

June 13, 2014

via electronic filing

Marlene H. Dortch
Secretary, Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation
Closed Captioning of IP-Delivered Video Clips · MB Docket No. 11-154
Closed Captioning Quality · CG Docket No. 05-231

Dear Ms. Dortch,

On June 11, 2014, Claude Stout of Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Andrew Phillips of the National Association of the Deaf (NAD), and Lise Hamlin of the Hearing Loss Association of America (HLAA) (collectively, “Consumer Groups”), and Blake Reid of the Samuelson-Glushko Technology Law & Policy Clinic (TLPC) discussed pending Commission action in the above-referenced matters with Mary Beth Murphy, Michelle Carey, Diana Sokolow, and Steve Broeckert of the Media Bureau, Karen Peltz Strauss of the Consumer and Governmental Affairs Bureau, and Greg Hlibok, Rosaline Crawford, Eliot Greenwald, and Suzy Rosen Singleton, and Ted Chen of the Disability Rights Office.¹

Video Clips

We commended Chairman Wheeler’s commitment during his June 9 keynote address at the M-Enabling Summit to propose covering video clips under the Commission’s rules for consideration at the Commission’s July open meeting. This action will take a major step toward fulfilling the promise of equal access to video programming for the deaf and hard of hearing community—the heart of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”).

We also committed to working closely with the Commission and our industry colleagues to arrive at a workable consensus on the contours of the Commission’s rules for video clips. Toward that end, we noted the apparent consensus and joint support by consumer and industry representatives for the coverage of “straight lift” video clips.²

¹ Andrea Saks of the International Telecommunications Union observed but did not participate in the meeting.

² *Ex Parte of the National Cable & Telecommunications Association (NCTA)*, MB Docket No. 11-154, at 2 (June 9, 2014) (“*NCTA Ex Parte*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521278436>; *Ex Parte of the National Association of Broadcasters (NAB)*,

However, we expressed concern over the proposal of the National Association of Broadcasters (NAB) and National Cable & Telecommunications Association (NCTA) to limit such clips to those longer than 15 seconds.³ We are unaware of any reason to draw an arbitrary line at 15 seconds, and urged the Commission to cover all video clips absent any evidence that clips shorter than 15 seconds should not be covered.

We also strongly objected to the possibility that at the outset of the Commission’s rules, only video programming owners (“VPOs”) would be obliged to render or pass through captions for video clips when shown on their own websites or applications. While we support requiring VPOs to deliver video clips to other VPDs with captions intact, the prospect that video programming distributors (“VPDs”) will not have to render or pass through those captions means that viewers who are deaf or hard of hearing will be unable to actually access the captions—except through the VPO’s own services.

This untenable result would force viewers to incur the additional expense and difficulty of locating and, in some cases, paying for access to video clips through VPO-based services—which may not be available for many clips—in addition to VPD-based services to which they already subscribe. While we acknowledge that the universe of VPDs may be larger for clips than for full-length programming, relieving VPDs of rendering and pass-through obligations on a wholesale basis would exclude a variety of large VPDs, such as Hulu, Amazon, and YouTube that are already subject to the Commission’s rules for full-length programming, as well as a variety of popular, mainstream news organizations and blogs such as the Washington Post, New York Times, and Huffington Post that millions of Americans rely upon for access to news clips.

We acknowledged that a longer timeframe might be appropriate for phasing in VPD rendering and pass-through requirements for clips. However, we urged the Commission to require that these ensure that VPDs are ultimately subject to the same pass-through and rendering requirements for clips that they are for full-length programming. We also urged the Commission to clarify that clips hosted by VPO-based services and embedded within other websites or services—a situation where the rendering of captions remains under VPOs’ control—should be covered under the same rule that requires captioning on VPOs’ own websites or applications and under the same timeframe. Lastly, we noted that VPDs who post clips outside of the context of a licensing agreement with a VPO, such as those making a fair use of a clip under copyright law, should not be relieved of the obligation to render or pass-through captions.

We also responded to NAB’s contention that the “the majority of local stations would need regulatory relief until an automated captioning video clip solution comes to

MB Docket No. 11-154, at 2 (June 9, 2014) (“*NAB Ex Parte*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521278013>.

³ *NCTA Ex Parte* at 2; *NAB Ex Parte* at 2.

market.”⁴ While we acknowledged the theoretical possibility that a clip requirement might pose short-term difficulty for some stations, we again noted that the CVAA requires evidence of actual economic burden to exempt programmers from the Commission’s rules.⁵ NAB has provided no explanation of the contours of the class of stations it believes need a waiver, any evidence, even in general terms, of an actual economic burden that would warrant a waiver, or any details of how long a waiver period might be necessary. Without any information, we cannot begin to evaluate NAB’s proposal and urge the Commission to reject it.⁶

Next, we acknowledged industry concerns over the need to post “time-sensitive” videos immediately and for the Commission to afford a grace period for programmers to add captions.⁷ We continue to believe, however, that consumers who are deaf or hard of hearing have a right to access clips—*particularly* important and “time-sensitive” clips with widespread appeal—on equal terms. Should the Commission conclude that a grace period is appropriate, it should be on the order of minutes and in no event longer than one hour. Moreover, any such period should automatically sunset to ensure that programmers have adequate incentives to improve their workflows to facilitate immediate posting of captioned videos. We also expressed concern that no workable definition of “time-sensitive” has appeared on the record in this proceeding, and urged the Commission to limit any grace period to a narrowly circumscribed class of videos to ensure that programmers cannot categorize *any* video as “time-sensitive” to avoid captioning obligations.

Relatedly, we urged the Commission to reject any distinction in its rules based on the “promotional” nature of a clip. Such a distinction would simultaneously harm both viewers who are deaf or hard of hearing by depriving them of information about non-promotional video clips and full-length programming *and* programmers by depriving them of a significant audience for that programming and resulting revenue from advertisements and subscriptions.

We also urged the Commission to limit any grace period for “archival” clips first posted online that are later published or exhibited on television with captions and thereby

⁴ *NAB Ex Parte* at 2.

⁵ *See* 47 U.S.C. § 613(d).

⁶ We also discussed the possibility of a requirement that local stations post transcripts or detailed descriptions of the video as a short-term, interim substitute while they integrate clip captioning into their workflows. We are deeply concerned about the shortcomings of such an approach and again cannot evaluate its potential impact without more information about the contours of a waiver for small stations.

⁷ *NCTA Ex Parte* at 2;

become subject to the CVAA.⁸ In our view, a grace period would reward wasteful behavior by incentivizing IP distributors to wait to caption a clip until it is shown on television with captions and incur the unnecessary transaction costs of coordinating with the television distributor to determine that the television exhibition has occurred—introducing delays that deny viewers who are deaf or hard of hearing the ability to access the clip. If IP distributors instead determined in advance of posting a clip that it was likely to be shown on television with captions, they could simply ensure that the IP version was captioned from the outset, providing equal access to viewers who are deaf or hard of hearing *and* avoiding unnecessary transaction costs. The Commission should favor the latter result by limiting any grace period to the order of hours and in no case longer than one day.

Lastly, we reiterated our support for covering “montage” clips and clips in “mashups” that have been shown on television with captions under the Commission’s rules. We again acknowledged the possibility that developing workflows to cover these clips may take additional efforts and reflected our cautious support for reasonable phase-in periods.

Caption Quality

Next, we reiterated our position that the Commission should hold VPDs responsible for complying with its newly-announced television caption quality standards.⁹ We acknowledged that a model that leaves VPDs as the primary point of contact for the consumers while affording the Commission the ability to loop in VPOs and video programmers for problems under their control would be superior to a model that bounced consumers back and forth between VPDs and VPOs.¹⁰ However, we noted that consumers pay substantial fees for video programming services from VPDs, and we continue to believe that holding VPDs singularly responsible for the quality of their services, as the Commission does with the basic provision of closed captions, is the correct policy choice. Relatedly, we endorsed the Commission leaving the responsibility structure for the provision of closed captions intact regardless of any changes the Commission might make in the context of compliance with the quality standards.

⁸ See 47 U.S.C. § 613(c)(2)(A).

⁹ See generally *Reply Comments of TDI, et al*, CG Docket No. 05-231 (May 27, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521152476>.

¹⁰ See *Comments of Comcast Corp.*, CG Docket No. 05-231, at 1-2 (Apr. 28, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521100393>.

Finally, we commended the Commission’s forthcoming action on outstanding items in the *Closed Caption Quality FNPRM* and offered our preliminary observations on items in the *FNPRM*.¹¹ In particular, we discussed:

- The importance of minimum quality standards, including technical solutions to improve synchronicity, resolution of captions cut off at the end of programming, a narrower definition of near-live programming, and recaptioning for rebroadcasts of live and near-live programming;
- Harmonizing electronic newsroom technique (“ENT”) rules for non-broadcast VPDs;
- Making information about complaints publicly available;
- Revisiting and revising or eliminating captioning exemptions, including the new network, \$3 million, advertising, late-night, locally-produced, and interstitial exemptions, in light of changing economic conditions in the 15 years since the Commission first introduced the exemptions;
- Addressing the poor provision of CEA-708 captions and the difficulty in accessing CEA-708 features on many televisions;
- Protecting the privacy rights of consumers who are deaf or hard of hearing without introducing unnecessary delays and complications into the resolution of complaints directed to VPDs; and
- Supporting the development of technical standards of captioning for 3D and UltraHD programming.

* * *

Please don’t hesitate to contact me if you have any questions regarding this filing.

Respectfully submitted,

/s/

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¹¹ See generally *Closed Captioning of Video Programming*, Report and Order, Declaratory Ruling, and Notice of Proposed Rulemaking, CG Docket No. 05-231, PRM-11-CG, 29 FCC Rcd. 2221, 2296-312 ¶¶ 131-167 (Feb. 24, 2014).

Cc:

Meeting attendees

Maria Kirby, Office of Chairman Wheeler

Clint Odom, Office of Commissioner Rosenworcel

Adonis Hoffman, Office of Commissioner Clyburn

Matthew Berry, Office of Commissioner Pai

Courtney Reinhard, Office of Commission O'Rielly

Senator Edward Markey

Senator Mark Pryor