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Sept. 4, 2014

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Closed Captioning of Video Programming, Telecommunications for the Deaf and Hard of Hearing, Inc., Further Notice of Proposed Rulemaking, CG Docket No. 05-231, PRM11CG, FCC 14-12

Dear Ms. Dortch:

On Sept. 2, 2014, Ross Lieberman of the American Cable Association (“ACA”) and the undersigned, counsel to ACA, met with Karen Peltz Strauss and Caitlin Vogus of the Consumer and Governmental Affairs Bureau, and Greg Hlibok, Suzy Rosen Singleton, and Eliot Greenwald of the Disability Rights Office to discuss ACA’s views in the above-referenced matter.¹

ACA began by explaining that when Congress passed the Telecommunications Act of 1996, which, through Section 305, directed the Commission to prescribe rules for the closed captioning of televised video programming, cable operators faced far less direct competition for multichannel video programming distributor (“MVPD”) customers.² Today, cable operators provide MVPD services in an intensely competitive market where the cost to acquire a new subscriber often exceeds the cost of retaining one. The beneficiaries of this changed marketplace have been consumers, including those with special needs, as cable operators compete to provide the highest possible quality customer care. This is especially true with regard to smaller and medium-sized providers, who cannot price their services lower than larger MVPDs because their wholesale programming costs are so much higher. Accordingly, these operators recognize that providing good customer service and placing greater emphasis on meeting each of their individualized customers’ needs are ways of distinguishing themselves from rival MVPDs.

Consistent with its filings, ACA reiterated how the current regime for resolving consumer complaints concerning television closed captioning is unfair, inefficient, and ineffective.³ It is unfair and inefficient because it imposes unnecessary costs on video programming distributors (“VPDs”), which include MVPDs, by requiring them to obtain a contractual commitment from the programmer to

¹ *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).

² See *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

³ See Comments of the American Cable Association, CG Docket No. 05-231, at 4-6 (filed Apr. 28, 2014) (“ACA Comments”); Reply Comments of American Cable Association, CG Docket No. 05-231, at 2-7 (filed May 27, 2014).

comply with the Commission's rules and to indemnify the VPD in the event the Commission imposes a fine on the VPD due to an error by the programmer. It is ineffective because video programming providers have little incentive to comply with their obligations with respect to smaller MVPDs, as these smaller providers are less likely to seek legal recourse in the event of a closed captioning problem due to the costs involved in doing so. For these reasons, imposing direct liability for compliance with all closed captioning obligations on the video programmer when the programmer is the source of the problem is preferable from a policy perspective. The Commission has reached a similar conclusion in the IP Closed Captioning Order, recognizing that video programmers and owners should bear responsibility and liability for compliance with the quality standards while video programming distributors would continue to be responsible for passing through the captioning intact.⁴

During the meeting, participants discussed ACA's proposal that in the event the Commission receives complaints pointing to the same captioning problem occurring on the service of multiple VPDs, it should not explicitly relinquish its right to send its formal complaint directly to the video programmer, thus bypassing the VPD and relieving it of the obligation to investigate and demonstrate it's not the root cause of the problem. In other words, the Commission should not expressly bind itself to sending formal complaints directly to the VPD in all cases. Instead, as it did in the CALM Act Order,⁵ the Commission should retain its discretion for special circumstances where going directly to the programmer would be more efficient and lead to a more timely resolution. There, the Commission stated that if it "becomes aware of a pattern or trend of sufficiently specific complaints, it may open an enforcement inquiry with the station or MVPD in question."⁶ ACA explained that the Commission's retention of discretion would likely be beneficial with respect to closed captioning complaints as well, even if the universe of such complaints is far smaller than for CALM Act violations and the likelihood of the Commission exercising such discretion is far less. At the very least, ACA suggested that the Commission explicitly state, in the order it plans to adopt in this proceeding, that it retains the discretion to waive compliance with the rule and forward complaints directly to the video programmer in appropriate cases.

Participants also discussed the value of the Commission forwarding informal consumer complaints it receives to both the video programmer and VPD, even if the first line of responsibility for investigating the problem lies with the VPD. This would provide the video programmer with advance notice of a potential problem, and the opportunity to speed its resolution if the programmer recognizes the likely fault is on its part. In addition, participants discussed the fact that smaller MVPDs, like ACA members who purchase their national video programming through the National Cable Television Cooperative, have less direct interaction with these programmers than larger MVPDs and would benefit greatly from these programmers publicly disclosing the name and contact information of the person to contact about closed captioning problems in the video programmer's organization.⁷ One approach discussed for addressing this problem was including video

⁴ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787, ¶ 17 (2012).

⁵ See ACA Comments at 9, *citing Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222 ¶ 41, n.183 (2011) ("CALM Act Order"). For this purpose, the Commission defined "pattern or trend" to "mean complaints sufficiently numerous and specific to justify focused review by the station/MVPD and the Commission. We decline to define what number of complaints is sufficient to constitute a pattern or trend, as this judgment will be fact-specific, based on such matters as the ratio of complaints to subscribers."

⁶ CALM Act Order, ¶ 41.

⁷ ACA notes the programming contracts that NCTC's more than 900 members opt-in to typically do not include specific name and contact information of a person to contact about closed captioning problems, and typically the

programmers in the Commission's online VPD registry with the name of a dedicated contact person and information for reaching him or her, and requiring them to file certifications that they have either provided captions as required and are in compliance with the new closed captioning quality rules or are following best practices, or if they maintain they are not obligated to provide captions, identify the exemption they claim is applicable to their programming. ACA agreed this would be enormously helpful to VPDs, consumers and Commission staff in quickly resolving closed captioning problems, and especially help smaller VPDs with respect to monitoring their own compliance with the rules and addressing a complaint regarding a problem outside of their control. These VPDs would immediately know where to go to find the information they need, and the information would always be current.

Relatedly, participants discussed (i) whether VPDs should be required to check the registry for each programmer they carry and, if they cannot locate a particular video programmer's certification, inform the programmer of its obligation to file or report the missing certifications to the Commission, and (ii) a process for the VPD to forward consumer complaints filed with it directly to the video programmer by either redacting any personally identifiable information or providing only the content of the complaint. ACA found merit in each proposal, and suggested that the video programmer be required to respond to the VPD in writing in a form that allows the VPD to forward programmer's response to the consumer without modification. ACA explained this would reduce the burden on small and medium-sized cable operators.

Participants discussed the Commission explicitly adopting a "ladder of compliance" approach that first gives the responsible party the opportunity to respond to a pattern of consumer complaints with voluntary corrective actions, and, if that is not sufficient to address the problem, submission of a voluntary 180-day compliance plan. If these do not resolve the problem, the matter would be referred to the Enforcement Bureau. ACA indicated that such an explicit process that must be followed by the Commission unless extenuating circumstances exist would address its concern that VPDs would need some form of safe harbor because even responsible closed captioning equipment monitoring and maintenance cannot prevent certain types of real-time technical problems from occurring, and when that happens, VPDs should not immediately run the risk of enforcement action.

Finally, participants discussed Comcast's burden shifting proposal, and the steps a VPD would need to take before it could hand-off the problem for resolution by the video programmer. ACA noted that the capabilities of larger MVPDs are not the same as those of smaller MVPDs, and the steps to be taken during the VPD's investigation of a closed captioning problem must account for these differences. In some cases, a smaller MVPD might not have the same testing equipment as a larger MVPD, and therefore the rule should be flexible enough so that a smaller MVPD, defined as one with 400,000 subscribers or fewer, may satisfy each of the required steps with only the testing equipment that it has at the time it receives the complaint. This would avoid imposing onerous and costly burdens on smaller providers. Moreover, programmers should not be able to take advantage of these differences by expecting smaller MVPDs to utilize the exact same testing equipment, conduct the exact same testing procedures, or meet the same testing standards as larger MVPDs before accepting a smaller VPD's word that it satisfied the steps required to hand off the complaint. The word of a smaller MVPD, as defined above, that they satisfied each step, should be sufficient.

only contact information for a programmer contained in these contracts is a company address and/or fax number without a name of an individual.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara Esbin

cc: Karen Peltz Strauss
Caitlin Vogus
Eliot Greenwald
Greg Hlibok
Suzy Rosen Singleton