

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Closed Captioning of Video Programming

Telecommunications for the Hard and Deaf of  
Hearing, Inc.

Petition for Rulemaking

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CG Docket No. 05-231

PRM11CG

**REPLY COMMENTS**



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## I. INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”) submits these reply comments in response to Section VI.A of the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding and related filed comments.<sup>1</sup> In its initial comments, ACA urged the Commission to extend some responsibility and liability for closed captioning compliance under its rules to the video programmers that provide the captioning. To this end, ACA generally supported the proposed burden-shifting enforcement model as a mechanism for shifting the compliance burden from the video programming distributor (“VPD”) to the video programmer in appropriate cases.<sup>2</sup> ACA further recommended, in conjunction with these actions, that the Commission (i) require a VPD to report investigation results to the Commission only when the Commission has forwarded a complaint to the VPD; (ii) not establish joint and several liability for video programmers and VPDs, but rather declare that all liability for resolving a captioning issue passes to the video programmer after the VPD informs the video programmer that the captioning issue is not within the VPD’s control; and (iii) establish a safe harbor and allow a VPD to take corrective actions prior to initiating enforcement action against the VPD.

As the record reflects, there is solid support for ACA’s recommendation that the Commission extend some direct responsibility and liability for closed captioning compliance to the video programmers that provide the captioning. All multichannel video programming distributors (“MVPDs”) commenting on the record agree that making programmers directly liable for their role in the captioning chain is more fair and efficient and will improve outcomes for

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<sup>1</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, PRM11CG, FCC 14-12 (rel. Feb. 24, 2014) (“Report & Order” or “FNPRM”).

<sup>2</sup> See FNPRM, ¶ 125. This proposal was initially submitted by Comcast Corporation and NBCUniversal (together, “Comcast”). ACA also suggested a slight modification to the proposed enforcement model – that the Commission should have the discretion to forward complaints directly to video programmers, thus bypassing VPDs, in the event the Commission receives complaints pointing to the same captioning problem occurring on the service of multiple VPDs. See Comments of the American Cable Association, CG Docket No. 05-231, at 8 (“ACA Comments”).

consumers. There is also wide support for the burden-shifting or “shared responsibility” enforcement model, which attaches responsibility and liability for resolving complaints under the new captioning quality standards to a video programmer once it is clear that the VPD is not responsible for the captioning quality problem.<sup>3</sup>

The record also supports (i) adoption of a safe harbor, permitting a qualifying VPD to take corrective action regarding a captioning issue prior to Commission enforcement action; (ii) affording VPDs flexibility in how they handle initial investigations into the cause of a closed captioning complaint and relieving the VPD of liability after shifting compliance responsibilities to video programmers; and (iii) extension of compliance responsibility and liability to programmers for all closed captioning obligations, not just closed captioning quality.

## **II. THE RECORD SUPPORTS COMMISSION EXTENSION OF SOME DIRECT RESPONSIBILITY AND LIABILITY FOR COMPLIANCE WITH THE COMMISSION’S CLOSED CAPTIONING RULES TO VIDEO PROGRAMMERS**

As described in ACA’s comments, the Commission should place some direct compliance responsibility and liability for the new captioning quality standards on video programmers. This action is well supported by the record.

### **A. MVPD Commenters Overwhelmingly Agree That Fairness and Efficiency Dictate that the Commission Extend Some Captioning Compliance Responsibility and Liability to Video Programmers.**

All MVPDs commenting on the record agree that as a matter of fairness and efficiency the Commission should extend some compliance responsibilities for the new captioning quality standards to video programmers. By taking this action, VPDs and video programmers will each, in their respective roles, be responsible and liable to ensure captioning quality, therefore leading to higher quality closed captioning.

The cable operator commenters – a group comprised of Charter, Cablevision, Mediacom, Suddenlink, and Time Warner – explain that in “a regulatory model that assigns

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<sup>3</sup> See Comments of the Comcast Corporation and NBCUniversal, CG Docket No. 05-231, at 1-8 (“Comcast Comments”).

liability according to actual responsibility, each participant involved in the creation and delivery of captioned programming would be incented to focus entirely on fulfilling its specific regulatory charge.”<sup>4</sup> These operators emphasize that consumers’ captioning experience will improve if the Commission extends direct compliance responsibility and liability to video programmers for meeting closed captioning rules.<sup>5</sup> Verizon asserts that the Commission’s rules implementing the new closed captioning quality standards will be “more effective if the Commission imposes direct responsibility for compliance...on those entities that actually contract and provide for inclusion of the closed captions.”<sup>6</sup> DirecTV explains that the Commission’s closed captioning rules would function most efficiently if they allocate responsibility to the party in the best position to ensure compliance.<sup>7</sup>

Although advocates for the deaf and hard-of-hearing communities (“TDI”) note their opposition to what they call a “VPO-centric” model, they are not categorically opposed to placing some direct liability on video programmers.<sup>8</sup> A framework that assigns liability according to actual responsibility for the respective roles and functions of video programmers and VPDs would seem to meet TDI’s calls for “some category of entities – whether VPDs, [video programming providers], programmers, [video programming owners] or some combination thereof – to bear responsibility for ensuring the quality of captions.”<sup>9</sup>

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<sup>4</sup> Comments of Charter Communications, Inc. et al, CG Docket No. 05-231, at 9 (“Cable Commenters”).

<sup>5</sup> *Id.* at 2-10 (explaining in detail that video programmers are better positioned to ensure that programs are captioned and the new quality standards are met, that this would allow VPDs to focus on their pass-through and related equipment responsibilities, and that direct liability will better incentive video programmer compliance than the current enforcement model).

<sup>6</sup> Comments of Verizon, CG Docket No. 05-231, at 1 (“Verizon Comments”).

<sup>7</sup> Comments of DirecTV, LLC, CG Docket No. 05-231, at 1 (“DirecTV Comments”).

<sup>8</sup> TDI does not define precisely what a “VPO-centric” model would be. Nonetheless, ACA does not believe that the assignment of some direct liability, coupled with the proposed burden-shifting enforcement model, can fairly be termed “VPO-centric.” Rather, it is simply shared responsibility and liability for captioning, with each participant in the distribution chain responsible for its respective, but distinct, portion of the obligations.

<sup>9</sup> Comments of the Telecommunications for the Deaf and Hard of Hearing, Inc. et al, CG Docket No. 05-231, at 2 (“TDI Comments”).

ACA further submits that removing the VPD as the middleman in situations where the problem originates with the video programmer can only improve outcomes, particularly when the problem affects a customer served by a small or medium-sized VPD. ACA's comments explained that, under the Commission's current closed captioning regime, the large video programmers, who own or control the majority of the most popular programming viewed by consumers, do not have a strong incentive to proactively address closed captioning complaints involving smaller VPDs because they have little reason to worry that a smaller VPD will seek legal recourse if the programmer breaches its contractual obligation to provide proper captioning.<sup>10</sup> The inefficiencies arising from requiring VPDs to indirectly police video programmers' compliance with captioning requirements through contractual representations is particularly acute for smaller VPDs, who lack leverage to compel compliance by the video programmer.

ACA is not alone in noting the inefficiency of the current enforcement model. AT&T observes that "VPDs have little leverage to force programmers to improve the quality of closed captioning" and have few options to force a video programmer to improve closed captioning short of refusing to carry a programmer's content.<sup>11</sup> AT&T submits that video programmers are best positioned to develop and implement solutions to closed captioning quality issues because, as the Commission has concluded, "video programmers typically are the entities with the most direct control over the quality of closed captioning of their programming."<sup>12</sup> DirecTV notes that requiring an entity in one part of the programming production and delivery chain to warrant the performance of an entity in another part of the chain is highly inefficient at best because initial captioning responsibility and ability to troubleshoot rests with the video programmer and is not accessible to the VPD, who is left with nothing more than the ability to attempt to obtain

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<sup>10</sup> ACA Comments at 5. This fact pattern assumes that the smaller VPD was able to obtain contractual indemnification from the larger video programmer.

<sup>11</sup> AT&T Comments at 4.

<sup>12</sup> *Id.* at 3, *citing* Report & Order, ¶ 52.

contractual assurances after-the-fact that programmer obligations are met.<sup>13</sup> Comcast focuses on the fact that placing all compliance obligations on the VPD makes the resolution process more inefficient since the VPD has to act, in essence, as a middleman to resolve programmer-related issues.<sup>14</sup>

Rather than continuing the current unfair, inefficient, and indirect enforcement model, the Commission should adopt a model in which the party most directly responsible for the closed captioning problem and best positioned to fix and prevent the problem from occurring can be held accountable.<sup>15</sup> In some circumstances, this entity, as the record demonstrates, can be the video programmer. The Commission, as the group of cable operators emphasizes, “has long recognized that video programmers control programming content and thus are in a better position both to ensure that non-exempt programming is captioning and to control captioning quality than are VPDs.”<sup>16</sup> The reason, as Comcast highlights, is simple: “[p]rogrammers have a more direct relationship with the entities that provide captioning services and are more likely to have the rights to modify the content and to correct captions.”<sup>17</sup> In other words, video programmers caption, or arrange for captioning of their programming; therefore, they should bear the responsibility for any failure to undertake this activity correctly.<sup>18</sup> Even the advocates for the deaf and hard-of-hearing communities find appeal in a model that shifts some

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<sup>13</sup> DirecTV Comments at 5 (“Existing law requires an entity in one part of the programming production/delivery chain to warrant the performance of an entity in another part of the chain. This is highly inefficient at best. VPDs do not have the opportunity to review and ensure that programming is captioned before transmitting it to viewers. Nor do they have the opportunity to review the extent and quality of such captioning. At best, they can only attempt to negotiate contractual provisions that require VPOs to provide captioned programming as required under the Commission’s rules and/or produced in adherence to the Best Practices recently adopted.”).

<sup>14</sup> Comcast Comments at 3.

<sup>15</sup> See, e.g., Cable Commenters at 17 (“Regulatory liability in the closed captioning process should align with regulated entities’ real-world responsibilities.”); DirecTV Comments at 1 (the Commission’s closed captioning rules would function most efficiently if they allocate responsibility to the party in the best position to ensure compliance).

<sup>16</sup> *Id.* at 3.

<sup>17</sup> Comcast Comments at 3.

<sup>18</sup> See, e.g., DirecTV Comments at 5-6.

responsibility for adherence to quality standards to video programmers because it places direct responsibility on the party most able to resolve problems and is more efficient than having distributors indirectly enforce standards against programmers.<sup>19</sup>

The record is therefore clear: the Commission should extend some compliance responsibility and liability for the new captioning quality standards to video programmers to accomplish all of these goals.

**B. The Record Supports the Proposed Burden-Shifting Proposal as a Means to Extend Some Captioning Compliance Responsibility and Liability to Programmers.**

The FNPRM sought comment on a proposed burden-shifting enforcement model, under which consumers would still file captioning complaints against their VPD, and the VPD would be responsible for investigating the captioning issue as they are under the Commission's current rules.<sup>20</sup> The VPD would remain responsible and liable for the problem unless the VPD's investigation finds that the captioning issue is not within its control, and only at this point would responsibility and liability shift to the video programmer.<sup>21</sup>

As described in Comcast's comments, the proposed burden-shifting enforcement model "will facilitate the prompt and efficient resolution of captioning issues, provide incentives for VPDs and programmers to work collaboratively to address such issues, and achieve these

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<sup>19</sup> TDI Comments at 6 ("In a recent meeting [TDI] 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, [TDI] acknowledge[s] 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.").

<sup>20</sup> FNPRM, ¶ 123.

<sup>21</sup> Under Comcast's proposal, if the VPD determines that the issue is not within its control, the VPD will promptly notify the programmer in writing about the results of the initial investigation, with a copy of the notice to the Commission. Comcast envisions that the VPD will help the programmer troubleshoot the issue, but that responsibility for resolving the issue will rest with the programmer. Once the programmer resolves the issue, it would then advise the VPD, and the VPD will conduct follow-up checks of the program stream to confirm. The programmer will also advise the customer and the Commission that the programmer has resolved the issue. See Comcast Comments at 7-8.

objectives in a consumer-friendly manner.”<sup>22</sup> This, in turn, will “improve the overall captioning experience for consumers.”<sup>23</sup> Other commenters stress that the proposed burden-shifting enforcement model will lead to a more efficient complaint resolution process.<sup>24</sup> Verizon astutely points out that VPD equipment that properly passes through closed captioning does not insert misspellings, or have the capability to correct them.<sup>25</sup> Therefore, by imposing the responsibility for accurate captioning directly on the video programmer, the Commission can hold the responsible party accountable and better respond to consumer complaints – regardless of the delivery system.<sup>26</sup> TDI recommends that the Commission evaluate responsibility models to the extent which they incentivize high-quality captioning, aid the complaint process, and facilitate enforcement.<sup>27</sup> ACA submits that the record demonstrates that the burden-shifting proposal described in the FNPRM will accomplish all of these goals.

### **III. EXTENDING SOME DIRECT RESPONSIBILITY AND LIABILITY FOR COMPLIANCE FOR CLOSED CAPTIONING QUALITY RULES IS NOT INCONSISTENT WITH THE VIEWS OF THE DEAF AND HARD-OF-HEARING COMMUNITIES**

In general, the proposed burden-shifting enforcement model is not inconsistent with the goals of the deaf and hard-of-hearing communities. As these advocates tellingly concede, a “VPD-centric system is not perfect” and is marked by some inefficiencies.<sup>28</sup>

Accordingly, TDI has recommended that the test for whether a responsibility model will best serve the goal of equal access to video programming is the extent to which the model:

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<sup>22</sup> Comcast Comments at 8.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> See AT&T Comments at 2 (the proposed burden-shifting model “will lead to more effective and timely resolution of closed captioning problems and improved closed captioning”); DirecTV Comments at 2 (noting that the proposed burden-shifting model will streamline the Commission’s processes and enhance the efficacy of its closed captioning regime by removing the intermediary and dealing directly with the party in the best position to ensure compliance).

<sup>25</sup> Verizon Comments at 5.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> TDI Comments at 3.

<sup>28</sup> *Id.* at 6.

- (i) incentivizes the appropriate entities in the video programming ecosystem to provide high-quality captions;
- (ii) minimizes the burden and accelerates the resolution of consumer complaints; and
- (iii) permits swift and decisive enforcement action to determine non-compliance.<sup>29</sup>

ACA believes that the record shows the burden-shifting proposal under examination satisfies all of TDI's criteria.<sup>30</sup> Because video programmers are in the best position to ensure that captioning is accurate, synchronous, complete, and in the proper place, liability for compliance is most appropriately placed directly on them. VPDs, in turn, are in the best position to ensure that the equipment they employ passes through the captioning without interference and that the programming and captions reach the end user intact. Each will have the incentive to comply because direct liability will attach. Accordingly, extending some responsibilities to video programmers for compliance with the new quality standards will ensure that compliance problems can be more rapidly and effectively addressed than the current indirect enforcement model that places responsibility on the VPD for actions over which it has no direct control – the production and embedding of captions in video programming.

#### **IV. PROGRAMMERS HAVE NOT PRESENTED ANY DATA OR INFORMATION TO SUGGEST THE CURRENT REGIME IS OPTIMAL**

##### **A. Programmers are Incorrect that the Current Allocation of Compliance Responsibility is Consistent with Commission Practice.**

In support of maintaining the current allocation of compliance responsibility for closed captioning quality, the video programmers suggest that the Commission should rely upon the same reasoning it followed back in 1996. This argument, however, overlooks the fact that the Commission now recognizes that the current enforcement model's reliance on contractual

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<sup>29</sup> *Id.* at 3.

<sup>30</sup> TDI suggests that the Commission not extend liability to video programmers unless the record "conclusively demonstrates the merits of a divided VPD/programmer model." *Id.* at 4. The Administrative Procedure Act does not bind the Commission to such a standard before adopting a rule. The test, rather, is that the action be supported, upon consideration of the whole record, by substantial evidence. See 5 U.S.C. § 556(d); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). ACA submits that the record before the Commission on liability is more than adequate to satisfy this standard.

relationships between VPDs and video programmers has *failed* to produce captioning quality of a level necessary for deaf and hard of hearing consumers.<sup>31</sup> Moreover, video programmers' suggestion ignores the Commission's more recent and evolved reasoning, based on years of experience with the current regime, that extending direct responsibility and liability to video programmers in other contexts similar to television closed captioning leads to greater accountability by all parties involved in the distribution chain, and is also more efficient and less costly than relying on enforcement indirectly through contractual arrangements.

First, in 2012, the Commission allocated responsibility for IP closed captioning to both VPDs *and* video programmers.<sup>32</sup> In the IP context, the Commission found that placing obligations on video programmers would ensure that the Commission could hold the responsible party accountable for captioning violations.<sup>33</sup> The Commission explained that imposing direct responsibility on video programmers would be more efficient and less costly than relying on contractual negotiations between VPDs and video programmers."<sup>34</sup>

In 2013, the Commission took a similar approach in its Order revising the requirements for making emergency information available to individuals who are blind or visually impaired. In this proceeding, the Commission modified its rules to equitably allocate responsibility based on each party's role in making emergency information accessible.<sup>35</sup> The Commission determined that the entity that creates the visual emergency information and adds it to the programming

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<sup>31</sup> Report and Order, ¶ 22 ("The lack of regularity in the quality of closed captioning demonstrates that the Commission's original assumptions regarding the marketplace incentives for quality captioning have not been borne out.").

<sup>32</sup> *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, ¶ 15 (2012).

<sup>33</sup> *Id.*, ¶ 18.

<sup>34</sup> *Id.*, ¶ 17 ([L]eaving VPOs' responsibilities to be defined entirely by private contractual arrangements would be more costly and less efficient than appropriately allocating certain responsibilities among both VPOs and VPDs by Commission rule.").

<sup>35</sup> *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*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, ¶ 36 (2013) ("Emergency Information Order").

stream “is responsible for providing an aural representation of the information on a secondary audio stream, accompanied by an aural tone” while VPDs must “ensur[e] that the aural representation of the emergency information (including the accompanying aural tone) gets passed through to consumers.”<sup>36</sup> Again, the Commission found that imposing compliance responsibility directly on the party best positioned to comply with its obligations would ensure that the Commission can directly hold the responsible party accountable for a violation.<sup>37</sup>

Programmers attempt to distinguish video programming distribution in the IP context from video programming distribution in the television context.<sup>38</sup> Yet, there exist similarities between the television and IP closed captioning contexts that justify similar regulatory approaches to compliance responsibility and liability.<sup>39</sup> For example, in both the IP and television contexts, it is the video programmer that has the initial obligation to determine whether the programming needs to be captioned. Moreover, in both instances the video programmer captions the programming or arranges for captioning of its programming and provides the programming or program files with all required captions to the VPD. Then, upon receiving the captioned programming, VPDs in both the television and IP contexts must distribute or pass through the programming with the closed captions intact. Although in the television context this process is typically a direct one between the video programmer and VPD, in contrast to the numerous distributors that may participate in a single IP distribution chain, VPDs in each situation, and most acutely smaller VPDs, lack leverage against the programmer despite their direct contractual relationship. This lack of leverage should be given equal weight by the Commission when it comes to apportioning liability.

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Comments of CBS Corporation, Inc. et al, CG Docket No. 05-231, at 6 (“Video Programmer Comments”).

<sup>39</sup> See FNPRM, ¶ 129 (“[The Commission] seeks comment on whether there are similarities or differences between the television and the IP closed captioning contexts or the Commission’s emergency information rule that justify similar or different regulatory approaches.”).

Programmers further ignore the similarities between the television closed captioning context and the Commission's emergency information rules. Similar to the television closed captioning rules, the emergency information requirements adopted by the Commission in 2013 apply to video programming provided by MVPDs, television broadcast stations, and other residential distributors of video programming.<sup>40</sup> Under these rules, the entity that creates the emergency information and adds it to the programming stream bears the compliance responsibility for that obligation.<sup>41</sup> The MVPD, similar to the television closed captioning rules, must then pass through the emergency information to consumers, and bears compliance responsibility for that obligation. Similar to closed captioning, unless each participant in the content creation/distribution chain complies with their individual obligations, the end user will not receive the emergency information as required, yet the Commission did not hesitate to apportion compliance responsibility, rather than place it all on the MVPD to work out contractually with the broadcaster.

Accordingly, for the reasons set forth above, extending some responsibilities to video programmers for compliance with the new quality standards is consistent with Commission practice.

**B. Extending Captioning Responsibility for Compliance with the New Quality Standards Directly to Video Programmers Would Not be Wasteful as Programmers Allege.**

The video programmers argue that it would be "wasteful" for the Commission to create a mechanism that pushes complaints to video programmers when they allege that the "majority" of complaints deal with MVPD-related issues.<sup>42</sup>

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<sup>40</sup> Emergency Information Order, ¶ 7 (the emergency information requirements apply to video programming "that is provided by a covered entity, *i.e.*, video programming provided by television broadcast stations licensed by the Commission, MVPDs, and "any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.") (citations omitted).

<sup>41</sup> *Id.*, ¶ 36.

<sup>42</sup> Video Programmer Comments at 3-4.

For a variety of reasons, this argument misses the mark. First, the minor adjustments to the current closed captioning complaint process proposed by Comcast would not remove VPDs from the complaint process. To the contrary, the proposed burden-shifting enforcement model recognizes that VPDs are best positioned to deal with equipment-related problems and under the proposal will continue to be responsible for addressing those types of issues. Only after a VPD's initial investigation reveals that the captioning issue is not within its control would the compliance burden shift to the video programmer. Therefore, only once the MVPD concludes that the problem is not their fault will the burden shift to the programmer.

Second, the video programmers ignore that the new quality standards place responsibility for captioning accuracy, synchronicity, program completeness, and placement of captioning directly on the programmer, not the VPD.<sup>43</sup> Because the rules obligate video programmers to take certain actions, compliance responsibility should follow, as it does in nearly every other case under the Commission's rules. Moreover, consumers have not yet had an opportunity to file complaints in response to these new quality standards. The programmers' claim that the majority of closed captioning complaints in the past have raised VPD-related issues should not play a determinative role in establishing compliance liability under the new closed captioning quality rules.<sup>44</sup> This data does not support, and should have no bearing on, determining the party most likely to be responsible for closed captioning quality problems.

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<sup>43</sup> Report and Order, ¶ 26. The Commission also adopted a set of Best Practices, which requires video programmers to follow certain practices so that quality captions are achieved and caption quality problems are quickly resolved. *See id.*, ¶ 60.

<sup>44</sup> ACA lacks access both to the data relied upon by the video programmers and the Commission's database of television closed captioning complaints and is therefore not in a position to verify the programmers' claims or to put them in context. ACA submits that, at best, this should be considered one data point among many in such a determination.

**C. The Proposed Burden-Shifting Enforcement Model Would Not Discourage The Cooperative and Efficient Environment Among Programmers and VPDs Necessary to Resolve Closed Captioning Issues.**

The video programmers assert that the current closed captioning model works smoothly and best serves the public interest by promoting collaboration and encouraging all parties in the captioning process to promptly resolve captioning issues.<sup>45</sup> These programmers then further claim that the proposed burden-shifting enforcement model will discourage collaboration and harm the public interest.<sup>46</sup>

In support of this claim, the video programmers put forth three distinct arguments. First, the video programmers tout their recent collaboration with other entities in the television closed captioning distribution chain to develop the programmer Best Practices, and suggest that the proposed burden-shifting enforcement model would somehow undermine this type of collaboration.<sup>47</sup> Second, the video programmers emphasize that an enforcement model that relies upon the Best Practices and certifications will require that captioners, captioning vendors, program networks, and VPDs to work together through “their contractual relationships” to ensure that consumers receive high quality closed captioning.<sup>48</sup> Finally, the video programmers claim that the proposed burden-shifting enforcement model would harm this collaboration by focusing each party on risk minimization rather than problem-solving, and cite to a single example, drawn from the IP context, where an MVPD and programmer cannot resolve who is at fault.<sup>49</sup>

These claims do not withstand scrutiny. While ACA appreciates that the video programmers were willing to work with NCTA and other industry groups to formulate programmer Best Practices, this example of collaboration should have no bearing on the

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<sup>45</sup> Video Programmer Comments at 2-5.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 10-11.

<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.* at 11-12.

Commission's decision in this proceeding whether to extend direct responsibility and liability to video programmers. Video programmers fail to acknowledge that the Commission was considering whether to hold video programmers directly responsible and liable during the period of time that the programmer Best Practices were developed. Highlighting the public policy benefits of holding parties directly responsible, ACA believes that video programmers were strongly motivated to work with the industry on developing the programmer Best Practices because of the risk that they could be held directly responsible and liable for closed captioning quality rules, rather than as some altruistic act to help cable operators who would be liable under the current compliance regime. Moreover, video programmers' claim, without any supporting evidence, that an enforcement model that relies upon the Best Practices and certifications will encourage collaboration among all entities within the distribution chain to ensure that consumers receive high quality closed captioning, in contrast to a burden-shifting model.<sup>50</sup> While collaboration among entities within the distribution chain can be important at times, particularly when establishing initial best practices, video programmers overemphasize the importance of collaboration in resolving closed captioning complaints. At this point, parties understand their responsibilities for ensuring quality closed captioning, and to the extent that each party performs their duties, consumers should receive closed captioning of a high quality. It is the delineation of responsibilities that ensures that the system works, and also permits the Commission to comfortably adopt a burden-shifting enforcement model. Of course, there may be the rare instance when assigning responsibility for a closed captioning failure may be difficult, and entities within the distribution chain may feel at higher risk of being unfairly held responsible for a problem outside of their control. It is in these instances that all parties in the distribution chain will once again be self-motivated to collaborate and prevent these problems from occurring to lower this risk.

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<sup>50</sup> *Id.* at 11.

Finally, as just discussed, ACA has no reason to believe that the instances where an MVPD and programmer cannot resolve who is at fault will be common, nor does ACA believe that what is likely to be a rare occurrence should drive policy on how to allocate responsibility for closed captioning problems. Where no dispute over responsibility exists, it is clear that allocating liability to the party responsible for the violation is the most efficient and effective means to resolve the issue.

Nonetheless, the scenario that the programmers suggest where full responsibility is hard to determine is no different under the current regime than in the proposed burden-shifting enforcement model. The primary difference is that the current enforcement model relies on a court to ultimately determine liability under the terms of the contract between the parties rather than the Commission ultimately determining liability under the burden-shifting proposal. In either case, resolution of the problem would likely be slower than in instances where there is no dispute over who is responsible for the problem.

In the end, the programmers' argument boils down to the understandable desire to ensure that VPDs honestly assess whether they or the video programmer is at fault for a captioning issue,<sup>51</sup> rather than a legitimate concern that a burden-shifting enforcement model will lead to less collaboration among entities in the distribution chain.

## **V. THE COMMISSION SHOULD EXTEND COMPLIANCE RESPONSIBILITY AND LIABILITY TO VIDEO PROGRAMMERS FOR ALL CLOSED CAPTIONING OBLIGATIONS**

ACA's comments identify the public interest benefits that would result if the Commission extends some compliance responsibilities to video programmers to cover all television closed captioning obligations.<sup>52</sup> The comments of Comcast and Verizon corroborate ACA on this point. Conversely, commenters opposed to applying changes generally to all captioning obligations provide no reasonable justification for their position.

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<sup>51</sup> *Id.* at 12.

<sup>52</sup> ACA Comments at 9.

Advocates for the deaf and hard-of-hearing communities do not explain their reasoning or provide any reason why the Commission should refrain from addressing, at this time, whether to extend changes to the apportionment of captioning responsibilities generally to all captioning obligations. Instead, TDI's comments simply "urge" the Commission to leave changes to non-quality closed captioning rules off the table in this proceeding without providing supporting evidence or arguments why consideration of this issue is not timely.<sup>53</sup> ACA maintains that, contrary to TDI's assertion, applying a burden-shifting approach to all closed captioning complaints will provide regulatory certainty, erase confusion for consumers, and make Commission enforcement more efficient.<sup>54</sup> Additionally, as Comcast points out, applying a burden-shifting compliance model to the Commission's existing television closed captioning complaint procedures should eliminate any potential "liability gap," a concern expressed by the Commission in its FNPRM.<sup>55</sup>

## **VI. THE RECORD SUPPORTS THE ADOPTION OF A SAFE HARBOR**

In its initial comments, ACA supported the adoption of a safe harbor for VPDs, which would allow VPDs to take corrective actions prior to the Commission initiating enforcement action against the VPD. ACA explained that a safe harbor would be appropriate because there is no way to prevent real-time technical problems from occurring, even if the VPD has taken all reasonable steps to ensure that its equipment is in proper working order.

As several commenters note, allowing entities the opportunity to cure alleged deficiencies will promote better and more efficient compliance outcomes for consumers as well as providers. NCTA, for example, explains that responsible entities should have opportunities to cure any alleged deficiencies in the event of a potential pattern or trend of non-compliance

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<sup>53</sup> TDI Comments at 8.

<sup>54</sup> See, e.g., Comcast Comments at 5; Verizon Comments at 11-12.

<sup>55</sup> Comcast Comments at 5, *citing* FNPRM, ¶ 128.

with the quality rules, regardless of which entity is ultimately held responsible for compliance.<sup>56</sup> NCTA highlights the recent adoption of safe harbors in similar contexts as support for its position.<sup>57</sup> Similarly, DirecTV proposes a safe harbor for VPDs to the extent a VPD can “demonstrate that it has monitored and maintained its equipment in a diligent manner designed to ensure proper pass-through of closed captioning.”<sup>58</sup> These comments dovetail with ACA’s contention that it would be unjust to hold VPDs responsible for unexpected breakdowns in equipment when the VPD is taking appropriate preventative steps to minimize such occurrences.<sup>59</sup>

Creation of a safe harbor will give VPDs incentives to resolve problems quickly to avoid Commission enforcement action and this will lead to more rapid resolution of problems. In short, for the reasons identified above, the Commission should adopt a safe harbor for VPDs, and allow VPDs to take corrective actions prior to initiating enforcement action.

## **VII. THE COMMISSION SHOULD REFRAIN FROM REQUIRING VPDs TO FOLLOW SPECIFIC PROCEDURES WHEN SHIFTING RESPONSIBILITY TO VIDEO PROGRAMMERS**

ACA continues to support the proposed burden-shifting enforcement model as an efficient and practical means to extend some compliance responsibilities to video programmers. The Commission should move expeditiously to adopt it.

### **A. VPDs Should Have Flexibility in How They Handle Initial Investigations.**

Under the proposed burden-shifting enforcement model, VPDs would remain initially liable for investigating captioning issues as they are under the Commission’s current rules. Liability would then shift to the video programmer only after the VPD completes its initial

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<sup>56</sup> Comments of the National Cable and Telecommunications Association, CG Docket No. 05-231, at 2 (filed Apr. 28, 2014).

<sup>57</sup> *Id.* at 2 (emphasizing that the Commission recently adopted this type of approach for compliance with the new electronic newsroom technique captioning rules and for CALM Act enforcement).

<sup>58</sup> DirecTV Comments at 8.

<sup>59</sup> ACA Comments at 12-13.

investigation of the captioning issue and only if the VPD finds that the captioning issue is not within their control. For this initial investigation requirement, ACA agrees with Comcast that the Commission must afford VPDs the flexibility in how to fully investigate a consumer's captioning complaint.<sup>60</sup>

ACA members are comprised mostly of small and medium-sized MVPDs that lack the administrative and financial resources of larger MVPDs, cable multiple system operators, and the DBS providers. ACA members also range from companies that continue to operate traditional analog cable systems to companies that have installed fiber-to-the-home. Given these variations in size, staffing, and network architecture, it is imperative that the Commission refrain from requiring VPDs to follow set procedures to shift compliance responsibility to video programmers.

Moreover, the Commission's new technical compliance rules obviate the need for additional requirements. Under these rules, VPDs must monitor and maintain their closed captioning equipment by conducting technical equipment checks and keep records of their monitoring and maintenance activities for at least two years.<sup>61</sup> These new rules ensure that VPDs will be taking all reasonable preventative steps to ensure its captioning equipment is passing through the captions as received from the video programmer. Commission representatives at any time can request that a VPD supply these required records, and take appropriate action if the VPD has not complied with this recordkeeping requirement.

Therefore, so long as the VPD completes the initial investigation and determines, in good faith, that its equipment is properly passing through captions and that the captioning problem originated with the video programmer, compliance responsibility should shift to the

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<sup>60</sup> See Comcast Comments at 7 (“Comcast envisions that VPDs will have flexibility in how they handle these investigations given the variations in network architectures and other differences among VPDs.”).

<sup>61</sup> Report & Order, ¶¶ 94, 101.

video programmer. The Commission need not augment this proposed burden-shifting mechanism with any further requirements.

**B. Once a VPD Completes its Initial Investigation and Has Shifted Responsibility to the Video Programmer, the Commission Should Limit Further VPD Obligations to Helping Troubleshoot the Issue**

The proposed burden-shifting enforcement model envisions that if a VPD determines that the captioning problem originated with the video programmer, the VPD will notify the video programmer in writing and forward a copy of the notice to the Commission.<sup>62</sup>

Once the compliance responsibility has shifted to the video programmer, ACA stresses that VPD obligations should be limited to helping troubleshoot the issue. In other words, a video programmer can rely on a VPD if the VPD's assistance is necessary to find where the video programmer's captioning issue originated, or to help confirm that a captioning issue has been resolved, but responsibility for resolving the issue would rest entirely with the video programmer. Moreover, ACA reaffirms its opposition to joint and several liability when the problem is solely caused by the video programmer.<sup>63</sup> Once a VPD completes an investigation and finds that the captioning issue is not within the VPD's control, the video programmer should become wholly liable to address the problem. Anything other than full liability on the video programmer when the captioning problem originates with them would lead to a less effective mechanism for ensuring closed captioning quality.

**VIII. CONCLUSION**

The record supports ACA's recommendation that the Commission extend some direct responsibility and liability for closed captioning compliance to the video programmers that provide the captioning. All MVPDs agree that making programmers directly liable for their role in the captioning chain is more fair and efficient and will improve outcomes for consumers. The

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<sup>62</sup> Comcast comments at 8. ACA does not take issue with this requirement.

<sup>63</sup> See ACA Comments at 11-12 ("ACA opposes the concept of joint responsibility when the problem is solely caused by the video programmer.").

record also contains wide support for the burden-shifting or “shared responsibility” enforcement model, which attaches responsibility and liability for resolving complaints under the new captioning quality standards to a video programmer once it is clear that the VPD is not responsible for the captioning quality problem. In addition, the record also supports (i) adoption of a safe harbor, permitting a qualifying VPD to take corrective action regarding a captioning issue prior to Commission enforcement action; (ii) affording VPDs flexibility in how they handle initial investigations into the cause of a closed captioning complaint and relieving the VPD of liability after shifting compliance responsibilities to video programmers; and (iii) extension of compliance responsibility and liability to programmers for all closed captioning obligations, not just closed captioning quality.

Respectfully submitted,

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