractual remedies will prove ineffective unless and until VPDs

⁹ See *ACA Comments* at 4-5; *Cable Provider Comments* at 7-9; *Comcast Comments* at 4-5; see also *TDI Comments* at 6.

can specifically demonstrate how and to what extent those remedies have proven insufficient in the past.¹⁰

AT&T relatedly contends that programmers can ignore demands from VPDs to provide captioning because they can simply take their programming to other VPDs who do not demand captioning.¹¹ However, AT&T provides no general or specific evidence of a collective action problem on the part of some VPDs to pass their captioning obligations through to their programming partners—an unsurprising omission, given that all VPDs are subject to the same captioning rules. If willingness to ignore the captioning rules is in fact a differentiating factor for some VPDs, the Commission should act to *hold those VPDs liable for violating the rules*—not, as AT&T contends, to *change the rules* to relieve those VPDs of their responsibilities.

Lastly, some VPDs contend that shifting away from a VPD-centric model will lead to the quicker resolution of problems and complaints.¹² While we acknowledge that this is a possibility, we remain unconvinced that the ability for the Commission to shift the focus of complaint investigations further up the chain will necessarily lead to better results than

¹⁰ Some VPDs cite to the Commission’s 2012 *IP Captioning Order* for the proposition that VPOs are better positioned than VPDs to fulfill some captioning responsibilities. *See DIRECTV Comments* at 3 (citing *Closed Captioning of Internet Protocol-Delivered Video Programming*, Report and Order, MB Docket No. 11-154, 27 FCC Rcd. 787, 798-99, ¶¶ 15-16 (Jan. 13, 2012) (“*IP Captioning Order*”)); *Verizon Comments* at 5 (citing *IP Captioning Order*, 27 FCC Rcd. at 803, ¶ 24). As we noted in our initial comments, however, we are skeptical that this divided responsibility model has led to better results in practice. *TDI Comments* at 5. Moreover, the divided responsibility model in the IP captioning rules rests largely on the presumptions that IP VPDs (a) may not have the same “close contractual relationships” and resulting leverage with VPOs that television VPDs do and (b) may have difficulty determining when a particular program has been published or exhibited on television and is thereby subject to the rules—presumptions that inherently do not hold true in the television context. *See IP Captioning Order*, 27 FCC Rcd. at 801-803, ¶¶ 21-24.

¹¹ *AT&T Comments* at 3-4.

¹² *See ACA Comments* at 6-7; *Cable Provider Comments* at 10; *Comcast Comments* at 2-3.

swift and decisive enforcement of the rules against VPDs—a proposition not supported by any substantive evidence in the record.

II. The Commission should assign responsibility for caption quality to VPDs or jointly and severally to VPDs and programmers.

Given the dearth of specific evidence in the record supporting a shift to a divided or shared responsibility model, we again urge the Commission to extend its VPD-centric responsibility model for television captioning rules to require VPDs to bear responsibility for complying with the quality standards.¹³ As several programmers point out, a VPD-centric model for quality would “promot[e] the public interest and [be] consistent with longstanding Commission practice.”¹⁴

Nevertheless, we agree in principle with several commenters that the Commission has the authority to extend quality obligations to programmers.¹⁵ If the Commission chooses to exercise that discretion, it should do so cautiously and experimentally by holding VPDs and programmers jointly and severally liable for caption quality over a trial period of one year—a proposal that faces only cursory opposition from VPDs.¹⁶ As we noted in our comments, joint and several liability would afford the Commission the flexibility to experiment with involving video programmers in the complaint process and 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

¹³ *TDI Comments* at 4.

¹⁴ *See Comments of CBS Corporation, et al.*, CG Docket No. 05-231, PRM-11-CG, at 2 (Apr. 28, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100395>.

¹⁵ *See ACA Comments* at 3-4; *Cable Provider Comments* at 12-17; *Verizon Comments* at 3-4.

¹⁶ *TDI Comments* at 7-8; *but see ACA Comments* at 11 (citing unspecified “factors that would raise costs for VPDs and would lead to a less effective mechanism”); *Verizon Comments* at 9 (criticizing joint and several liability as “too tentative a step”).

Commission could then re-evaluate with better data whether it should split responsibility between VPDs and programmers or instead assign it exclusively to VPDs on a more permanent basis.

III. The Commission should not adopt any changes to non-quality television captioning rules at this time.

Finally, we urge the Commission to reject the invitation of some VPDs to make changes in the responsibility model for the existing captioning rules.¹⁷ As we noted in our comments, 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.¹⁸ The cursory endorsement of such a change by VPDs is not a sufficient record upon which to make such a fundamental shift, and doing so would be arbitrary and capricious.

Respectfully submitted,

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¹⁷ See, e.g., *Comcast Comments* at 5; *Verizon Comments* at 12-13.

¹⁸ *TDI Comments* at 8.

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