

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Closed Captioning of Internet Protocol-Delivered)	
Video Programming: Implementation of the)	MB Docket No. 11-154
Twenty-First Century Communications and Video)	
Accessibility Act of 2010)	

**REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA,
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, AND THE
NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF DIMA PETITION
FOR TEMPORARY PARTIAL EXEMPTION OR LIMITED WAIVER**

The Motion Picture Association of America, the National Cable & Telecommunications Association, and the National Association of Broadcasters (hereinafter “Associations”) respectfully submit reply comments in support of the Digital Media Association’s (“DiMA”) Enhanced Captioning Petition seeking a narrowly tailored adjustment to the implementation schedule for “Enhanced Captioning Features”¹ under the Twenty-First Century Communications and Video Accessibility Act (“CVAA”).²

It is critical to underscore the limited nature of the requested relief. The Associations do not seek any modification to the schedule for the provision of basic captioning, which will be required this September for prerecorded content. The member companies of the Associations have dedicated, and continue to dedicate, significant resources to satisfying this aggressive timeline.

¹ Enhanced Captioning Features include the set of display controls that permit consumers to manipulate the appearance of captions, *e.g.*, color, opacity, font. *See* 47 C.F.R. § 79.103(c).

² *See* Digital Media Association Petition for Temporary Partial Exemption, MB Docket No. 11-154 (filed May 8, 2012) (“Enhanced Captioning Petition”). Although DiMA also filed a second petition addressing the rendering of captions, the Associations do not address this second petition and have no collective position on that request. *See* Digital Media Association Petition for Temporary Partial Exemption or Limited Waiver from the Provisions of Section 79.4(c)(2)(i) Relating to the Rendering of Captions, Including to the Applications, Plug-Ins, or Devices Provided by a VPD, MB Docket No. 11-154 (filed May 8, 2012).

Moreover, DiMA and the Associations do not object to the obligation to provide Enhanced Captioning Features.³ Rather, the simple request is to adjust the implementation schedule for Enhanced Captioning Features to align the compliance date to January 1, 2014 for both apparatus manufacturers and video programming distributors (“VPDs”) that offer applications and plug-ins.

The record in this proceeding clearly supports the requested relief. There is no basis for having different schedules that address effectively the same set of technical challenges in providing Enhanced Captioning Features. Indeed, the same development and deployment concerns that led the Commission to establish the January 2014 deadline for apparatus manufacturers (including hardware with integrated software components) apply to VPD software. For example, DiMA explained that VPDs “must rewrite their software” and detailed the “sheer complexity” of this task.⁴ Commenters have now provided further support underscoring the need for additional time to address the technical and operational challenges VPDs face in delivering Enhanced Captioning Features.

The only set of comments opposing the Enhanced Captioning Petition, TDI *et al.*, objects chiefly to the process by which DiMA has sought relief here.⁵ Contrary to TDI’s procedural claims, the Commission has clear authority to provide the requested relief under its general waiver authority, the CVAA, and the implementing rules. Indeed, the Commission also has flexibility to abstain from enforcing its rules for a given period of time – and it has exercised that authority time and again.⁶ Moreover, nothing in the CVAA or the Commission’s implementing rules supersedes

³ See 47 C.F.R. § 79.103(c); 47 C.F.R. § 79.4(c)(2)(i).

⁴ Enhanced Captioning Petition at 5.

⁵ Opposition to the Petitions for Temporary Partial Exemption or Limited Waiver by the Digital Media Association (DiMA) of Telecommunications for the Deaf and Hard of Hearing, Inc. *et al.*, MB Docket No. 11-154 (filed June 15, 2012) (“*TDP*”).

⁶ See *infra* n. 21-23.

the agency’s settled authority to waive its own rules for good cause,⁷ on a “blanket” basis if needed. Finally, the Commission should reject any suggestion that the grant of a waiver is limited to extraordinary circumstances. Waivers are appropriate wherever they would serve the public interest – a standard that is clearly met here.

I. THE DISCRETE REQUEST TO MODIFY THE IMPLEMENTATION TIME FRAME FOR ENHANCED CAPTIONING FEATURES IS IN THE PUBLIC INTEREST.

In the Enhanced Captioning Petition, DiMA detailed the complexities facing VPDs in incorporating Enhanced Captioning Features. Specifically, the Petition outlined the impracticability of conducting all necessary software development in the six-month period provided to ensure Enhanced Captioning Features work properly on different hardware, software, screen sizes, and user interfaces.⁸ DIRECTV, Rovi, and the Associations have provided additional evidence that the timeline for Enhanced Captioning Features should be modified.⁹ As Rovi explains “no matter how much additional funding or resources [are] available ... little or no schedule acceleration is possible” to complete all the necessary software design, development, integration, testing, and release management tasks.¹⁰

Because VPDs often customize software to optimize their service for consumers, VPDs face the additional complications of ensuring that both the underlying software platform and any custom-built software are updated and operating properly. Rovi stresses the complicated and interdependent chain of players involved in implementing Enhanced Captioning Features for VPDs, explaining that “any substantial change to ‘plug-in’ software has manifest effects on many different

⁷ 47 C.F.R. § 1.3.

⁸ Enhanced Captioning Petition at 8-16.

⁹ See e.g., Comments of DIRECTV LLC, MB Docket No. 11-154 (June 4, 2012) (“*DIRECTV*”); Comments of Rovi Corporation, MB Docket No. 11-154 (filed June 18, 2012) (“*Rovi*”); Letter from Susan L. Fox, The Walt Disney Co, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154 (filed June 12, 2012).

¹⁰ *Rovi* at 3-8.

custom and semi-custom software products, with a large set of customers (each with their own development, integration, and testing needs).”¹¹ This is as true for programmers and distributors experienced with basic captioning as for those new to the process; and, importantly, it is as true for VPDs as it is for apparatus manufacturers.

The Enhanced Captioning Petition’s proposed solution to align the timing for VPDs’ implementation of the Enhanced Captioning Features obligation with the existing implementation schedule for apparatus manufacturers (including integrated software) in January 2014 is the most logical fix – because it would permit “the entire online video ecosystem [to be] working on the same problem on the same time line.”¹² Rovi agrees, finding that “the engineering necessary to enable closed caption decoding, rendering, and pass-through is substantially identical” for hardware and software solutions.¹³ Aligning the deadlines also would help address Hulu’s challenge that “a VPD’s ability to provide the millions of combinations of display functionalities ... is limited by the capabilities, architectures, processing power, and video playback of the specific device on which the VPDs’ application is used.”¹⁴ Hulu notes that providing Enhanced Captioning Features presents device-by-device implementation challenges.

TDI has not provided any evidence to rebut the Enhanced Captioning Petition or establish any basis to maintain the September 2012 deadline.¹⁵ TDI also misconstrues the scope of the

¹¹ *Id.* at 4.

¹² Enhanced Captioning Petition at 14. DIRECTV correctly highlights that the Enhanced Captioning Features “deadline itself was proposed in neither the Notice of Proposed Rulemaking in this proceeding nor the underlying report of the Video Programming Accessibility Advisory Committee.” *DIRECTV* at 2.

¹³ *Rovi* at 3 (explaining that “[p]roducts which are software-only have little differences from hardware/software apparatus, and have only slight time-to-market advantages”).

¹⁴ Letter from Mace Rosenstein, Counsel to Hulu, LLC to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-154, at 1 (filed June 20, 2012).

¹⁵ *TDI* at 15-21. The bulk of TDI’s opposition appears directed at a different DiMA petition, not the Enhanced Captioning Petition. Specifically, TDI expresses repeated concerns about DiMA’s separate request on the rendering of closed captions. *See e.g.*, *TDI* at 21 (arguing that “delaying the rendering obligations of VPDs from September 30,

Enhanced Captioning Petition and the challenges underlying the request. For example, TDI erroneously suggests that accounting for “literally millions of combinations” of different user controls is simply a user interface menu design issue.¹⁶ What TDI fails to recognize is the substantial software development and testing necessary to allow any user menu to operate properly.¹⁷

As the Associations have explained, it makes no sense that apparatus manufacturers should be afforded additional time to comply with effectively the same technical challenges that our members face. TDI notes that one solution would be to “requir[e] non-VPD apparatus manufacturers to meet the shorter deadlines imposed on VPDs, rather than the other way around.”¹⁸ This is a rhetorical flourish rather than a feasible solution. While we are sympathetic to the desire to deliver the most robust captioning as soon as possible, September 2012 is not a realistic implementation schedule for any industry segment, and the shared desire for an aggressive implementation of CVAA must be tempered by technical and operational realities.

By establishing a 2014 deadline for apparatus manufacturers to provide Enhanced Captioning Features, the Commission has decided, in effect, that an additional 15 months to allow technical issues to be resolved is not an unreasonable amount of time. Ultimately, the public interest would be best served by aligning the implementation deadlines for Enhanced Captioning Features for both VPDs and apparatus manufacturers so that all consumers receive those features at the same time. This approach provides VPDs the time necessary to provide advanced captioning

2012 to January 1, 2014 would effectively ensure that VPDs would not have to make any content accessible until then. This would flatly contravene the widespread consensus of the industry and consumer representatives of VPAAC.”)

¹⁶ *TDI* at 16, n. 57.

¹⁷ *See Rovi* at 3 (detailing “a testing grid of nearly three million test cases.”).

¹⁸ *TDI* at 20-21.

capabilities without delaying the implementation of basic captioning functionality on the Commission's original timetable (*i.e.*, starting in September).

II. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT THE REQUESTED RELIEF.

DiMA provided the Commission with a number of procedural vehicles by which the Commission can align the implementation deadline for Enhanced Captioning Features for all affected groups, including a temporary partial exemption under the CVAA or a limited waiver under the Commission's general authority. The vast majority of TDI's pleading is dedicated to second-guessing DiMA's procedural approach, which has no bearing on the merits of the request or whether the Commission has authority to act here – which it clearly does.¹⁹

As an initial matter, the Commission clearly has the authority to decide how to enforce particular regulatory requirements, and “can exercise discretion in its enforcement of the rules” through “a variety of mechanisms.”²⁰ One such mechanism, where appropriate, is a temporary moratorium on enforcement, even absent a specific request for exemption or waiver. The Commission has exercised such flexibility on numerous occasions at the Bureau level; for example, the Enforcement Bureau in 2005 suspended its enforcement of certain VoIP E911 requirements.²¹ In other cases, individual bureaus have suspended enforcement activities for specific periods of

¹⁹ *Id.* at 9-10 (characterizing incorrectly DiMA's petition as an untimely petition for reconsideration). TDI fails to provide any precedent to support the view that a simple request to adjust an implementation schedule must be conducted through a formal rulemaking or reconsideration petition.

²⁰ *Review of the Emergency Alert System*, Third Report and Order, 26 FCC Rcd 1460, 1490 (2011); *see also Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1231 (D.C. Cir. 1996) (“[T]he FCC's decision whether to investigate a particular matter is an ‘agency action ... committed to agency discretion by law.’” (citations omitted)); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (detailing reasons why agencies choose not to take enforcement actions and noting that such agency decisions are generally judicially unreviewable).

²¹ *Enforcement Bureau Provides Additional Guidance to Interconnected Voice Over Internet Protocol Service Providers Concerning Enforcement of Subscriber Acknowledgment Requirement*, 20 FCC Rcd 17078 (EB 2005) (indicating that the Bureau would “continue to refrain from exercising our enforcement authority” with regard to certain VoIP E911 rules).

time.²² Thus, the Commission has authority here to suspend enforcement activities on Enhanced Captioning Features until January 2014, and may do so at the Bureau level.

TDI is simply wrong to suggest that the Commission cannot grant an industry-wide exemption or waiver.²³ The Enhanced Captioning Petition discusses the applicability of the exemption provisions of the CVAA and implementing rules to VPDs as a class.²⁴ TDI's apparent preference for a "case-by-case" framework²⁵ would require dozens, hundreds, or even thousands of VPDs to file individual requests for exemptions and/or waivers – all for the purpose of addressing an implementation schedule for Enhanced Captioning Features that this record demonstrates is not reasonable for any industry segment. Individual requests based on the very same underlying facts and arguments about the complexity of necessary software updates would not be an administratively practical solution. Such an approach would waste the time and resources not only of the petitioners themselves, but also those of the Commission and of entities opposing these petitions (perhaps including TDI itself).

More fundamentally, "[g]ranted a waiver of a Commission rule to similarly situated parties that did not formally request the waiver is consistent with Commission precedent."²⁶ There are

²² See, e.g., *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Order, 15 FCC Rcd 6675 (CCB 1999) (suspending enforcement of payphone TRS rules for a two-year period); *Wireless Telecommunications Bureau Announces 60-Day Amnesty for Structures Identified in Initial Quarterly Audit of Antenna Structures*, 18 FCC Rcd 15340 (WTB 2003); *International Bureau and Enforcement Bureau Announce Program to Increase Compliance with Licensing Requirements*, 16 FCC Rcd 3857 (IB/EB 2001) (establishing period in which International Bureau will not refer certain section 214 authorization violations to the Enforcement Bureau); *International Section 214 Reporting Requirements Compliance Update*, 12 FCC Rcd 15201, 15202 (IB 1997) (detailing that staff will "refrain from taking enforcement action" with respect to certain failures to file reports).

²³ *TDI* at 11-14, 23-25.

²⁴ See Enhanced Captioning Petition at 6-7.

²⁵ TDI dedicates much of its opposition to its contention that "section 713(c)(2)(D)(ii) does not grant the Commission authority to issue categorical exemptions from its regulations for classes of entities pursuant to a petition," but instead requires the Commission to "include such exemptions in its regulations as it prescribes the regulations during the course of a rulemaking." *TDI* at 6.

²⁶ *National Exchange Carrier Association Petition to Amend Section 69.104 of the Commission's Rules*, 19 FCC Rcd 13591, 13604 n.99, 13607 n.116 (2004) (citing *Telephone Number Portability*, 19 FCC Rcd 6800, 6800 ¶ 1 (2004)).

numerous examples of Commission action waiving requirements on an industry-wide basis.²⁷ This precedent governs DiMA’s Section 1.3 waiver request, and should equally inform the Commission’s implementation of the CVAA exemption process – particularly if TDI is correct in arguing that Section 713(d)(3) of the CVAA and Section 1.3 of the Commission’s rules “wholly overlap.”²⁸

The Commission’s decision in *Anglers for Christ Ministries, Inc.*²⁹ is not to the contrary. In *Anglers*, the Commission reversed a Bureau-level grant of permanent closed-captioning exemptions to two entities, which had later served as the basis for nearly 300 additional exemptions. The Commission cited five rationales for the reversal, none of which applies to the time-limited request here.³⁰

TDI places great reliance on a single sentence of that decision taken out of context.

Specifically, TDI stresses that the Commission held that “the process for determining closed

(granting a waiver request and extending waiver to all entities satisfying stated criteria); *BellSouth Corp. Petition for Waiver of Section 32.22 of the Commission’s Rules to Permit the Implementation of Flash-Cut Normalization Relating to Tax/Timing Difference Originating in 1988*, 2 FCC Rcd 5146, 5147 ¶¶ 10, 15 (CCB 1987) (same).

²⁷ See, e.g., *Amendment of Part 101 of the Commission’s Rules to Accommodate 30 Megahertz Channels in the 6525-6875 MHz Band*, 24 FCC Rcd 9620 (2009); *Improving Public Safety Communications in the 800 MHz Band*, 21 FCC Rcd 5503 (2006); *Waiver of Certain Global Maritime Distress and Safety System (GMDSS) Rules Applicable to Fishing Vessels and Small Passenger Vessels*, 14 FCC Rcd 528 (1998); *Motorola, Inc.*, 22 FCC Rcd 579 (WTB 2007); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 24 FCC Rcd 14721, 14721-22 ¶¶ 1-2 & n. 6-7 (CGB/WCB 2009); *Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television*, 16 FCC Rcd 5946 (2001); *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 14 FCC Rcd 12764 (1999); *Revision of Part 15 of the Commission’s Rules Regarding Ultra-Wideband Transmission Systems*, 17 FCC Rcd 13522 (OET 2002); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 4998 (CCB 1998); *Ameritech Operating Companies Revisions to Tariff F.C.C. No.2*, 8 FCC Rcd 5172 (CCB 1993).

²⁸ *TDI* at 24. TDI claims that “a determination that a petitioner is not eligible for an exemption pursuant 79.4(d) necessarily precludes the petitioner’s eligibility for a waiver under rule 1.3.” *Id.* This can only be true if the CVAA provision permits “blanket” exemptions, just as Section 1.3 permits blanket waivers.

²⁹ 26 FCC Rcd 14941 (2011) (“*Anglers*”). See generally *TDI* at 4.

³⁰ The Commission found that it was inappropriate to (1) grant exemptions based on the noncommercial nature of the programming at issue, (2) place reliance on the entities’ nonprofit status, (3) create a presumption that future exemptions would be granted to similarly situated entities, (4) grant any permanent exemptions, and (5) consider whether petitioners had solicited captioning assistance from their programming distributors. *Anglers*, 26 FCC Rcd at 14950-53 ¶¶ 17-24.

captioning exemptions on the basis of purported undue burden is designed to consider the unique, individual circumstances of each petitioner on a case-by-case basis.”³¹ But the Commission was *not* addressing – much less denying – the propriety of temporary industry-wide relief where such relief is warranted. Rather, it was simply rejecting the Bureau’s adoption of a presumption that future permanent exemptions would be granted to similarly situated entities. *Anglers* thus is irrelevant to DiMA’s request for industry-wide relief. In any case, even if *Anglers* were relevant, that decision does not (and does not purport to) alter the scope of Section 1.3, which – as discussed above – clearly permits industry-wide waivers.

Finally, TDI’s claim that a Section 1.3 waiver would reflect an “extraordinary” exercise of Commission authority ignores long-settled precedent to the contrary. A waiver is warranted so long as it will serve the “public interest.”³² Section 1.3 permits the Commission “to waive requirements not mandated by statute where strict compliance would not be in the public interest, so long as it articulates identifiable standards for exercising that authority.”³³ As detailed above, the Commission has granted numerous waivers – including blanket waivers – where such waivers were conducive to the public interest. As explained in the Enhanced Captioning Petition, in comments filed by the Associations, and elsewhere in this docket, the DiMA request satisfies this test. The waiver therefore is warranted.

³¹ *See id.* at 14051 ¶ 19.

³² 47 C.F.R. § 1.3.

³³ *See, e.g., Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

III. CONCLUSION

The Commission has authority to grant DiMA's requested relief, and should do so expeditiously to provide clear guidance to all affected parties on the timing of VPDs' Enhanced Captioning Features obligation. In doing so, the Commission's action will help direct all available resources toward satisfying the agency's aggressive deadline to provide basic captioning on IP-delivered programming starting this September.

Respectfully submitted,

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Your submission has been accepted

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