

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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BROADCASTERS**

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EXECUTIVE SUMMARY

Television broadcasters fully support the goal of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) and the *Notice of Proposed Rulemaking (NPRM)* to better enable individuals who are deaf or hard of hearing to view video programming that is delivered using Internet Protocol (IP). National broadcast television networks and local broadcast television stations have a proud history of serving the deaf and hard-of-hearing community. Broadcasters also have led the way in making national and local video programming content, including local news programming, available on the Internet.

Through the Video Programming Accessibility Advisory Committee (VPAAC), NAB and its members are working with disabilities access groups to assess the technical and practical considerations of CVAA implementation. In particular, NAB's network members have been extremely active participants in the VPAAC's examination of technical issues relating to IP captioning. With this background and experience, NAB is pleased to comment on this *NPRM* to assist the Commission in ensuring an appropriate balance between promoting accessibility and preserving broadcasters' continued ability to innovate in the delivery of video programming online, so that all online viewers can benefit.

The instant proceeding presents novel questions about an extremely complex programming distribution ecosystem that is still very much evolving. Delivery of broadcast video programming via IP presents business, technical, and operational challenges that necessarily affect accessibility and the VPAAC's ability to reach even a "rough consensus" within the short timeframe available to establish recommendations. Recognizing this complexity and the need to provide for further evaluation, NAB urges the Commission to adopt a regulatory framework that can take all moving parts into account, regulating with sufficient clarity to provide certainty to all sectors of the industry, while affording flexibility where appropriate to accommodate technical differences and new developments.

Specifically, in this proceeding, the Commission should:

- Apply the rules only to full-length, English- or Spanish-language, U.S. programming that is neither consumer-generated nor consumer-distributed;
- Codify procedures for the submission of case-by-case exemption petitions and establish categorical exemptions from the IP captioning rules;
- Endorse a marketplace "mechanism" for industry to share information regarding captioned programming;
- Consider adopting SMPTE-TT as the standard interchange format for IP captioning, and allow encoding with SMPTE-TT to serve as a safe harbor for the Commission's IP captioning requirements; and
- Adopt complaint procedures that largely parallel existing procedures for television captioning complaints.

The *NPRM* also raises many related issues that the Commission should *not* address until it has more information regarding the process of distributing captioned programming online. Now is not the time to explore proposals that, while well-intentioned, would divert resources from implementing the express statutory requirements of the CVAA. Moreover, in many cases, consideration of such ancillary issues would be premature in light of the nascency of IP captioning and online video distribution and could create a disincentive for broadcasters to make their programming, including local news, available online. For example, the Commission should not adopt any standard for performance quality. Nor should the Commission establish a complicated and unnecessary certification regime for sharing information regarding captioning.

As the Commission has recognized, American citizens increasingly are relying on the Internet for their news and entertainment content. Through websites associated with their over-the-air operations and other online platforms, television broadcasters are connecting with viewers in more ways, on more devices, than ever before. For example, many broadcasters now offer applications (apps) for smartphones and tablets that enable viewers to watch streaming video. The Commission should implement CVAA requirements to afford broadcasters sufficient flexibility to continue to innovate in their multiplatform delivery of video programming and to avoid stifling such innovation as an unintended consequence of any new rules.

The Commission must also ensure that broadcasters have sufficient time to prepare to deliver captions online. NAB recommends that the Commission provide an additional six months to all stations to comply with the captioning requirements for live, near-live, and prerecorded, unedited programming. The additional time is necessary because local broadcasters must coordinate with multiple entities that are involved in the complex IP ecosystem of broadcast websites, including third party website hosts, software manufacturers, and content delivery networks, to ensure that the consumer is able to fully access IP captions. Without an extension, stations may be forced to reduce or eliminate online posting and live or near-simultaneous streaming of content until their captioning capabilities are more fully developed.

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I. INTRODUCTION

Television broadcasters fully support the goal of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)¹ and the above-captioned *Notice of Proposed Rulemaking (NPRM)* to better enable individuals who are deaf or hard of hearing to view video programming that is delivered using Internet Protocol (IP).² National broadcast television networks and local broadcast television stations have a proud history of serving the deaf and hard-of-hearing community. Broadcasters also have led the way in making national and local video programming content,

¹ 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. Section 202(b) of the Act requires the FCC to implement regulations requiring closed captioning on video programming delivered using Internet Protocol (IP) that previously was published or exhibited on television with captions. Section 203 expands the number of devices that are required to be capable of decoding and displaying closed captioning, video description, and emergency information requirements.

² *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, Notice of Proposed Rulemaking, FCC 11-138 (rel. Sept. 19, 2011) (*NPRM*).

including local news programming, available on the Internet.³ With this background and experience, the National Association of Broadcasters (NAB)⁴ and its members are pleased to comment on this *NPRM* to assist the Commission in ensuring an appropriate balance between promoting accessibility and preserving broadcasters' continued ability to innovate in the delivery of video programming online, so that all online viewers can benefit.

The Commission's implementation of Section 202(b)-(c)⁵ and Section 203⁶ of the CVAA has many moving parts and requires significant technical coordination among broadcasters, other programmers, multichannel video programming distributors (MVPDs), manufacturers, software developers, website hosts, content delivery networks

³ THE COMSCORE 2010 U.S. DIGITAL YEAR IN REVIEW, 22 (Feb. 2011), *available at* <http://www.aaaa.org/agency/pubs/NewEssentials/Documents/Digital/comScore%202010%20Digital%20Year%20in%20Review%202011-02.pdf> ("In Q4 2010, Hulu accounted for 19.4 billion minutes (323 million hours) of online TV viewing, up 17 percent from the previous year. The five major broadcast TV sites (ABC, CBS, NBC, Fox and the CW) combined to account for 9.7 billion minutes (162 million hours), which equates to half of the total time spent viewing video on Hulu, but grew at approximately five times the rate at 82 percent. The total combined time spent viewing online TV on Hulu and the five network sites grew 33 percent over the past year. This strongly growing market represents one of the most significant opportunities for advertisers with this attractive advertising channel generating both high engagement from viewers and high CPMs for publishers."); COLLECTIVE, A BRAND MARKETER'S GUIDE TO ONLINE VIDEO 4 (May 2011) (only 48% of 18-34 year olds watch TV primarily on a TV set) (citing Harris Poll and 24/6 Wall St. Surveys cited in Oct. 28, 2010 press release), *available at* http://collective.com/sites/default/files/Brand%20Marketer's%20Guide%20to%20Video_May2011.pdf; *see also* 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....").

⁴ NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission (FCC or Commission) and other federal agencies, and the courts.

⁵ CVAA, § 202(b)-(c), codified at 47 U.S.C. § 613.

⁶ *Id.*, § 203, codified at 47 U.S.C. § 613.

(CDNs), and numerous other entities. Although the Commission has substantial experience developing and enforcing rules regarding closed captioning on television, it has not previously examined captioning for IP-delivered programming. In fact, the Commission has not previously engaged in any rulemaking proceeding—either in the accessibility context or more generally—that specifically addresses the distribution of video programming online. Accordingly, the Commission should bear in mind that the instant proceeding presents novel questions about an extremely complex programming distribution ecosystem that is still very much evolving. The Commission’s rules must take all moving parts into account, regulating with sufficient clarity to provide certainty to all sectors of the industry, while affording flexibility where appropriate to accommodate technical differences and new developments. For example, video programming owners (VPOs), video programming providers (VPPs), and video programming distributors (VPDs) should be permitted to establish private contractual mechanisms to allocate responsibility for compliance with the captioning and pass-through of programming. In addition, parties must be afforded sufficient ramp-up time to prepare to comply with the new rules.

Moreover, the statute substantially limits the amount of time the Commission may take to consider the core IP captioning mandate—a window so slim that the total comment cycle (comments and replies) is only 30 days.⁷ With issues so complex and a

⁷ By statute, the Commission is required to adopt IP closed captioning rules six months after the date by which the Video Programming Accessibility Advisory Committee (VPAAC) submitted its report on IP closed captioning to the Commission. The VPAAC Report was submitted to the Commission on July 12, 2011. Accordingly, rules in the instant proceeding must be adopted by January 12, 2012. The Commission thus established a comment deadline of 20 days after Federal Register publication and a reply comment deadline of 10 days thereafter.

time frame so short, the Commission should only focus for now on the key statutory requirements:

- Require closed captioning of IP-delivered video programming shown on television after the effective date of the regulations;⁸
- Adopt “an appropriate schedule of deadlines for the provision of closed captioning, taking into account whether such programming is prerecorded and edited for Internet distribution, or whether such programming is live or near-live and not edited for Internet distribution”;⁹
- Delay or waive the requirements where application is “economically burdensome to providers of video programming or program owners”;¹⁰
- Establish a “mechanism to make available to video programming providers and distributors information on video programming subject to the [CVAA] on an ongoing basis”;¹¹
- Require that “apparatus designed to receive or play back video programming transmitted simultaneously with sound ... be equipped with built-in closed caption decoder circuitry or capability,” with certain exceptions;¹² and
- Require that all devices “designed to record video programming ... [must] enable the rendering or the pass-through of closed captions” and that the “interconnection mechanisms and standards for digital video source devices are available to ... permit or render the display of closed captions.”¹³

⁸ 47 U.S.C. § 613(c)(2)(A).

⁹ 47 U.S.C. § 613(c)(2)(B).

¹⁰ 47 U.S.C. § 613(c)(2)(C).

¹¹ 47 U.S.C. § 613(c)(2)(D)(v).

¹² 47 U.S.C. § 303(u). The CVAA addresses device issues related to video programming, but those provisions do not implicate broadcasters. The Commission should clearly delineate this distinction. Specifically, the Commission should be clear that broadcasters’ obligations are met by the provision of captions on programming previously aired on television. Broadcasters are not responsible for ensuring receipt of such captions by distributors or by individuals who are deaf or hard of hearing. The capabilities of MVPD systems, Internet access networks, and television receivers produced by various manufacturers are not within the control of broadcasters. See *infra* Section VIII.

¹³ *Id.* § 303(z).

The *NPRM* raises many related issues that the Commission should not address until it has more information regarding the process of distributing captioned programming online.¹⁴ Now is not the time to explore proposals that, while well-intentioned, would divert resources from implementing the express statutory requirements of the CVAA. Moreover, in many cases, consideration of such ancillary issues would be premature in light of the nascency of IP captioning and online video distribution and could create a disincentive for broadcasters to make their programming, including local news, available online.

One of the best examples of the complexity of IP captioning, and a model for the promise of collaborative developments in this area outside the regulatory process, is the Commission's Video Programming Accessibility Advisory Committee (VPAAC). Congress directed the FCC to convene the VPAAC so that the Commission would have the benefit of advice from a technical body representing a cross-section of affected sectors and disabilities access groups. Through the VPAAC, NAB and its members are working with disabilities access groups to assess the technical and practical considerations of CVAA implementation. In particular, NAB's network members have been extremely active participants in the VPAAC's examination of technical issues relating to IP captioning. The VPAAC's ability to reach even a "rough consensus" within the short time frame available to establish recommendations should be applauded.

¹⁴ For example, as discussed in more detail herein, the Commission should not impose any quality standard or adopt a certification or database requirement. Nor should the Commission adopt a rule requiring an IP captioning button or icon. It is not yet clear how all parties would know about and coordinate regarding the availability of appropriate software to display such a button or icon, and such a requirement at this point could stifle innovation in the delivery of captioned IP programming. It would also raise jurisdictional and First Amendment issues.

With certain very limited exceptions discussed herein, the VPAAC's important work should be incorporated into the Commission's rules.

As the Commission has recognized countless times, American citizens increasingly are relying on the Internet for their news and entertainment content. Through websites associated with their over-the-air operations and other online platforms, television broadcasters are connecting with viewers in more ways, on more devices, than ever before. For example, many broadcasters now offer applications (apps) for smartphones and tablets that enable viewers to watch Internet video.¹⁵ The Commission must be careful as it implements the CVAA requirements to afford broadcasters sufficient flexibility to continue to innovate in their multiplatform delivery of video programming and to avoid stifling such innovation as an unintended consequence of any new rules. The Commission must also ensure that local broadcasters have ample time to prepare to deliver captions online. Broadcasters use numerous different models to make programming available to their viewers, but one consistent issue is that their current IP-based distribution methodologies may not be sufficient to deliver captioning by the deadlines proposed in the *NPRM*. They will need more time to ramp up their capabilities. In addition, the rules that the Commission adopts here cannot be overly complex or burdensome, because such requirements would simply force many local broadcasters to discontinue online streaming of live or "nearly simultaneous" video

¹⁵ See, e.g., Apps by CBS Local, ANDROID MARKET (last visited Oct. 16, 2011), <https://market.android.com/developer?pub=CBS+Local> (offering apps associated with local CBS station in 20 markets); Mapping Our Apps, MOBILE LOCAL NEWS (last visited Oct. 16, 2011), <http://www.mobilelocalnews.com/mlnClients.php> (listing local news apps created by DoApp, including apps for over fifty local broadcast TV stations); see also Todd Wasserman, *Exclusive: NBC iPad App Now Broadcasts Full Episodes*, MASHABLE (Sept. 8, 2011), <http://mashable.com/2011/09/08/nbc-ipad-app/>.

produced by their local stations. In order to foster innovation and ensure the delivery of quality news, emergency information, and entertainment content on multiple platforms, the Commission must recognize the technical and economic challenges facing broadcasters in the delivery of online captions.

While the Commission's regulatory efforts should be limited to the specific tasks outlined in the statute, the Commission also can work with industry on voluntary efforts to develop practical, consumer, and industry-shared information on closed captioned programming delivered via IP. Broadcasters look forward to working with the Commission to ensure greater accessibility of captioned programming in the online ecosystem.

II. DELIVERY OF BROADCAST VIDEO PROGRAMMING VIA IP PRESENTS COMPLEX BUSINESS, TECHNICAL, AND OPERATIONAL CHALLENGES THAT NECESSARILY AFFECT ACCESSIBILITY

A. ONLINE VIDEO DISTRIBUTION

Addressing definitional questions and the allocation of responsibility for IP captioning among various parties requires some discussion of the online distribution chain for broadcast video programming. A limited number of entities are involved in distributing captioned programming on television. For over-the-air broadcasts, there are only the broadcaster and any additional underlying program suppliers. For MVPD customers, there are the programmers (i.e., broadcasters and non-broadcast programmers, as well as underlying program suppliers) and the MVPD. Even adding television receivers and set-top boxes to the mix does not greatly expand the cast of characters, although it does add to the overall technical complexity.

Online distribution of video content generally involves many more entities than broadcast- or cable-based distribution, and not all of these entities fall under the FCC's

jurisdiction. The Commission must consider, and the industry will need adequate time to address, the implications of current and future video delivery practices on the Internet compared to traditional television broadcasting.

For example, local broadcaster websites generally are hosted by third parties. Although these web-hosting services may help broadcasters provide both video streaming and hosting for pre-recorded programming, they may lack adequate hardware and software infrastructure to support high-quality and high-volume synchronized captioned video at this time. Broadcasters will either encode Internet-based content locally or rely on a third-party vendor for encoding, but broadcasters typically employ CDNs to deliver that content. As one report puts it:

In the early days of the Web, big content providers like news organizations and streaming media providers built large hosting facilities to store and serve content from a centralized location. Pretty quickly, those companies discovered that they were not getting good response times serving content to all their users. Because of the architecture of the Internet, if a backbone or major ISP went down, content could be forced to take a less speedy route to the user. Hosting content centrally also placed a burden on the company to ensure it had enough redundant links through several ISPs to protect against a network outage.¹⁶

Video content providers therefore increasingly have engaged CDNs and third-party vendors to facilitate video delivery in the IP environment. In the Commission's words, CDN services "are designed to reduce the capacity requirements and costs of the CDN's edge provider clients by hosting the content for those clients closer to end users."¹⁷

¹⁶ Chris O'Kennon, *Content Delivery Networks* (2010), available at <http://www.faulkner.com/freereport/contentdeliverynets.htm>.

¹⁷ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17948 ¶ 76 n.235 (2010). CDNs' customers thus are content providers, not end users.

Video content providers essentially store copies of their content in multiple CDN servers for easy retrieval by end users.¹⁸ Such content may comprise (among other things) an image, a video file for download, or a streaming video file of the type at issue here.¹⁹ When customers retrieve content from a video content provider, their queries are redirected from the content provider’s own website—which could be hosted half a world away and may have insufficient capacity to ensure prompt delivery to all users at any given time—to one of their CDN vendor’s servers, which likely is much closer to the end user and enjoys more robust connectivity. From the end users’ perspective, they are interacting with the video content provider, even though the provider’s content is stored on a CDN’s servers. There are multiple CDNs, including Akamai,²⁰ Limelight Networks,²¹ and Level 3. Level 3, for example, markets its “global network of caching locations,”²² claiming that this network “delivers a superior streaming media experience to [Level 3’s content-provider customers’] broadband users,” and leaves the company “uniquely positioned to support the rich-media delivery that users demand.”²³

¹⁸ For example, leading CDN Akamai operates “nearly one hundred thousand servers, deployed in 72 countries and spanning most of the networks within the Internet” to store up-to-date “copies” of content provided by its customers. Akamai, AKAMAI, <http://www.akamai.com/html/about/index.html> (last visited Oct. 17, 2011).

¹⁹ “Typically firms host only resource-intensive files on a CDN. These include images, movies, and streaming video.” O’Kennon, *supra* note 16.

²⁰ See Akamai, AKAMAI, <http://www.akamai.com/html/about/index.html> (last visited Oct. 17, 2011).

²¹ See Media Delivery, LIMELIGHT NETWORKS, <http://www.limelight.com/media-Delivery/> (last visited Oct. 17, 2011).

²² Content Delivery Network (CDN), LEVEL 3, <http://www.level3.com/en/products-and-services/video/content/> (last visited Oct. 17, 2011).

²³ *Id.*

The Commission should take into account, and the industry will need adequate time to address, the implications of video delivery practices that vary so substantially from traditional television captioning. Broadcasters' use of third-party vendors and CDNs (and possibly other intermediaries) to host and deliver their content raises questions of technical functionality and private contracts, neither of which can be quickly resolved. In addition, even setting aside broadcasters' use of third-party website hosts and CDNs, the Commission should take note in this proceeding of the technical complexity of online video distribution.²⁴ Moreover, captioning of IP-based programming is too new an endeavor for any party yet to have a comprehensive understanding regarding the way in which the interaction among broadcasters, CDNs, third-party web hosts affects a consumer's ability to access captions. More time is needed to determine how the parties in this distribution chain can ensure the successful delivery of captions.

Attempting to overlay the technical elements of traditional television captioning rules in this space is thus an unworkable regulatory model, and even under requirements that ultimately are feasible from a business and technical standpoint, parties will need time to ramp up for compliance.

²⁴ See CISCO, CISCO VIRTUAL VIDEO INFRASTRUCTURE: MANAGING COMPLEXITY AND SCALE IN A NEXT-GENERATION VIDEO NETWORK 1 (2008), *available at* http://www.cisco.com/en/US/solutions/collateral/ns341/ns524/ns610/white_paper_c11-508951.pdf (noting that the current video distribution may be a "significant barrier to success" and the growing complexity of a next-generation video network); ADITYA KISHORE, MULTIPLATFORM VIDEO: OVERCOMING TECHNOLOGY & REVENUE CHALLENGES EXECUTIVE SUMMARY 2 (2010), *available at* http://img.lightreading.com/heavyreading/pdf/hr20100917_esum.pdf ("[D]elivering multiplatform video has its own challenges, requiring seamless coordination across different networks and device platforms.... [T]he optimal technologies selected to support these services will have significant implications on costs, from bandwidth/distribution to video servers.").

B. ALLOCATION OF RESPONSIBILITY

The CVAA is focused on the experience of the consumer who seeks access to captioned, IP-delivered programming. For example, the statute directs the Commission to clarify that the terms “video programming distribution” and “video programming providers” include “an entity that makes available *directly to the end user* video programming through a distribution method that uses [IP].”²⁵ To be consistent with Congress’s intent, and to ensure a practical, workable allocation of responsibility, the Commission should place the burden of compliance on the entity that is closest to the end user. In some instances, this will be a broadcaster or other programmer acting as a VPD/VPP for its own content; in most instances, it will be a VPD/VPP to whom a programmer has provided content for distribution. Programmers and distributors have substantial experience in traditional television delivery and, more recently, in online video working together in the marketplace to appropriately allocate responsibilities amongst themselves, without government intervention.²⁶ The Commission should leave allocation of compliance responsibility to programmers, distributors, and other entities, rather than attempting to hold both an underlying programmer and an unaffiliated distributor responsible for compliance.²⁷

²⁵ CVAA, § 202(b)(iii).

²⁶ Indeed, the Commission relied on just such cooperation in placing the responsibility for captioning traditional television programming on the distributors to end users, based on the assumption that distributors and program providers or producers would work together to devise an efficient allocation of responsibility, a process that has worked exceptionally well for more than a decade. *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, 3286-87 ¶¶ 27-28 (1997).

²⁷ See *infra* Section IX.

III. THE IP CAPTIONING RULES SHOULD APPLY ONLY TO FULL-LENGTH, ENGLISH- OR SPANISH-LANGUAGE, U.S. PROGRAMMING THAT IS NEITHER CONSUMER-GENERATED NOR CONSUMER-DISTRIBUTED

A. ONLY FULL-LENGTH PROGRAMMING IS COVERED BY THE STATUTE

The CVAA legislative history explicitly contemplates that captioning regulations will apply only to full-length programming,²⁸ and the Commission should define “full-length programming” in a common-sense way that is consistent with the general understanding of the term.²⁹ Specifically, full-length programming is programming that is created for viewing as a whole *on television*, such as an episode of a television series, a sporting event, a news program, or a movie, and subsequently posted online. Multiple segments of a full-length program, if posted together for sequential viewing and composing the entire program would constitute full-length programming. Individual segments or clips of a full-length program, however, are not full-length programming. Any attempt to define the percentage or duration of programming constituting a clip is both impractical and inconsistent with the statute. Congress thus did not intend for anything less than 100 percent of a full-length program to be covered as full-length programming.

In addition, given technical complexities, there would be substantial production costs and delays associated with any requirement to caption an excerpt of a full-length program. For example, some stations post 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.

²⁸ H.R. REP. No. 111-563, at 30 (2010) (“The Committee intends ... for the regulations to apply to full-length programming and not to video clips or outtakes.”).

²⁹ *NPRM*, ¶ 21.

The programming may also be streamed “nearly simultaneously” with captions, or as part of a “pre-recorded” program in its entirety. In this complex cycle, it may be very difficult for a local station to identify, encode, and then re-post excerpts of its local news.

B. THE RULES SHOULD APPLY ONLY TO PROGRAMMING AIRED ON TELEVISION IN THE U.S. IN ENGLISH OR SPANISH

IP-delivered content that has aired on television only in another country, and not in the United States, should be exempt from the captioning requirements.³⁰ As the Commission explains, different captioning standards in foreign countries would make it challenging to caption such programming for online distribution in the United States. Similarly, it would be too complex at this stage to apply captioning rules to any programming that is not initially aired on television in English or Spanish.³¹

C. THE COMMISSION SHOULD DEFINE EXEMPT “CONSUMER-GENERATED” PROGRAMMING TO INCLUDE “CONSUMER-DISTRIBUTED” PROGRAMMING

For some types of video programming available online, consumers may have the ability (as authorized by the copyright owner) to redistribute portions of the programming. Because the VPO in such case has no relationship with the consumer (unlike in the case of a typical distributor with which the VPO has a contractual arrangement), the VPO should not be held responsible for the proper display or the rendering of the captioning of its programming if the programming is re-distributed by a consumer. VPOs/VPDs can only be responsible for online distribution for initial mass viewing, not subsequent redistribution by consumers over which they may have no knowledge or control. Thus, “consumer-generated” programming should include not

³⁰ *NPRM*, ¶ 22.

³¹ *Id.*, ¶ 32.

only content “which is made available online by individual consumers without the consent of the VPO,” but also any consumer-distributed content, such as reposted video from authorized websites to social networking sites. For example, a consumer may post a news segment on Facebook, where other users could view the video through Facebook’s embedded media player. In such cases, VPOs/VPDs have no contractual relationship with the consumer, and they have no ability to ensure that Facebook’s media player provides captions with the proper display or rendering.³²

IV. ACHIEVING AN EQUIVALENT EXPERIENCE TO TV CAPTIONING DOES NOT REQUIRE ADOPTION OF THE PROPOSED IP QUALITY STANDARD

On television, broadcasters strive to deliver high quality captioning to audiences that rely on captions for a wide variety of reasons. This dedication to captioning quality will be the same for online programming, with the added benefit that the Internet offers numerous potential opportunities for improving and expanding on traditional approaches to content delivery. Consumers should be able to experience high-quality captioning online, just as they do on television. Indeed, in many cases, the captioning they see on IP-delivered video programming will appear identical to what they would have seen on the same program delivered via broadcast or an MVPD platform. It is important, however, that the Commission not create disincentives to making programming available online, which ultimately disserves both hearing-impaired and hearing viewers, by imposing “quality” standards not required by the CVAA. The community that relies on captions and online video audiences more generally will benefit more from flexibility

³² Of course, no party in a legitimate distribution chain should be held responsible for captioning content that has been pirated and is not authorized for online distribution. In such cases, the absence of captions on full-length programming distributed online without authorization may help to drive viewers to legitimate content and away from pirated material.

that ensures a satisfactory user experience without mandating a particular level of “quality.”

In the *NPRM*, the Commission seeks comment on whether the new captioning rules “should include any required performance objectives.”³³ This concept is distinct from the question separately asked in the *NPRM*—and separately addressed in these comments—of whether the Commission should adopt a technical interchange standard.³⁴ The Commission’s proposal to “adopt a rule requiring the captioning of IP-delivered video programming to be of at least the same quality as the television captions for that programming” goes beyond the scope of the CVAA—Congress did not require IP captioning to be “of at least the same quality.” “Quality,” at least in this context, involves a subjective determination that will hinder, not help, the captioning process. The captioning rules adopted in the instant proceeding will apply to programming delivered on a wide variety of platforms and devices with differing types and sizes of displays. The rules will be meaningless if a consumer using a covered service or product cannot adequately view the provided captioning. Similarly, the rules would be limiting if they merely require parties to caption online just as they do on television. IP-based delivery and the nearly limitless ways in which consumers can access IP-delivered content may give rise to approaches to captioning display that are impossible on television. In the CVAA, Congress intended the Commission to embrace the opportunity of the Internet, not to stifle it.

³³ *NPRM*, ¶ 17.

³⁴ See *infra* Section VIII.

Moreover, the proposal in the *NPRM* does not provide clear guidance and would be unworkable.³⁵ The clause “at least the same quality,” in addition to potentially foreclosing technical innovation (as discussed above), is impossibly vague. It does not tell a covered entity what it is required to do. Given the Commission’s intent to establish complaint and enforcement procedures, it is essential that parties required to comply with the rules be given a clear understanding of them. This clause does not accomplish that goal because it does not make plain what would be required. It would be tremendously challenging for the Commission to administer—and for parties to comply with—a regime that measures captioning quality.

Although the *NPRM* bases its proposal on certain VPAAC recommendations, those recommendations similarly go beyond the scope of the CVAA.³⁶ The VPAAC’s recommendations thus should be treated as aspirational, and they should not serve as the basis for any rule.³⁷ For example, although the VPAAC Report discusses the need for “accuracy,” that concept should not lead the Commission to impose new quality standards not currently in the television captioning rules.³⁸ As the VPAAC Report states, “[e]fforts towards improving the overall quality of captioned content are encouraged.”³⁹ However, “encouraging” captioners to provide high-quality captions (a

³⁵ This proposal could also raise First Amendment concerns.

³⁶ *NPRM*, ¶ 17.

³⁷ VPAAC Report at 14 (discussing a consumer “experience that is equal to, if not better than, the experience provided as the content was originally aired on television”).

³⁸ *NPRM*, ¶ 18; VPAAC Report at 14 (“When captioned television content is repurposed for Internet use, such captioning must be equal to or greater than the accuracy of captions shown on television.”). The *NPRM* does not propose to, nor should the Commission, modify the television captioning rules.

³⁹ VPAAC Report at 14.

goal fully supported by NAB and its members) should not be confused with a rule that would impose a quality mandate.

To the extent the Commission takes any action regarding performance objectives, it should establish a safe harbor by which a covered entity that uses the same or substantially the same captioning used on television will be deemed in compliance. For example, the Commission correctly notes the concern of VPDs and VPPs that they would be unable to provide captions that are “better than” those available on television because any alteration to the captions would violate the VPOs copyright to those captions.⁴⁰ NAB agrees that there should be no obligation to require VPDs and VPPs to create derivative works by correcting captioning errors, given the substantial copyright infringement concerns. However, efforts to improve captioning should be encouraged on a voluntary basis where feasible.⁴¹

For similar copyright reasons, the Commission’s proposed distinction between “prerecorded programming” and “edited for Internet distribution” is unworkable.⁴² Television programming that is placed online remains subject to the copyright held by the VPO, and VPDs/VPPs generally lack any right to create derivative works when distributing that television programming online. As a result, there is no need to draw a distinction between such programming for purposes of the instant proceeding. While changes to the number or duration of advertisements from the television version do not

⁴⁰ *NPRM*, ¶ 19.

⁴¹ *See id.* n.78. For example, it may be feasible in certain situations to improve synchronization of the captioning and the spoken word prior to placing the captions online, but such improvements are extremely complex, not always possible, and carry significant costs.

⁴² *See id.*, ¶ 27.

constitute substantial edits,⁴³ and furthermore do not raise copyright concerns, that issue does not directly impact whether or in what manner online programming is captioned.

V. GIVEN THE COMPLEXITY OF IP DELIVERY AND THE NEED TO MINIMIZE CONSUMER CONFUSION UPON ROLLOUT, THE COMMISSION MUST AFFORD ADDITIONAL TIME BEYOND THE DEADLINES PROPOSED IN THE *NPRM*

The purpose of the CVAA is not only to ensure that the deaf and hard of hearing have access to captioned IP-delivered programming, but also that the captioning process is a workable and sustainable one. Broadcasters share the Commission's goal of expanding the amount of captioned programming available as soon as possible. However, rushed deadlines will not afford broadcasters the ramp-up time they need to prepare to serve viewers of IP-delivered programming who rely on captions. If the Commission adopts the timelines proposed in the *NPRM*, many local broadcasters will not be ready to comply. As a result, rather than risk enforcement action, they will have no choice but to reduce or even eliminate the local content they post or stream online. This result would be particularly harmful to viewers who rely on captions, given that local broadcasters are responsible for a vast amount of local news and public affairs video available on the Internet.⁴⁴

The Commission can promote IP-delivered video captioning in the short term by encouraging programmers and distributors to make captioned programming available

⁴³ *Id.*, ¶ 27.

⁴⁴ See, e.g., Deborah Potter, Katerina-Eva Matasa, and Amy Mitchell, *Local TV: Good News After the Fall*, THE STATE OF THE NEWS MEDIA 2011 (2011) (“[L]ocal television stations produced the top local media sites in 14 markets in November 2010....”); Kenny Olmstead, Amy Mitchell, and Tom Rosenstiel, *Online: Key Questions Facing Digital News*, THE STATE OF THE NEWS MEDIA 2011 (2011) (“Broadcast-based news outlets began building more of their top stories as video....”).

as soon as possible. With respect to compliance deadlines, however, the Commission should follow the type of ramp-up timeline and phase-in periods that it adopted with respect to television captioning.

In implementing the original closed captioning requirements added by the Telecommunications Act of 1996 (1996 Act),⁴⁵ the Commission provided an eight-year transition period for distributors to comply with a phased-in requirement that all new video programming be captioned.⁴⁶ Even after acknowledging that captioning technology had been available for many years and that the video industry was aware since the passage of the 1996 Act that closed captioning would no longer be voluntary, the Commission recognized that full accessibility could still not be reached immediately. Instead, the Commission adopted a transition period that allowed industry to meet the statutory requirement in “an efficient and practical manner.”⁴⁷

Here, a useful basis for phasing in compliance would be the distinction between network programming and non-network programming. The Commission could adopt the proposals in the *NPRM* with respect to network programming (i.e., programming originated, produced, or distributed for broadcast television by one of the top four commercial broadcast networks). However, local broadcasters, including network

⁴⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, § 305 (adding Section 713 of the Communications Act).

⁴⁶ See *Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, 3292-94 ¶¶ 41-45 (1997), as modified by Order on Reconsideration, 13 FCC Rcd 19973 ¶ 9 (1998) (“*Closed Captioning Order*”). To ensure full compliance by the end of the transition period, the Commission established three intermediate benchmarks. *Id.* at 3294 ¶ 45; see also 47 C.F.R. § 79.1(b)(1)(i)-(iv).

⁴⁷ *Closed Captioning Order*, 13 FCC Rcd at 3292-93 ¶ 41.

affiliates and stations owned by networks, require additional time to prepare for compliance. Thus, the Commission should revise its *NPRM* proposals as follows:

- For non-network produced/originated (VPO) prerecorded programming not edited for Internet distribution, the Commission should afford stations an additional six months (i.e., establish a compliance deadline that is 12 months after publication of an IP-captioning order in the Federal Register).
- For non-network produced/originated (VPO) broadcast programming that is live or near-live, the Commission also should afford stations an additional six months (i.e., establish a compliance deadline that is 18 months after publication of an IP-captioning order in the Federal Register).

This additional time is required to ensure that local broadcasters are ready to caption online. Without an extension, stations may be forced to reduce or eliminate online posting of live or near-simultaneous streaming of content until their captioning capabilities are fully developed. More specifically, live or near-simultaneous streamed programming in particular will be difficult to caption, even if it is distributed online after it airs live on television. Local broadcasters need additional time to ensure that the marketplace can develop and deliver products and services that support IP captioning. With respect to near-live programming, the Commission should adopt the same definition as for video description⁴⁸—programming that is produced from start to finish within 24 hours of being published or exhibited on television—not 12 hours as proposed in the *NPRM*.

⁴⁸ See *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11866 ¶ 40; 47 C.F.R. 79.3(a)(7).

While extending the deadlines proposed in the *NPRM*, the Commission could nevertheless encourage all VPOs, VPDs, and VPPs who have captioning capabilities in advance of the compliance deadlines to begin captioning as soon as possible.

VI. THE COMMISSION SHOULD CODIFY PROCEDURES FOR THE SUBMISSION OF CASE-BY-CASE EXEMPTION PETITIONS AND ESTABLISH CATEGORICAL EXEMPTIONS FROM IP CAPTIONING REQUIREMENTS

A. VPPS AND VPOS SHOULD BE PERMITTED TO FILE EXEMPTION PETITIONS TO THE EXTENT THAT COMPLIANCE WITH APPLICABLE IP CAPTIONING RULES WOULD BE ECONOMICALLY BURDENSOME

The Commission should adopt its proposal to establish a process by which VPOs and VPPs may request an entity-specific or program-specific full or partial exemption from the IP captioning rules if compliance would be economically burdensome.⁴⁹ As proposed, the Commission should consider such exemption requests on a case-by-case basis, utilizing the same standard used in the television closed captioning context—whether captioning imposes “significant difficulty or expense.”⁵⁰

In addition, consistent with Congress’s intent, the Commission should use the four factors set forth in existing Section 713(e) of the Communications Act to make this determination: “(1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.”⁵¹ This four-factor consideration is an appropriate and equitable standard to be used for case-by-case review of IP captioning exemption

⁴⁹ See *NPRM*, ¶¶ 29-31 (citing 47 U.S.C. § 613(d)(3)).

⁵⁰ See *id.*, ¶ 30.

⁵¹ *Id.*, ¶ 29 (citing 47 U.S.C. § 613(e)).

requests. The factors effectively capture the considerations most relevant to whether the IP captioning requirements will be economically burdensome to individual VPOs and VPPs. Small broadcasters, in particular, and the local VPOs whose programming they distribute (such as religious organizations), may be unable to bear the costs of IP captioning, which may be substantial relative to the potential revenue generated by such broadcasters from repurposing their television video for online use. As a result, absent an appropriate exemption standard, such small broadcasters may refrain entirely from offering video online to avoid the cost imposed by the IP captioning rules, which would be contrary to the Commission's objective to encourage the wide dissemination and availability of local news, emergency, and other programming of local interest.⁵²

Moreover, the Commission's proposal to permit entities to seek entity-specific and/or program-specific exemptions is an effective means of ensuring that any exemptions issued by the Commission are appropriate in scope.⁵³ In addition, consistent with Section 202(c) of the CVAA, to prevent a VPP from refraining to distribute IP programming during the pendency of the Commission's consideration of an exemption petition, the Commission should exempt the VPP (or programming covered

⁵² See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12425-27 (2004) (“[L]ocalism has been a cornerstone of broadcast regulation for decades.... The concept of localism derives from Title III of the Communications Act, and is reflected in and supported by a number of current Commission policies and rules.... All of these rules, policies, and procedures reflect the Commission's overarching goal of establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities.”); see also STEVEN WALDMAN, INFORMATION NEEDS OF COMMUNITIES 345 (July 2011) (“Government . . . can remove obstacles confronting those working to solve the problems of providing robust local news and information.”).

⁵³ See *NPRM*, ¶ 30. To the extent that the Commission determines that an entity's exemption request is overly broad given the particular economic burden faced by a VPO or VPP with respect to particular programming, the Commission can approve or deny the request in part consistent with its proposal. See *id.* (“[T]he Commission could deny or approve the petition in whole or in part.”).

by the exemption petition if the petition is limited in scope) from application of the IP captioning rules until the Commission has acted on the exemption petition.⁵⁴ Also, the Commission should permit, but not require, exemption requests to be filed electronically. Finally, for purposes of clarity and regulatory certainty, all of these policies should be codified explicitly in a new section of the Commission's rules.⁵⁵

B. THE COMMISSION SHOULD ADOPT CATEGORICAL EXEMPTIONS TO PROVIDE CLARITY AND CONSERVE RESOURCES

Contrary to its proposal in the *NPRM*, the Commission should adopt categorical exemptions from the IP captioning rules for certain types of programming as expressly envisioned by the CVAA.⁵⁶ As an initial matter, such categorical exemptions will provide needed clarity to captioning parties operating under new rules in a new environment. Exemptions also would provide clarity to and help educate viewers regarding the types and sources of programming that they should expect to be captioned.

In addition, the creation of categorical exemptions will ensure the efficient use of scarce Commission resources. Absent categorical exemptions, each VPO and VPP would be required separately to file petitions going forward with respect to categories of programming for which the Commission previously has uniformly provided

⁵⁴ See *id.*, ¶ 29 (citing 47 U.S.C. § 613(d)(3)). The CVAA provides the Commission with six months to act on an exemption petition but permits the Commission to extend this period if necessary “to determine whether . . . requirements are economically burdensome.” See 47 U.S.C. § 613(d)(3).

⁵⁵ See *NPRM*, ¶ 31 (“We propose codifying the statutory requirement that the Commission consider the VPP or VPO subject to an exemption request to be exempt from the IP closed captioning requirements while the exemption petition is pending.”).

⁵⁶ See 47 U.S.C. § 613(c)(2)(D)(ii) (permitting the Commission to “exempt any service, class of service, program, class of program, equipment, or class of equipment for which the Commission has determined that the application of such regulations would be economically burdensome for the provider of such service, program, or equipment”); see also *NPRM*, ¶ 32.

exemptions.⁵⁷ Given the potential number of VPOs and VPPs, processing such a large number of petitions would be administratively inefficient because it would require an extensive commitment of scarce Commission resources. Thus, going forward, if the Commission were to receive a large number of petitions regarding a single type of programming, it should consider adopting a categorical exemption in that area.

Irrespective of any new categorical exemptions for IP-delivered programming, the Commission should categorically exempt from the IP captioning rules each of the categories of programming currently exempted from the traditional television closed captioning rules. As noted in the *NPRM*, adopting such IP captioning categorical exemptions will have no effect with respect to programming that is broadcast on television without closed captioning due to an existing television closed captioning exemption because such programming is not subject to the IP captioning rules.⁵⁸ However, programming should be exempt from the IP captioning requirements under certain circumstances, even if it was broadcast with closed captioning, if the programming is of a type that was not *required* to be captioned on television.

If the television closed captioning categorical exemptions are not applied to IP captioning, the Commission may inadvertently cause a reduction in the amount of closed captioning of television programming. Specifically, VPOs and VPPs may refrain from captioning television programming that is subject to a television categorical exemption (but which the VPOs and VPPs may otherwise nevertheless have captioned)

⁵⁷ Although programming exempt from the television captioning requirements in many cases will not be captioned on television (and, therefore, would not be required to be captioned online), this is not always the case.

⁵⁸ See *NPRM*, ¶ 32 & n.110 (listing television categorical exemptions set forth in 47 C.F.R. § 79.1(d)).

to avoid the additional cost of captioning such programming in a manner compliant with the IP captioning rules. Such a result would be fundamentally inconsistent with the Commission's objective of promoting the availability of captioning but can easily be avoided by separately applying certain of the television categorical exemptions to the new IP captioning rules.⁵⁹

In addition, live programming or repeats of live programming originally transmitted live which have been appropriately captioned using the "electronic newsroom technique" and which is placed online should be considered appropriately captioned for purposes of IP captioning.⁶⁰

VII. THE IP CAPTIONING RULES MUST BE CAREFULLY BALANCED TO ENSURE THAT REQUIREMENTS TO SHARE INFORMATION ABOUT CAPTIONED PROGRAMMING ARE NOT OVERLY BURDENSOME OR COMPLEX

Although the CVAA directs the Commission to "establish a mechanism to make available to [VPPs and VPDs] information on video programming subject to the [CVAA] on an ongoing basis,"⁶¹ the statute does not require the Commission to insert itself into complex business relationships. The Commission should leave the mechanics of compliance with the CVAA to the programmers and distributors to work out among themselves by contract. Congress sought to ensure that all parties in the distribution chain for IP programming would have sufficient information regarding whether a particular program is required to be captioned. This is intended to maximize compliance

⁵⁹ Certain of the television closed captioning categorical exemptions set forth in Section 79.1(d) may not translate fully to the IP context. The Commission should consider how to account for such exemptions and mirror the underlying purpose of the exemption as closely as possible.

⁶⁰ See *id.* § 79.1(e)(3).

⁶¹ 47 U.S.C. § 613(c)(2)(D)(v); *NPRM*, ¶ 34, n.112.

and minimize circumstances in which an entity covered by the rules can point to a lack of information as a justification for a failure to comply. Congress's goal can be accomplished if the Commission directs VPOs, VPPs, and VPDs to develop or expand upon business relationships that are clear regarding responsibility for captioning. For example, as the Commission notes, private contractual mechanisms could "obligate the contracting VPO to provide all required captions for IP delivery, while requiring the contracting VPD/VPP to enable the rendering or pass through of all such captions to the end user."⁶² Conversely, the goals of the CVAA would be frustrated by adoption of the *NPRM* proposals regarding certifications and/or a database. Although the Commission's suggestions for appropriate "mechanisms" represent a well-intentioned attempt to satisfy a statutory mandate, the Commission can adopt rules that require less but accomplish far more than the *NPRM* proposals.

A. *THE PROPOSED CERTIFICATION SYSTEM WOULD BE IMPRACTICAL, COSTLY, AND TIME CONSUMING*

The Commission's proposal to require certifications to be provided in the case of all programming that is not captioned, as well as to update such certifications within a short time frame upon any change in captioning status of the underlying programming, is unworkable.⁶³ It would impose a substantial economic and resource cost on broadcasters and other VPOs, thereby upsetting the intended CVAA balance between promoting accessibility and limiting burdensome requirements unnecessary to promote such accessibility.

⁶² *NPRM*, n. 121.

⁶³ *Id.*, ¶¶ 35-36.

Requiring every program that is delivered to a distributor without captioning to be accompanied by a certification would generate substantial paperwork and require additional employee resources—a burden that may be impossible for smaller VPOs to meet. This would be true even if the certification requirement were merely a check box, but the Commission has instead proposed that VPOs also include the reason that captioning is not required. There is no reason to require a programmer to provide an explanation as to why a non-captioned program is not captioned, when the same result (ensuring that a VPD/VPP has sufficient information and will not raise “lack of information” as a reason for failure to comply) can be accomplished in the marketplace through existing channels by processes developed over the course of experience.

Moreover, a VPO is not necessarily aware of the identity of all VPDs/VPPs that are authorized to make the VPO’s video programming available directly to end users through a distribution method that uses IP. Certainly, VPOs cannot be responsible for captioning on any *unauthorized* distribution of programming by an entity that qualifies as a VPO/VPD.

If a program is aired on television without captions (or airs on television with captions prior to the effective date of the new rules), it may be distributed online without captioning. Even if such program later is captioned on television, the Commission’s proposal to require an update by the VPO to distributors would impose a retroactive obligation that is unnecessarily burdensome and, as a general matter, completely impractical.⁶⁴ If a non-captioned program later is captioned on television, a VPO should not have to update its distribution of the program or be responsible for ensuring that

⁶⁴ *Id.*, ¶ 36.

distributors use the newly captioned version. Congress did not mean the statute to be retroactive, and it specifically said that the rules would apply to programming “published or exhibited on television with captions after the effective date of such regulations.” It did not authorize the Commission to apply the new rules to previously delivered programming. In addition, requiring content that was posted online before the effective date to have captions if it airs on television after the effective date imposes a significant burden for those programmers with archival content online without captions. Revising archival content should remain a business issue between programmers and distributors. Over time, market forces and the availability of versions put online after the effective date will increase the amount of content with captions.

Rather than imposing an obligation on programming later captioned on television, or an obligation on content that was delivered and distributed online before the rules were effective, the Commission can achieve close to the same result in a far less burdensome manner by simply encouraging parties to update programming with captions whenever possible.

B. A DATABASE HOSTED BY THIRD PARTIES WOULD NOT BENEFIT INDUSTRY OR CONSUMERS

The Commission should not establish a database for information regarding captioned programming.⁶⁵ The information currently collected by companies such as Rovi and Tribune Media Services does not capture all of the information that a VPO would need to take into account to determine whether to provide a VPD/VPP with captioned programming for online distribution. Moreover, it goes well beyond the scope of the statute to propose that VPOs and others be required to provide all necessary

⁶⁵ *Id.*, ¶ 38.

information to a third party, who would then take responsibility for administering it. Such a database would be challenging to manage, and it is not clear how the database would identify any later-captioned version of a program and address rights issues and other important aspects of distribution.

Generating information that can be used by consumers would add a further layer of technical and administrative complexity that would be unworkable and unnecessary at the present time. Expansion of information available to consumers could be revisited after some experience with the basic captioning obligation, but it is premature now. At the appropriate time, NAB would be glad to work with the Commission and other stakeholders to explore voluntary approaches by which VPOs, VPDs, and VPPs can make more information available to viewers who rely on closed captioning.

*C. THE COMMISSION SHOULD ENDORSE A MARKETPLACE
“MECHANISM” FOR INDUSTRY INFORMATION ON CAPTIONING*

Rather than create a complicated, dense, regulatory scheme to ensure that parties in the distribution chain have sufficient information, the Commission should direct VPOs, VPPs, and VPDs to develop or expand upon business relationships that are clear regarding responsibility for captioning. The Commission could determine that its focus will be on compliance by the entity that is closest to the consumer, which is consistent with the statute’s description of programming “delivered to the end-user.” Private contracts could then appropriately allocate responsibilities, assurances, and information to an extent sufficient to meet the goals of the statute. Consistent with the CVAA, a VPP or VPD could be “deemed in compliance if such entity enables the rendering or pass through of closed captions and makes a good faith effort to identify

video programming subject to the [CVAA] using the mechanism.”⁶⁶ Broadcasters would be glad to work with the Commission and other interested parties to develop a voluntary process that would help facilitate these goals.

VIII. THE COMMISSION SHOULD ADOPT A STANDARD INTERCHANGE FORMAT FOR IP CAPTIONING

A standard interchange format—a specification for the purely technical aspects of providing captions for video delivered via IP—would be an extremely helpful component of the new rules. The VPAAC correctly concluded that a standard interchange format should be specified for content providers to encode closed captions into programming before they distribute it, and the VPACC specifically recommended the Society of Motion Picture and Television Engineers (SMPTE) Timed Text (SMPTE-TT) standard for this purpose.⁶⁷ The Commission should follow this recommendation.⁶⁸ Otherwise, various parties in the distribution chain will lack certainty and guidance, consumers may suffer and will not know to whom to complain, and all parties—including the FCC—will be forced to expend more time and resources to ensure the success of an IP captioning regime. As the *NPRM* notes in citing the VPAAC Report, the VPAAC prefers SMPTE-TT because it best meets the requirements and already is being employed in production environments to repurpose television content for Internet use.⁶⁹

In adopting SMPTE-TT, the Commission also should recognize that VPOs cannot possibly encode captions in every format, for every player (or application) on

⁶⁶ 47 U.S.C. § 613(c)(2)(D)(vi); *NPRM*, ¶ 34.

⁶⁷ See *NPRM*, ¶ 39 (citing VPAAC Report at 17).

⁶⁸ As the *NPRM* notes, the VPAAC did not recommend adoption of a single delivery format standard, and NAB supports the VPAAC’s recommendation. *Id.* NAB agrees with the VPAAC’s assessment.

⁶⁹ See *Id.*, ¶ 40.

every device, both now and in the future. Accordingly, to achieve a holistic captioning regime that works for consumers, all online media players will need to support, at a minimum, one specific captioning standard. Programmers will have limited, if any, ability to affect whether a device and the software running on that device will be able to render captions. Given the variety of devices and software for displaying television programming and the frequency with which they are updated, programmers cannot guarantee that consumers will be able to access the captions in online programs. Programmers should only be held responsible for *delivering* programming with captions in a single specific format. The responsibility for *rendering* captions should lie with the device or software manufacturer, as the CVAA contemplates.⁷⁰ Accordingly, even if the Commission does not adopt SMPTE-TT as the approved interchange standard, it must recognize that an entity that delivers online captioning based on SMPTE-TT has met its obligation under the CVAA and the Commission's rules.

IX. COMPLAINT PROCEDURES FOR IP CAPTIONING THAT PARALLEL EXISTING PROCEDURES FOR TV WILL BEST SERVE CONSUMERS BY EXPEDITING RESOLUTION OF ANY PROBLEMS

The Commission should adopt complaint procedures for the new IP video closed captioning rules that follow the established procedures for issues concerning television closed captioning.⁷¹ By extending this existing and well-understood procedural framework to the new arena of online video, the Commission will prevent opportunities

⁷⁰ NAB is concerned that if software is not subject to the same requirements regarding captioning that consumers may have an inconsistent viewing experience. *Cf. Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket No. 10-213, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-151, ¶ 58 (rel. Oct. 7, 2011).

⁷¹ *NPRM*, ¶¶ 43-47.

for potential confusion or miscommunication that might slow the resolution of complaints. Because unnecessarily cumbersome, novel, or ambiguous complaint procedures would dissuade the ultimate objective of better enabling deaf or hard-of-hearing viewers to access and enjoy online video programming, NAB urges the Commission to hew even more closely to the existing framework for television closed captioning complaints than the *NPRM* appears to contemplate.⁷²

Thus, for example, the new complaint procedures for online video captioning should direct viewers/users to file complaints about online captioning with the FCC by established means. The existing television captioning complaint process already provides a broad array of methods for communicating with the agency—including online submissions, emails, facsimile transmissions, telephone calls to FCC customer service representatives and mail.⁷³ There is no need to introduce ambiguity into the procedures by indicating that “any [other] reasonable means” for submitting complaints also would suffice. Rather than put the agency’s own staff in jeopardy of accidentally overlooking or misplacing complaints filed by unspecified means, the Commission would better serve consumers by adapting the existing complaint form (Form 2000C) for use in the online video context.⁷⁴ The adapted form would ensure that complaints contain at least

⁷² The Commission may wish to consider affording viewers additional time to file complaints regarding online captioning, given the complexities of the Internet ecosystem. For example, rather than the 60-day period for television captioning, 75 days may be more appropriate for IP captioning.

⁷³ See FCC Form 2000C, Disability Access Complaint, at 3 (instructions).

⁷⁴ Focusing consumer attention on the adapted, yet familiar, FCC form as the vehicle for complaints should help the Commission educate consumers about the existence of the new online captioning obligations and the means of filing complaints.

a minimally sufficient amount of information for agency action on the underlying substance of the viewer's concern.

To serve that same fundamental objective—expeditious resolution of a reported problem—permitting viewers to file complaints directly with the VPD/VPP before filing complaints with the Commission provides an effective means to resolve issues without the need for FCC involvement. NAB would not oppose allowing viewers to use this approach in the online video context; VPD/VPPs should be given an opportunity to try to resolve these types of complaints and determine whether that process is workable before any FCC regulation is considered.

Other procedural steps also should mirror what is done for broadcast TV captioning. A complaint should go first to the VPD/VPP, rather than to any underlying copyright owner, because VPDs/VPPs are the entities closest to the viewer/user and therefore best able to begin diagnosing the reported problem. Narrowing the point of contact to the VPD/VPP also should simplify the process for both complainants and the Commission's staff.⁷⁵ Any FCC attempt to launch separate enforcement efforts against VPOs would be confusing at best, and potentially counterproductive at worst. Furthermore, while the VPP/VPD addresses the complaint, the FCC should not intervene by concurrently launching a separate inquiry. Overlapping levels of internal and external investigation would not only impose additional costs on the VPD/VPP but also extend the time needed to resolve the concern—and thereby stymie efforts to streamline the process for the overall benefit of consumers.

⁷⁵ It would be reasonable for the Commission to adapt the existing requirements for television station contacts, 47 C.F.R. § 79.1(i), to the online context. However, the Commission should refrain at this time from imposing any additional requirements.

With respect to the range of possible sanctions for violations of the new online captioning rules, NAB urges the Commission to take into account the groundbreaking nature of the rules and the lack of experience shared by *all* of the interested parties—consumers, providers, and regulators alike—in the technical issues that may arise in the early days of the new regulatory regime. As the Commission has done in the past when implementing a completely novel set of mandates,⁷⁶ the agency should use its early enforcement efforts here as a means of educating regulated entities about their new obligations and guiding them through the practical issues involved in satisfying the mandates.

X. CONCLUSION

Broadcasters support the goals of the CVAA and are proud to lead the way in providing the highest quality video programming content online. In order to continue making such programming—particularly local content—available on the Internet, broadcasters must be given sufficient time and flexibility to adapt to the complex distribution models for IP-delivered programming. The Commission’s rules must take all moving parts into account, regulating with sufficient clarity to provide certainty to all sectors of the industry, while leaving room for technical differences and new developments. As a general matter, the Commission should refrain from adopting any rule that is not essential to increasing accessibility of IP-delivered video programming

⁷⁶ For example, when the Commission implemented the Children’s Television Act of 1990, the complexities of the statutory scheme prompted the agency to extend the compliance deadline “in part to afford broadcasters the additional time to ‘hone their plans to ensure compliance.’” *Tak Communications Inc., D.I.P.*, 8 FCC Rcd 488 (1993) (quoting *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 5529, 5530 (1991)). The Commission also published a number of admonishments in the early days following the effectiveness of the “kidvid” rules. See, e.g., *WGN of Colorado, Inc.*, 8 FCC Rcd 489 (1993); *SuperStation, Inc.*, 8 FCC Rcd 490 (1993).

and would create a disincentive for broadcasters to make their programming, including local news, available online.

Specifically, as discussed herein, the Commission should allow marketplace participants to allocate captioning responsibility among themselves, extend its proposed compliance deadlines, apply the rules only to full-length programming (not clips, outtakes, or consumer-distributed programming), establish a waiver process and adopt categorical exemptions, create complaint procedures that mirror those for television captioning, and a standard interchange format. The Commission should decline to adopt a performance quality standard or establish a certification and/or database requirement for programmers and distributors. All other issues should wait until the Commission has more information regarding the process of distributing captioned programming online. NAB also would be glad to work with the Commission to develop voluntary consumer-education and related efforts to accompany the new rules.

Respectfully submitted,

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