

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of

Closed Captioning of Internet  
Protocol-Delivered Video Programming:  
Implementation of the Twenty-First Century  
Communications and Video Accessibility  
Act of 2010

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MB Docket No. 11-154

**THE NATIONAL ASSOCIATION OF BROADCASTERS  
OPPOSITION TO PETITION FOR RECONSIDERATION OF  
TELECOMMUNICATIONS FOR THE DEAF AND HARD OF  
HEARING, INC., ET AL.**

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	i
I. Introduction .....	1
II. TDI Fails to Meet the Procedural Requirements for Reconsideration .....	4
III. Contrary to TDI's Assertion, the Commission Had Authority under the CVAA to Exclude Video Clips from the IP Captioning Rules .....	6
IV. The Commission's Decision to Exclude Video Clips Was Consistent with Clear Congressional Intent as Expressed in the Legislative History .....	10
V. The Commission's Determination to Exclude Programming Less than Full-Length Was Appropriate to Avoid Adding Burdensome Complexities for Broadcasters.....	13
VI. Conclusion .....	16

## EXECUTIVE SUMMARY

Through the course of the above-captioned proceeding, television broadcasters have fully supported the efforts of the Federal Communications Commission to better enable deaf and hard-of-hearing individuals to view video programming previously aired on television when it subsequently is delivered using Internet Protocol (IP). The National Association of Broadcasters (NAB) has been pleased to assist the Commission in implementing the important and challenging IP captioning provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). The Commission's IP captioning rules establish an appropriately balanced framework that serves the CVAA's goal while maintaining the flexibility and practicality needed by broadcasters to make online content with captions available within the short time frames desired by Congress and the FCC.

National broadcast television networks and local broadcast television stations already are hard at work preparing to meet the new captioning requirements to better serve individuals with disabilities. The Commission should reaffirm the balanced approach taken earlier this year and permit broadcasters to move forward under the current rules, rather than considering new arguments not appropriately raised in reconsideration petitions and/or reiterating old arguments previously raised by commenting parties and explicitly rejected by the Commission. Specifically, NAB hereby urges the Commission to deny the Petition for Reconsideration filed by Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.* (TDI) with respect to TDI's request that the Commission reconsider its decision to apply IP captioning requirements to full-length programming but not to video clips.

As an initial matter, TDI has not met the procedural standard for reconsideration. It offers statutory arguments that could have been put forth at an earlier stage, and it provides no explanation as to why they were not. TDI's Petition must fail for that reason alone.

TDI also errs substantively in arguing that the Commission lacks authority to apply the captioning rules to full-length programming but not to video clips that do not count as full-length programming. As TDI itself previously acknowledged in earlier filings in this proceeding, the Commission has authority to adopt this full-length programming limitation, which is fully consistent with the language of the CVAA and its legislative history.

Section 202(a) of the Act expressly defines "video programming" to include "programming by a television station and *programming comparable* to that which is provided by a broadcast television station." Indeed, the CVAA's captioning provisions related to video programming owners, providers, and distributors apply only to "programming delivered using [IP] that was *published or exhibited on television with captions.*" This language demonstrates that Congress intended to apply these new requirements only to (a) television programs (broadcast and comparable to broadcast), (b) that are already captioned, (c) on other platforms, *i.e.*, when delivered via IP.

Broadcasters and non-broadcast programmers airing programming on television generally do not even air clips and excerpts. The notion of short segments available for viewing is very much a product of the Internet ecosystem; there is no easy corollary in the traditional television world. Thus, video clips do not fall within the CVAA's definition of video programming as that programming "comparable" to broadcast television

programming. NAB also notes that the CVAA's IP Captioning provisions are inapplicable to the types of short-form programming that broadcasters do air on television (e.g., promotions, interstitials, and public service announcements) because such programming is exempt from the FCC's captioning form and, accordingly, is *not* generally exhibited on television with captions.

Indeed, the Commission could not properly have applied its rules to "video clips," as TDI requests here, given that the relevant Senate and House committee reports on the captioning provisions of the CVAA explicitly stated that Congress did not intend for clips to be covered. In addition, the Commission's policy decision to exclude video clips from its rules appropriately recognized both the practical complexities and the undue time and expense required to caption video clips delivered via IP. For all these reasons, the Commission should deny TDI's request to reconsider the application of the captioning rules only to full-length video programming.

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**THE NATIONAL ASSOCIATION OF BROADCASTERS  
OPPOSITION TO PETITION FOR RECONSIDERATION OF  
TELECOMMUNICATIONS FOR THE DEAF AND HARD OF  
HEARING, INC., ET AL.**

**I. INTRODUCTION**

Through the course of the above-captioned proceeding, television broadcasters have fully supported the efforts of the Federal Communications Commission to better enable deaf and hard-of-hearing individuals to view video programming previously aired on television when it subsequently is delivered using Internet Protocol (IP). The National Association of Broadcasters (NAB)<sup>1</sup> has been pleased to assist the Commission in implementing the important and challenging IP captioning provisions of

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<sup>1</sup> NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the FCC and other federal agencies, and the courts.

the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA).<sup>2</sup> The Commission's IP captioning rules, adopted in January 2012, establish an appropriately balanced framework that serves the CVAA's goal while maintaining the flexibility and practicality needed by broadcasters to make online content with captions available within the short time frames desired by Congress and the FCC.<sup>3</sup>

National broadcast television networks and local broadcast television stations already are hard at work preparing to meet the new captioning requirements to better serve individuals with disabilities. The Commission should reaffirm the balanced approach taken earlier this year and permit broadcasters to move forward under the current rules, rather than considering new arguments not appropriately raised in reconsideration petitions and/or reiterating old arguments previously raised by commenting parties and explicitly rejected by the Commission. Specifically, pursuant to Section 1.429(f) of the Commission's rules,<sup>4</sup> NAB hereby urges the Commission to deny the Petition for Reconsideration filed by Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.* (TDI)<sup>5</sup> with respect to TDI's request that the Commission reconsider

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<sup>2</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of Title 47 of the United States Code) (CVAA). The law was enacted on October 8, 2010 (S. 3304, 111th Cong.). See *also* Amendment of Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-265, 124 Stat. 2795 (2010), also enacted on October 8, 2010, to make technical corrections to the CVAA and the CVAA's amendments to the Communications Act of 1934.

<sup>3</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, MB Docket No. 11-154, 27 FCC Rcd 787 (2012) (*Order*).

<sup>4</sup> 47 C.F.R. § 1.429(f).

<sup>5</sup> Petition for Reconsideration of Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.*, MB Docket No. 11-154 (Apr. 27, 2012) (TDI Petition or Petition).

its decision to apply IP captioning requirements to full-length programming but not to video clips.<sup>6</sup>

TDI errs substantively in arguing that the Commission lacks authority to apply the captioning rules to full-length programming but not to video clips that do not count as full-length programming. As TDI itself previously acknowledged in earlier filings in this proceeding, the Commission has authority to adopt this full-length programming limitation, which is fully consistent with the language of the CVAA and its legislative history. Indeed, the Commission could not properly have applied its rules to video clips, as TDI requests here, given that the relevant Senate and House committee reports on the captioning provisions of the CVAA explicitly stated that Congress did not intend for clips to be covered. In any event TDI has not met the procedural standard for reconsideration. It offers statutory arguments that could have been put forth at an earlier stage, and it provides no explanation as to why they were not. TDI's Petition must fail for that reason alone.

The Commission's decision to exclude video clips from its rules appropriately recognized both the practical complexities and the undue time and expense required to caption video clips delivered via IP. For these reasons, as discussed herein, the

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<sup>6</sup> The *Order* defines "video clips" as "excerpts of full-length video programming, consistent with the proposals of some commenters." *Order* at ¶ 45. The Commission explained that "this definition is consistent with what consumers commonly think of as 'video clips.' ... We reject proposals that the Commission limit the definition of 'video clips' to promotional materials that do not exceed a certain duration or fraction of the program. There is no evidence in the CVAA or its legislative history that Congress intended to exclude 'video clips' only if they are promotional in nature, and we do not see any evidence that Congress sought to exclude only clips of a certain duration or percentage of the full-length program." *Id.* at ¶¶ 45, 47 (internal citations omitted). NAB agrees with the Commission's reasoning and conclusion.



Commission should deny TDI's request to reconsider the application of the captioning rules only to full-length video programming.<sup>7</sup>

## **II. TDI FAILS TO MEET THE PROCEDURAL REQUIREMENTS FOR RECONSIDERATION**

As discussed in detail in Sections III and IV below, TDI's claim that the FCC lacks authority to exclude video clips is clearly erroneous. But even without reaching TDI's unmeritorious statutory arguments, the Commission could, as an initial matter, dismiss the TDI Petition as procedurally defective because it does not satisfy the requirements for reconsideration. Section 1.429(b) of the Commission's rules makes clear that a petition for reconsideration "which relies on factors or arguments which have not previously been presented to the Commission will be granted *only* under the following circumstances: (1) changed circumstances; (2) the facts or arguments were unknown to petitioner and could not have been discovered through the exercise of ordinary diligence since its last filings with the Commission; or (3) the Commission nonetheless determines consideration is required in the public interest."<sup>8</sup>

TDI fails to provide any explanation as to why it raises statutory interpretation arguments in the Petition that it did not raise through the course of the proceeding. In fact, at the reply comment stage, TDI demonstrated that it was well aware of the relevant legislative history, a point that underscores that TDI *could* previously have raised its statutory arguments. Specifically, on reply, TDI acknowledged that the Commission not only had authority to exclude video clips, but was directed by Congress to do so and was entitled to establish its own definition for the term:

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<sup>7</sup> This opposition is not intended to address TDI's petition as related to device synchronization requirements.

<sup>8</sup> 47 C.F.R. § 1.429(b).

The legislative history makes clear that Congress intended the Commission to define “full-length programming” in terms of what it is not: namely, programming that is not a “video clip” or an “outtake.” *Accordingly, we urge the Commission to define full-length programming as “any video that is not a video clip or outtake,” and focus on appropriately defining those terms to effectuate Congress’s intent.*<sup>9</sup>

Nonetheless, without explanation, TDI now disputes that the Commission has such authority. TDI’s Petition thus fails the first two prongs of Section 1.429(b): TDI has not attempted to, and cannot, claim that its statutory arguments are proper for reconsideration due to changed circumstances or are newly discovered. Nor does TDI explain its apparent changed position since its reply comment filing. Further, Commission consideration of the Petition cannot be described as required in the public interest – the Commission determined it has authority to limit the rules to full-length programming and has already considered the impact of the rules adopted. Accordingly, the Petition also fails the third prong of Section 1.429(b). Because TDI fails to meet any required element of the standard for reconsideration, the Commission should dismiss the Petition on that basis alone.

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<sup>9</sup> Reply Comments of TDI, MB Docket No. 11-154, at 7 (filed Nov. 1, 2011) (emphasis in original omitted; emphasis added). Not only did TDI admit that the Commission has authority to exclude video clips, but it made *policy arguments* regarding how video clips should be defined – TDI never asserted that the statutory language of the CVAA controlled the matter. See *id.* at 8. Similarly, although TDI argued in its most recent advocacy prior to the adoption of the *Order* that there was an “absence of additional guidance as to congressional intent in defining” video clips and full-length programming, TDI nonetheless “reiterated the position from [its] comments and reply comments that Congress intended to define ‘full-length programming’ by what it is not – namely, video clips and outtakes,” and accordingly urged the Commission to limit the definition of video clips. See Notice of *Ex Parte* Presentation of TDI and the National Association for the Deaf, MB Docket No. 11-154, at 2 (filed Dec. 15, 2011).

### **III. CONTRARY TO TDI'S ASSERTION, THE COMMISSION HAD AUTHORITY UNDER THE CVAA TO EXCLUDE VIDEO CLIPS FROM THE IP CAPTIONING RULES**

Notwithstanding the argument above, if the Commission elects to consider the merits of TDI's request for reconsideration, it should deny the Petition because it is inconsistent with the CVAA. There is no basis to TDI's argument that the CVAA "unambiguously requires 'video clips' to be captioned" and that the Commission thus lacked authority to limit its requirements to "full-length programming" and thereby exclude clips from the captioning rules.<sup>10</sup> Administrative law is well settled that where a statute is "silent ... with respect to [a] specific issue, the question for [a] court is whether the agency's answer is based on a permissible construction of the statute."<sup>11</sup> While it is true that the CVAA on its face does not explicitly exclude video clips from the captioning requirements, it also does not specifically prohibit the Commission from excluding video clips.

In fact, to the extent there is any "unambiguous" reading of the statute with respect to video clips, it can only be that the CVAA clearly does not constrain the Commission's authority to exclude video clips. As noted above, TDI previously acknowledged that the Commission not only had authority to exclude video clips, but was directed by Congress to do so and entitled to establish its own definition for the term.<sup>12</sup>

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<sup>10</sup> TDI Petition at 3, 2-9.

<sup>11</sup> *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984); see also *Association of Administrative Law Judges v. FLRA*, 397 F.3d 957, 961-62 (D.C. Cir. 2005) (rejecting an argument that the court should infer that Congress did not intend there to be a certain exception, where other exceptions had been enumerated).

<sup>12</sup> See *supra* note 9 and accompanying text.

Without any reference to its earlier acknowledgement or its evident change of position, TDI now claims the Commission lacks precisely the authority TDI previously recognized. TDI has not and cannot point to any provision of the CVAA that “unambiguously” requires video clips to be captioned. Instead, TDI asserts that the *lack* of specific language in the statute discussing the length of programming demonstrates an unambiguous direction from Congress. While a review of the legislative history demonstrates that this most certainly was not Congress’s intent (as discussed below), the Commission need not reach the legislative history to dismiss TDI’s authority argument.

A plain reading of the statute shows that Congress intended IP captioning requirements to be applied to programming comparable to that which is aired by broadcast television stations. Section 202(a) of the Act expressly defines “video programming” to include “programming by a television station and *programming comparable* to that which is provided by a broadcast television station.”<sup>13</sup> Indeed, the CVAA’s captioning provisions related to video programming owners, providers, and distributors apply only to “programming delivered using [IP] that was *published or exhibited on television with captions*,”<sup>14</sup> demonstrating that Congress intended to apply these requirements only to (a) television programs (broadcast and comparable to broadcast), (b) that are already captioned, (c) on other platforms, *i.e.*, when delivered via IP.

Broadcasters and non-broadcast programmers airing programming on television generally do not air clips and excerpts. The notion of short segments available for

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<sup>13</sup> 47 U.S.C. § 613(h)(2) (emphasis added).

<sup>14</sup> *Id.* § 613(c)(2)(A) (emphasis added).

viewing is very much a product of the Internet ecosystem; there is no easy corollary in the traditional television world. Thus, video clips do not fall within the CVAA’s definition of video programming as that programming “comparable” to broadcast television programming. NAB also notes that the CVAA’s IP Captioning provisions are inapplicable to the types of short-form programming that broadcasters do air on television (e.g., promotions, interstitials, and public service announcements) because such programming is exempt from the FCC’s captioning form and, accordingly, is *not* generally exhibited on television with captions.

In addition, broadcasters are not required under the Commission’s traditional captioning rules to provide captioning for the few types of short-form programming they do offer, such as “[I]nterstitial material, promotional announcements, and public service announcements.”<sup>15</sup> While this exemption is not identical to the “clips” exemption for IP captioning, Congress was well aware that in the case of traditional closed captioning the Commission had identified some types of programming (including less than full-length programming) that is not subject to the rules. The fact that Congress did *not* unambiguously direct the Commission to refrain from limiting the applicability of its rules

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<sup>15</sup> 47 C.F.R. § 79.1(d)(6).

must mean, under both the tenets of administrative law<sup>16</sup> and common sense, that the Commission has authority to exclude video clips from its rules.<sup>17</sup>

Nothing in the plain language of the CVAA directs the Commission to implement regulations to require IP captioning for programming other than programming comparable to what is aired on television. More broadly, the language of the statute does not suggest in any way that Congress desired or intended every snippet of video content – no matter the length, type of programming, or captioning status – to be captioned when delivered in an IP format. At most, TDI can argue here that the Commission should not, as a policy matter, have excluded video clips from its rules – an argument that NAB addresses below. The claim that the Commission lacked authority to make this well-considered and balanced determination, however, is wholly unsupported and not at all reflective of either the statutory language or the Commission’s careful approach in this and other CVAA implementation proceedings.

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<sup>16</sup> See *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (under *Chevron*, a reviewing court “must first exhaust the ‘traditional tools of statutory construction’-- including examination of the statute’s text, legislative history, structure and purpose -- to determine whether Congress has spoken to the precise question at issue” ) (quoting *Chevron USA., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)). As Congress was aware of the Commission’s current closed captioning rules, Congress could have, but did not, direct the FCC to implement IP closed captioning rules with no exceptions.

<sup>17</sup> In excluding video clips from the definition, the Commission defined “full-length programming” in a common-sense way that is consistent with the general understanding of the term and with the CVAA’s language. Multiple segments of a full-length program, if posted together for sequential viewing and composing the entire program would constitute full-length programming. Video clips that are of shorter duration than full-length programming and cannot be assembled to comprise a whole program cannot be considered programming comparable to broadcast programming. Broadcasters may opt to post video clips or excerpts of content online rather than the full-length programming, and may do so for a variety of reasons (*e.g.*, an on-demand video clip is more consistent with consumer expectations for that type of programming). Certainly, broadcasters have no intention of dividing full-length programming for the sole purpose of evading the IP captioning rules.

#### IV. THE COMMISSION'S DECISION TO EXCLUDE VIDEO CLIPS WAS CONSISTENT WITH CLEAR CONGRESSIONAL INTENT AS EXPRESSED IN THE LEGISLATIVE HISTORY

As discussed above, the language of the CVAA clearly permits the Commission to exclude video clips from IP captioning requirements. The Commission need not move beyond this analysis of the statutory language to reaffirm its authority. However, if the Commission concludes that further tools of statutory construction are needed to confirm Congress' intent, it should examine the CVAA's legislative history and structure,<sup>18</sup> as well as its purpose.<sup>19</sup> The Commission will not need to look far: the committee reports unequivocally provide that "[t]he Committee intends, at this time, for the regulations to apply to full-length programming and not to *video clips* or outtakes."<sup>20</sup> The Commission appropriately followed this clear direction from the legislators.

It is curious that TDI wishes the Commission to find "unambiguous" intent to include clips where none exists in the statutory text, yet TDI would have the Commission ignore the unambiguous reference to clips in legislative history specifically setting forth Congressional intent regarding the scope of FCC rules. Instead, TDI claims that the legislative history's references to video clips "were intended to refer to videos already exempt from the captioning rules...."<sup>21</sup> As discussed above, NAB agrees

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<sup>18</sup> See *Southern California Edison Co. v. FERC*, 116 F.3d 507 (D.C. Cir. 1997).

<sup>19</sup> See *First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996); *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as univocally as might be wished.")

<sup>20</sup> S. REP. NO. 111-386 at 13-14; H.R. REP. NO. 111-563 at 30 (together, the Committee Reports) (emphasis added).

<sup>21</sup> TDI Petition at 9-10. TDI's central argument appears to rest on a hypothesis that "likely intent" behind the terms of art "video clips" and "full-length" programming is that they merely refer to articulated exemptions already established by Commission rules.

with TDI that Congress likely was well aware of the existing exemptions in FCC rules for captioning traditional television programming. However, there is no merit to the argument that the term “video clips” in the Committee Reports intended to refer to interstitials, promos, PSAs, and the like. Had Congress meant to limit its IP captioning exclusion to only promotional, interstitial, and PSA material, both the plain language of the CVAA and concurrent legislative history would have made that intention clear, most likely by referencing terms of art consistent with current FCC regulations.<sup>22</sup>

Indeed, under TDI’s proposition, the legislative history’s specific reference to “video clips” as excluded from the captioning requirements of Section 202(b) would have been wholly unnecessary because that material, already exempt under the traditional closed captioning rules, would unlikely be broadcast with captions and therefore would not be subject to the CVAA.<sup>23</sup> The argument that the Committee Reports’ use of the term “video clips” was intended to refer to the FCC’s traditional exceptions to closed captioning rules further fails because video clips, as commonly understood, are often not related to program promotions and are regularly posted *after* a program has aired on television.<sup>24</sup> Video clips do not necessarily promote full-length

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<sup>22</sup> Notably, Congress did not use terms such as “interstitials,” “promotional announcements,” and “public service announcements,” in addition to other terms found in the Commission’s traditional closed captioning rules, in the CVAA or the Committee Reports. See 47 C.F.R. § 79.1. Instead, the Committee Reports use the term “video clips,” and the Commission accordingly defined the term in a way consistent with consumer expectations. See *supra* note 6.

<sup>23</sup> See 47 USC § 613(c)(2)(A) (“[T]he Commission shall revise its regulations to require the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited *on television with captions....*”).

<sup>24</sup> See, e.g., Reply Comments of the National Cable and Telecommunications Association, MB Docket No. 11-154, at 5 (filed Nov. 1, 2011) (“[M]any clips are not related to program promotions since they often are posted online *after* a program has



programming, and are often not the same versions of programming that has aired on television.<sup>25</sup>

Finally, “guidance” from members of Congress *after the enactment of a law* should not influence the Commission’s consideration of the Petition or its interpretation of the CVAA. Such “guidance” is merely the opinion of the members, and, as well-established in case law, is *not* part of the legislative history and should be afforded *no* interpretative deference.<sup>26</sup> Despite TDI’s claims otherwise, the legislative history is clear that individual segments or clips of a full-length program are not, and should not

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aired on television. Such excerpts exist to reach a separate viewing platform and do not necessarily promote full-length programming.”).

<sup>25</sup> As the Commission concluded, when substantially all of a full-length program previously aired on TV with captions is available via IP it indeed constitutes full-length programming and therefore should be subject to IP closed captioning requirements. See *Order* at ¶ 45.

<sup>26</sup> Perhaps in an attempt to cloud the Commission’s analysis of the actual legislative history, TDI references a January 10, 2012 letter from Rep. Edward Markey and Sen. Mark Pryor. See TDI Petition at 10 (citing Letter from Rep. Edward Markey and Sen. Mark Pryor to the Honorable Julius Genachowski, Chairman, FCC (Jan. 10, 2012)). The letter is not part of the legislative history, and therefore is not controlling in this matter. See, e.g., *Eloise Pepion Cobell v. Gale A. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (noting “post-enactment legislative history is not only oxymoronic but is entitled to little weight”); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 365 (D.C. Cir. 1989) (“[p]ost-enactment statements are a different matter, and they are not to be considered by an agency or by a court as legislative history.”); see also *Barber v. Thomas*, 130 S.Ct. 2499, 2507 (2010) (“[W]hatever interpretative force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made after the bill in question has become law.”); *United States ex rel. Long v. SCS Business & Technical Institute, Inc.* 1743 F.3d 870, 878-79 (D.C. Cir. 1999). Therefore, the Commission must confine itself to the language of the CVAA and the recorded legislative history, and not place any interpretative weight on the January 10 letter.

be considered, the equivalent of full-length programming, and thus are properly excluded from the IP closed captioning rules.<sup>27</sup>

In its initial comments, TDI was correct in part that “the rise of Internet-delivered video ... has led to a rise in conceptually and thematically complete short-form programming with durations of mere minutes or even seconds.”<sup>28</sup> However, such developments are happening primarily in online-only video, not with respect to programming aired initially on television and then repurposed for the Internet. Therefore, TDI’s reliance on the existence of short-form web-based programming to support its request is misplaced. Web-based programming never previously broadcast on television is not covered under the CVAA, and is irrelevant to the adoption by the Commission of definitions under the IP captioning rules. The Commission should ignore this red herring.

#### **V. THE COMMISSION’S DETERMINATION TO EXCLUDE PROGRAMMING LESS THAN FULL-LENGTH WAS APPROPRIATE TO AVOID ADDING BURDENSOME COMPLEXITIES FOR BROADCASTERS**

As discussed above, TDI’s introduction of statutory arguments for the first time in its Petition fails the Commission’s standards for a petition for reconsideration. TDI

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<sup>27</sup> TDI’s suggestion that the Committees’ references to “video clips” are intended to refer to “consumer-generated media” is also unavailing, and is unsupported by both the statute and the legislative history. The CVAA discusses consumer-generated media in the provisions relating to the Video Programming Accessibility Advisory Committee, but does not use the term in its direction to the FCC to implement IP closed captioning rules. Thus, there is no indication in the CVAA that Congress intended the FCC to limit exceptions to its rules only to consumer-generated media. See *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Similarly, the Committees could have, but did not, note that “video clips” referred to consumer-generated media.

<sup>28</sup> Comments of TDI, Inc., *et al.*, MB Docket No. 11-154, at 19 (filed Oct. 18, 2011).

seemingly uses its new statutory arguments to rehash the policy arguments it has made throughout the proceeding – arguments that the Commission fully considered, but ultimately dismissed.<sup>29</sup>

Acting properly within its authority under the CVAA, the Commission carefully considered what Congress said in the statute, and meant in the Committee Reports, by “video clips” and adopted rules that reflected Congressional intent as well as sound public policy. As the record in this proceeding demonstrated, any requirements for programming that is less than full-length to have captions when distributed over IP would add substantial complications to the information ecosystem.<sup>30</sup> NAB’s initial comments explained that, given technical complexities, there would be substantial production costs and delays associated with any requirement to caption an excerpt of a full-length program.<sup>31</sup> For example, some stations post video clips of news stories ahead of airtime. In such cases, the same story will be aired on television (and may be captioned either live or through the use of Electronic Newsroom Technique (ENT)) as part of a full newscast. The programming may also be streamed “nearly simultaneously” with captions or as part of a “pre-recorded” program in its entirety. In

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<sup>29</sup> See *Order* at ¶ 47, fn. 200-01 (citing to and rejecting TDI’s proposals).

<sup>30</sup> See, e.g., Reply Comments of NAB, MB Docket No. 11-154, at 12 (filed Nov. 1, 2011) (“[T]here would be substantial production costs and technical delays associated with any requirement to caption an excerpt of a full-length program.”); Reply Comments of the Association of Public Television Stations and the Public Broadcasting Service, MB Docket No. 11-154, at 6-7 (filed Nov. 1, 2011) (“Video clips currently must be separately captioned, even if the clip is taken from a full-length program that has been captioned for IP distribution.... PBS would need to either build additional functionality into the [PBS] content management system to allow video files to be paired with related closed caption files or manually generate new closed caption files for more than 7,000 clips in the collection.”).

<sup>31</sup> See Comments of NAB, MB Docket No. 11-154, at 12-13 (filed Oct. 18, 2011) (“NAB Comments”).

this complex cycle, it may be very difficult for a local station to identify, encode, and then re-post excerpts of its local news. The Commission recognized these challenges and appropriately excluded programming that is less than full-length.

TDI's desire for all programming of any length to be captioned online is understandable, but it cannot be evaluated in a vacuum. NAB shares the goal of increased accessibility for broadcast viewers (and online viewers of broadcast programming). However, as Congress and the Commission recognized, there are real costs, difficulties, and burdens associated with captioning online video clips. Online video is a developing, but nascent, technology and business model. If the Commission were to impose additional costs and burdens on broadcasters and other programming owners now, it could easily reduce the number of clips online, a result that is clearly contrary to the interest of the public as a whole.<sup>32</sup>

Moreover, TDI's claims of harm are overstated and premature.<sup>33</sup> Broadcasters want their high-value, unique, local news content accessible to as many viewers as possible. There is no record evidence that news outlets will unreasonably "resist" making video clips accessible,<sup>34</sup> particularly as the IP captioning rules for pre-recorded

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<sup>32</sup> Such a result would certainly not be in the public interest. See STEVEN WALDMAN, INFORMATION NEEDS OF COMMUNITIES 76 (July 2011) ("[E]vidence is growing that ... local TV stations are becoming important sources for news online. In fact, local TV news sites rank among the most popular news websites....").

<sup>33</sup> See TDI Petition at 16 ("[I]t appears that many news outlets will resist making their 'video clips' accessible if not obliged to do so under the Commission's rules.").

<sup>34</sup> One cable programmer's statement in unrelated litigation has no relevance here. See TDI Petition at 16, discussing *GLAD v. Time Warner, Inc.* Time Warner's defense to a complaint under the Americans with Disabilities Act does not implicate the company's future plans, nor does it serve to predict an industry-wide future.


programming do not even go into effect until September 30, 2012.<sup>35</sup> Accordingly, the Commission's exclusion of video clips from the IP closed captioning rules was fully justified and appropriate, as well as consistent with legislative intent. The Commission should not now be swayed by TDI's theoretical claims that, at best, are exceptionally premature.<sup>36</sup>

## VI. CONCLUSION

For all the reasons stated above, the Commission should deny TDI's petition for reconsideration as it relates to video clips.

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

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<sup>35</sup> After that date, the amount of video material available with captions online will grow exponentially. Broadcasters also will have more opportunity to experiment with captioning software equipment, and it is possible that the technical and engineering challenges associated with captioning some short-form IP video programming may decrease over time.

<sup>36</sup> Further underscoring the prematurity of TDI's concerns, the Commission noted that if it finds that consumers who are deaf or hard of hearing "are not getting access to critical areas of programming, such as news, because of the way the programming is posted" it may reconsider the issue. *Order* at ¶ 48.

## CERTIFICATE OF SERVICE

I, Susan Baurenfeind, a secretary at the National Association of Broadcasters, do hereby certify that on this 7th day of June, 2012, I caused a copy of the foregoing "Opposition to Petitions for Reconsideration" to be sent via first-class U.S. Mail, postage prepaid, to the following:

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