

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

To: The Commission

PETITION FOR TEMPORARY PARTIAL EXEMPTION OR LIMITED WAIVER

Introduction and Summary

Pursuant to Section 202(b) of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)¹ and Section 79.4(d)(1) of the Commission’s Rules,² the Digital Media Association (“DiMA”), a national trade organization devoted primarily to the online video and audio industries,³ requests a temporary exemption from a discrete sub-part of the Commission’s rules. Specifically, video programming distributors (“VPDs”) represented by the undersigned request that all VPDs as they work to meet the Commission’s pass-through and rendering obligations be exempt for a limited time period, until January 1, 2014, from the provisions of Section 79.4(c)(2)(i) that require VPD-provided applications, plug-ins or devices⁴ to comply with the user configuration and formatting requirements set forth in Section 79.103(c).

¹ Pub. L. No. 111-260, 124 Stat. 2751, §202(b) (2010) (“CVAA”).

² 47 C.F.R. §79.4(d)(1).

³ DiMA Member Google does not join this petition.

⁴ It is requested that the waiver should explicitly state that the waiver applies to websites, as part of the “applications, plug-ins, or devices” provided to deliver video programming.

Alternatively, DiMA requests that the Commission use its authority under Section 1.3 of its rules to waive for good cause the specified provisions in Section 79.4(c)(2)(i) for all VPDs until January 1, 2014.⁵

These requirements concern only configuration settings such as the ability to customize caption background, color, opacity, and font, but not the core requirement to ensure that consumers receive captioned video content. Granting this narrow, time-limited waiver request therefore will still ensure that consumers receive captioned video content in the timeframe set by the Commission.

The public interest would be served by this limited extension. In contrast, enforcing a deadline that many VPDs will be unable to meet, and which was not proposed in the rulemaking process, would not. Several VPDs represented by the undersigned simply cannot overcome the significant technical challenges associated with implementing the full suite of user configurations detailed in Section 79.103(c) in the extremely short time allotted by the Commission – a mere six months. Importantly, this brief deadline for user configuration requirements for VPDs was not included in the Commission’s Notice of Proposed Rulemaking and was not included in the Commission’s video advisory committee (“VPAAC”) report. The VPD industry therefore did not anticipate that they would need to build and implement these new functions into their products in such a short time period. VPDs are working in haste to comply, but will not complete this difficult work by September 30, 2012. Furthermore, this extension would true up the deadline for a VPD’s requirements with the deadline imposed on apparatus

⁵ *Id.* §1.3.

manufacturers and would ensure that the entire online video ecosystem will work in sync to accomplish the tremendous transition called for in the Commission’s Order.

I. THE COMMISSION SHOULD GRANT A TEMPORARY EXEMPTION TO VPDS OF THE IP CLOSED CAPTIONING REQUIREMENTS RELATING TO USER CONFIGURATION SETTINGS UNDER SECTION 79.4(C)(2)(I).

A. Requirements of Section 79.4(c)(2)(i)

The Commission set forth the duties of a VPD in Section 79.4(c)(2)(i) of its Rules, which were added by the Report and Order⁶ implementing the closed captioning requirements of Section 202 of the CVAA. Specifically, each video programming distributor and provider must:

Enable the [a] rendering or [b] pass through of all required captions to the end user, maintaining the quality of the captions provided by the video programming owner and transmitting captions in a format reasonably designed to reach the end user in that quality. [c] A video programming distributor or provider that provides applications, plug-ins, or devices in order to deliver video programming must comply with the requirements of Section 79.103(c)-(d).⁷

The rule thus imposes distinct obligations on VPDs. Each VPD must (a) pass through all required captions to the end user, or (b) render the required captions. For those VPDs that provide applications, plug-ins or devices to users to render the video programming, these VPDs have a substantial, additional obligation: in the context of addressing the FCC’s rendering requirements, they must (c) ensure that these products comply with the technical requirements of Section 79.103(c)-(d). The technical requirements in Section 79.103(c) (the “CEA-708

⁶ *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787 (Jan. 12, 2012) (“Report & Order”).

⁷ 47 C.F.R. §79.4(c)(2) (alphabetic punctuation inserted).

requirements”)⁸ are quite detailed, and mirror many of the decoder requirements for digital television receivers and converter boxes, which the Commission required receiver manufacturers to implement over a period of almost two years.⁹

Pursuant to the provisions in Section 79.4(b), all of these requirements become effective for prerecorded programming on September 30, 2012.¹⁰ Though Section 79.4(b) contains later dates for live and edited prerecorded programming, those longer dates do not seem to pertain to the FCC’s Section 79.4(c)(2)(i) requirements related to rendering. Two reasons support this conclusion. First, the same technology will be used to render closed captioning regardless of the type of content, so while the longer dates are important for some purposes, they are not relevant here. Second, the vast majority of content provided by VPDs is prerecorded. For these reasons, VPD software must comply with the new obligations for each upgrade or new release issued after September 30, 2012.¹¹

⁸ As explained in the VPAAC Report, the CEA-608 standard applies to analog television captions, while the CEA-708 standard applies to digital television captions. *First Report of the Video Programming Accessibility Advisory Committee*, Closed Captioning of Video Programming Delivered Using Internet Protocol at 8-9 (July 13, 2011) (“VPAAC Report”). The CEA-708 standard supports several additional font and style formatting options. However, television closed captions are still authored using tools based on CEA-608 to ensure compatibility with analog television sets. VPAAC Report at 16. Those CEA-608 captions are then transcoded to the CEA-708 format for digital television delivery. *Id.*

⁹ See *In the Matter of Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, 26 FCC Rcd. 13734, ¶60 and n. 194 (Sept. 19, 2011) (“NPRM”).

¹⁰ 47 C.F.R. §79.4(b)(setting deadline for requirements on VPDs and VPOs as to prerecorded programming as the date of publication in the Federal Register plus six months).

¹¹ The Report and Order states that “[i]f a VPD uses software to enable the rendering or pass through of captions, the VPD is responsible only for software it deploys after the applicable compliance date [of six months].” Report & Order at ¶53. The Commission further explains that it considers “upgrades to VPD software to be new applications.” *Id.* at n. 227. VPD Petitioners urge the Commission to maintain this “next upgrade” position after the exemption period requested herein has elapsed.

The CEA-708 requirements impose obligations on VPDs that present daunting technical difficulties in the time allotted. Most VPDs rely, to one extent or another, on a VPD-provided application, plug-in or device to enable users to access the VPD's content. While it is true that third-party provided applications, plug-ins or devices in the market are sometimes used by consumers to access video content, it is equally true that with regard to the high-quality video content provided by DiMA members, the typical method of accessing that content is for a consumer to use the products provided by the VPD. Consequently, in the short time frame established by the Commission, VPDs must rewrite their software to comply with the many CEA-708 requirements. These requirements present substantial complexity compared with the requirement to deliver closed captioning created with authoring tools based on the CEA-608 technical standard.¹² Additional time is needed for compliance with the CEA-708 requirements, because of the sheer complexity involved in the never-before-written software and also because the video content provided by VPDs will be displayed on, in some cases, hundreds of apparatus or devices with different form factors (each of which might run a different version of the VPD's products). As explained below, this steep technical challenge cannot be met in the short timeframe set by the Commission.

Importantly, VPD's did not know that the FCC would impose such an impossibly short time frame for implementing the new technology. This deadline was not included in the Commission's NPRM. Similarly, the VPAAC Report explicitly declined to recommend a time frame for the Commission to require "availability of the user-controlled feature set."¹³

¹² "This standard [CEA-708] provides for a rich set of features and capabilities above and beyond those supported by CEA-608 captions." VPAAC Report at 9; *see also id.* at 13.

¹³ *Id.* at 34.

Accordingly, the inclusion of this obligation in the Commission's final rule, and the compliance burden it entails, was unexpected by many VPDs.¹⁴

These daunting technological challenges in the short time line prompts DiMA to seek a temporary exemption from the second sentence of Section 79.4(c)(2)(i) for all VPDs until January 1, 2014.

B. Standard of Review

Section 202(b) of the CVAA empowers 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.”¹⁵ Section 79.4(d)(1) of the Commission's Rules implementing this provision states that the Commission may grant to video programming distributors an exemption from the closed captioning rules upon a showing that the requirements would be economically burdensome, which the rule defines as “imposing significant difficulty or expense.”¹⁶ Section 79.4(d)(2) of the Rules identifies the following factors that the Commission will consider in determining whether specific requirements for Internet protocol (“IP”) closed captioning would impose significant difficulty or expense: (i) the nature and cost of the closed captions for the programming; (ii) the impact on the operation of the video programming

¹⁴ Compare NPRM at ¶¶4, 16, 36, Appendix A (referencing pass through and rendering requirement) with 47 C.F.R. §79.4(c)(2) (imposing pass through and rendering obligations and adding applications, plug-ins and devices for compliance with technical requirements).

¹⁵ Section 202(b) of the CVAA (adding a new Section 713(c)(2)(D)(ii) to the Communications Act, 47 U.S.C. §613(c)(2)(D)(ii)).

¹⁶ 47 C.F.R. §79.4(d)(1). Because the Report and Order concludes that “video programming providers” and “video programming distributors” have the same meaning, the Order also makes clear that the reference to video programming provider in Section 79.4(d)(1) subsumes VPDs. Report & Order at ¶¶ 9, 62-63 & n. 257 (stating the Section 79.(d)(1) exemption process includes VPDs).

provider; (iii) the financial resources of the video programming provider; and (iv) the type of operations of the video programming provider. And Section 79.4(d)(3) directs a petitioner to “describe any other factors it deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements of this section”¹⁷

The Commission’s Report and Order contemplates that “entities that find it economically burdensome to meet the [compliance] deadlines may petition for an exemption.”¹⁸ Indeed, Congress gave the Commission the authority “to grant or deny any such petition, in whole or in part,”¹⁹ and that authority enables the Commission to impose temporal limitations on an exemption request as readily as restrictions on scope. Moreover, the limited nature of the exemption requested here, which would apply only until January 1, 2014, argues for the Commission to conduct this inquiry with not as exacting a standard as would be applied to a request for a permanent exemption. Instead, DiMA urges the Commission to review the temporary exemption request with an eye on the complexity of the technological challenge the industry must solve in a short timeframe, and with another eye on the end goal which the industry is working hard to achieve: developing a well-constructed IP closed captioning infrastructure that will serve consumers, VPDs, and video programming owners for decades to come.²⁰

¹⁷ 47 C.F.R. §79.4(d)(3).

¹⁸ Report & Order ¶ 52.

¹⁹ 47 U.S.C. §613(d)(3).

²⁰ In the context of considering exemption requests in rulemakings, the Commission has recognized that the term “economically burdensome” applies differently to rulemaking decisions to exempt categories of programming than case-by-case exemptions. Report & Order at ¶67. By the same analysis, the term should apply differently to requests for temporary exemption of a (continued...)

C. Consideration of Statutory Factors

1. The Nature and Cost of the Closed Captions for the Programming

In order to comply with the CEA-708 requirements imposed on a VPD under Section 79.4(c)(2)(i), a video programming distributor will need to develop new software that can render IP closed captioning on multiple devices. In many cases this will mean working with third-party software vendors. Implementing the Section 79.103(c) obligations will involve tremendous complexity in implementation. The ten specific technical requirements in Section 79.103(c) cover every feature of captions from character color and background color, to character size, font styles, character edge attributes and character opacity.²¹ And under each requirement there are multiple sub-requirements, including the requirement to offer eight different font styles, five different character edge attributes, eight different character colors and separately background colors, three different opacities and a range of character sizes.²² These detailed requirements mean that there are literally millions of combinations that a VPD must account for as it works to meet its rendering obligations.²³

class of providers than by individual outlets. The former case of necessity calls for a broader inquiry in which the Commission is asked to make broad assessments and not detailed analysis of an individual outlet. *See generally id.* at ¶267 & n. 282 (citing comments from CTIA arguing for a “broader inquiry” when assessing exemptions for classes of devices).

²¹ Report & Order ¶113 (“We believe that by incorporating the precise language of the VPAAC Report, we will ensure that manufacturers will clearly understand their obligations regarding the features they are required to implement and support.”).

²² 47 C.F.R. §79.103(c)(1-10).

²³ Here is an accounting of the sub-requirements in Section 79.103(c): Presentation (3) x Character color (8) x Character opacity (2) x Character size (could be many but assume twenty-five percent increments between fifty percent and two hundred percent, inclusive: (7) x Fonts (8) x Caption background color (8) x Caption background opacity (3) x Character edge attributes (5) x Caption window color (8) x Caption window opacity (3) x Language (assume 2) = 15,482,880.

Implementing these changes in the very short time period mandated under the existing rules places demands on VPDs that even large companies cannot meet. Companies plan significant changes to complex software systems over far longer timeframes than six months. Companies require these longer time periods for several reasons.

- First, large software changes require additional highly skilled programmers, designers, and engineers. Demand for these individuals already far outstrips supply; companies compete aggressively for these individuals; and even well-funded VPDs simply cannot all add enough programmers familiar with the relevant software quickly enough to meet the mandate.
- Second, even if additional developers were available, rushing substantial changes to complex software projects is likely to be counter-productive, and perhaps even harmful. Unplanned changes in course increase the likelihood of bugs and other errors, which threaten to undermine not only user configurable settings, but also core captioning and other important device functions, because the software that must be changed integrates multiple classes of device functions.
- Third, companies need more time to complete critical tests of new software – the testing regimes alone often run longer than six months. These tests identify unexpected problems introduced by substantial changes to existing software and are a central part of all software development. It would be significantly difficult, in only six months, for VPDs to develop new software functions, test the new software, and then fix problems identified by the testing.

The VPD development and testing process must take place for numerous different platforms, which can range from televisions, set-top boxes, DVD players and game consoles to

personal computers, smart phones, and tablets. Consequently, the software, application or plug-in used by the VPD must be tailored to each device in order to accommodate the huge variety of hardware, software, screen sizes and user interfaces employed by each device. This entire process will take substantial time and be extremely difficult to accomplish in the short timeframe set by the Commission.

DiMA members have committed tremendous resources to comply, and the new software they build will exist and benefit consumers for many years. However, this entire process will take longer than six months. It is noteworthy that the Commission concluded that “manufacturers generally require approximately two years to design, develop, test, manufacture and make available for sale products.”²⁴ Software development and deployment requires virtually all of the same steps, with the exception of physically assembling the product.

2. *The Impact on Operations*

In combination with the many distinct obligations imposed on VPDs under the Commission’s new IP closed captioning requirements, subjecting VPDs to the requirements to meet the Section 79.103(c) requirements by September 30, 2012 imposes significant difficulty on VPDs’ operations.

VPDs currently are working with video programming owners to develop a series of processes and mechanisms to ingest and pass-through closed captions. VPDs are working to develop processes and mechanisms to enable content owners to transmit programming with closed captions; store the closed captions; prepare such content to be passed through to the end user, and upgrade the applications, plug-ins or devices to display the captions at the request of

²⁴ Report & Order at ¶122.

the user. VPDs also are laboring to amend contracts and define new obligations between video programming owners and distributors to comply with the IP closed captioning requirements. This work is tremendously complex and will require the close attention of a VPD's key technical staff. At the same time, VPDs continue to launch new products and services in this very competitive business. The impact of the additional obligation to make software compliant with the millions of technical combinations rooted in Section 79.103(c) across many different types of devices on which their content can appear, in the same short time frame as the pass-through requirement, imposes significant difficulty on VPDs.

3. Financial Resources

The relevance of this factor to a request for a temporary exemption to allow for more time to comply is attenuated. The difficulty underlying this request is not based on Petitioners' financial resources; the Petitioners are spending substantial resources to comply with the Commission's IP closed captioning rules. Rather, as discussed above, the obligation imposes significant difficulty because of the short time frame set by the Commission. The financial resources of the VPDs represented by petitioner simply cannot overcome the complexity and technical challenges that are preventing VPDs from complying with the CEA-708 requirements in the time allotted.

4. The Type of Operation

The nature of VPD operations supports granting the requested waiver. VPDs face tremendous challenges in implementing the required new user-configuration software into their existing operations while also working to address operational changes resulting from the many other mandates created by the FCC. To understand the extent of this challenge, it is important to recognize that VPDs vary in size and reach and encompass a range of companies and business models that collectively offer tens of thousands of hours of online video content. An

overwhelming percentage of that content is prerecorded programming, and a significant percentage of that programming will appear on television after the applicable deadline. Consequently, DiMA members will be offering content online that will need IP closed captioning and that will be rendered or displayed using a VPD-provided application, plug-in or device on multiple platforms. As a result, VPDs will need to work with numerous diverse vendors to ensure that the products they supply to users to view their programming can meet the CEA-708 requirements. Once they achieve that step, as discussed above, VPDs will still need to conduct extensive and time-consuming testing to ensure that their products will work on the many different devices on which a VPD's content can appear and do not create unanticipated problems with core captioning, other accessibility functions, or other consumer expectations. VPDs cannot effectively meet these operational challenges by September 30, 2012.

5. *A Temporary Exemption Is Supported by Other Relevant Factors and Serves the Public Interest.*

Section 79.4(d)(3) directs a petitioner to “describe any other factors it deems relevant to the Commission’s final determination”²⁵ This part addresses those other relevant factors, which demonstrate that grant of a temporary, partial exemption would be in the public interest.

First, the Commission’s IP closed captioning rules will fundamentally transform the online video experience and require complex and untested engineering solutions that take time to develop and deploy. Some, but not all, VPDs provide closed captions with online video today. The Commission’s new rules will require all those VPDs that distribute covered programming to upgrade their closed captioning capability or supply that capability for the first time. And given that a VPD’s content could appear on numerous different types of devices, ranging from

²⁵ 47 C.F.R. §79.4(d)(3).

televisions, game consoles, personal computers, smartphones, and tablets — all of which have different hardware, software, screen sizes and user interfaces — engineering the IP closed captioning to work appropriately on each device is a major undertaking. The technical challenge is enormous in light of the many technical specifications in Section 79.103(c) that companies have not had to comply with previously. For those VPDs that do not currently offer captioning, the challenge is especially great.

Second, there is no basis in the record for the six-month timeframe as applied to the user configuration requirements on VPD-provided applications, plug-ins and devices, as stated above. It would therefore be arbitrary and capricious to impose such a requirement on VPDs.

Third, if the affected DiMA members had understood that in the context of meeting its rendering obligations, (a) the Commission was going to impose a compliance deadline on applications, plug-ins or devices that VPDs provide to access their video content, and (b) that the Commission would set the six-month time line on compliance with the CEA-708 requirements that applied to VPD-provided applications, plug-ins or devices, those DiMA members and other VPDs would have informed the Commission during the notice and comment process that the deadline was not realistic for many VPDs.²⁶ The Commission could have taken this input into account when adopting its final rules. However, in light of the fact that the Commission's

²⁶ The Commission has previously refrained from reaching into a device or service to regulate its piece parts (despite requests from commenters to do so) and instead has focused on the objectives it wants to achieve. *See In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 14581, ¶ 58 (Oct. 7, 2011) (concluding that the better interpretation of the CVAA “is that it does not impose independent regulatory obligations on providers of software”); *In the Matter of Implementation of Section 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, IT and Telecom RERCs Comments at 4-5. This same approach of focusing on rendering and refraining from reaching the piece parts involved with enabling rendering should be taken here to avoid the above mentioned conflict in the Commission's rules.

NPRM made no mention that in the context of establishing its rendering requirements it would establish a compliance deadline for VPD applications, plug-ins or devices, the VPDs had no notice that this unrealistic time line was going to be imposed, preventing VPDs from being prepared for the requirements. This makes the short time frame all the more difficult.

Fourth, the Commission's rules create a false distinction between imposing IP closed captioning requirements on apparatus makers and requirements on VPDs' applications, plug-ins and devices. Under Section 79.103(a), apparatus makers have until January 1, 2014, to comply with the IP closed captioning technical requirements. A note to the rule makes clear that "[a]pparatus includes the physical device *and the video players . . . whether in the form of hardware, software, or a combination of both . . .*"²⁷ VPDs, on the other hand, have to ensure that their video players can comply with the same requirements in just six months. Yet the technical challenge is the same: apparatus makers and VPDs alike need to work with their software developers to upgrade their video players so that the video players can display the IP closed captioning and comply with all the technical requirements. Indeed, it is certainly possible that a video player developed for a VPD will be installed on an apparatus. That leads to the following anomaly: for a video player installed on an apparatus, the Commission has determined January 1, 2014, is the appropriate compliance date. But for the same video player used by a VPD, the Commission's rules state compliance must occur if that software is deployed after September 30, 2012. The public interest is served by the entire online video ecosystem working on the same problem on the same time line. Not only will this encourage the development of

²⁷ 47 C.F.R. §79.103(a)(note)(emphasis added).

industry-wide solutions, but it also avoids unintentionally creating an unequal economic burden on VPDs.

Fifth, in adopting the CVAA, Congress gave the Commission authority over entities it has never directly regulated before, including some of DiMA's members. VPDs are working diligently to comply with the rules, but the Commission should be mindful that its regulations, and the potential for consumer complaints, now will fall on dozens of companies that in the past were not subject to the FCC's requirements. The FCC's rules will fundamentally transform the online video experience, and to ensure that the transformation is smooth and that consumers embrace the technology shift, it should not be unnecessarily rushed.

Sixth, during the fifteen-month exemption period, consumers still will be able to watch programs with closed captioning since the exemption request only applies to user configuration requirements. Thus, consumers will be able to enjoy video programming online that was created using CEA-608 authoring tools; the same captioning they receive from MVPDs today.

Lastly, the Commission should be assured that all VPDs have the same incentive: to deploy a workable digital closed captioning solution that can comply with the technical requirements as soon as possible. Granting the temporary exemption will not slow down compliance efforts; as soon as a VPD has developed and tested a workable application, plug-in or device that can meet the Commission's IP closed captioning requirements, it will have every incentive to push those products into the marketplace because that feature will give the VPD a comparative advantage over other VPDs that do not yet have IP closed captioning capability. For these reasons, there will be no holding back of IP closed captioning capability until the adjusted deadline approaches. Instead, the Commission should expect VPDs to deploy IP closed captioning capabilities as soon as they are ready for the market.

6. *Captioning Created Using CEA-608 Authoring Tools Provides Consumers with a Reasonable Substitute.*

Section 79.4(d)(3) directs a petitioner to describe “any available alternatives that might constitute a reasonable substitute for the closed captioning requirements” As stated above, the requested temporary exemption would apply only to the additional features set forth in Section 79.103(c). During the pendency of the exemption, VPDs rendering captioning created using CEA-608 authoring tools would have the obligation to continue to pass through or render those captions. CEA-608 captioning would provide consumers with a “reasonable substitute” since it would provide them with core captioning information that is used to create television captions today. As a result, consumers would be able to enjoy all covered programming until the applications, plug-ins or devices compliant with CEA-708 formatting features were made available. Accordingly, during the exemption period consumers would be no worse off because they would have access to closed captioning and over time consumers would be made better off with the new captioning technology.

II. IN THE ALTERNATIVE, THE COMMISSION SHOULD GRANT A LIMITED WAIVER TO VPDS OF THE IP CLOSED CAPTIONING REQUIREMENTS RELATING TO USER CONFIGURATION SETTINGS UNDER SECTION 79.4(C)(2)(I).

A. Standard of Review

Any of the Commission’s rules may be waived if good cause is shown.²⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on

²⁸ *Id.* §1.3.

²⁹ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

an individual basis.³⁰ Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest.³¹

B. Class Covered by the Waiver Request

The requested waiver should be applied to all VPDs. While the DiMA members requesting this limited waiver represent a subset of the entire class of VPDs that would be affected by the Commission's current rules, other entities also may need additional time to comply with the CEA-708 requirements for the same reasons articulated herein, and there is no procedural or policy reason not to extend the requested waiver to all VPDs.

C. Special Circumstances Warrant a Deviation From the General Rule.

As explained above, waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule.³² Many special circumstances support a temporary, limited waiver of the second sentence of Section 79.4(c)(2)(i) relating to the user configuration requirements in Section 79.103(c).

Specifically, each of the factors cited in the above discussion of our request for a temporary exemption³³ also constitute special circumstances that would justify a limited waiver for good cause, and the entire argument in Part I is incorporated herein by reference. In particular, the special circumstances include:

³⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Ne. Cellular*, 897 F.2d at 1166.

³¹ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Ne. Cellular*, 897 F.2d at 1166.

³² *Ne. Cellular*, 897 F.2d at 1166.

³³ *See* Part I.C.5., *supra*.

- The Commission’s rules will fundamentally transform the online video content industry, and more time is needed to ensure the transition is seamless in order to avoid software malfunctions borne by consumers.
- Consumers will be able to enjoy programming with core captioning consistent with the CEA-608 standard during the waiver period until the CEA-708 user configuration features are deployed.
- There is no basis in the record for the six-month period for the user configuration obligations in connection with VPD-provided applications, plug-ins, and devices.
- It is not in the public interest to set a deadline for apparatus makers at two years and for software developers at six months, since the video online content community should implement the same fundamental solution under the same deadline.
- The Commission is exercising jurisdiction over dozens of companies and wide swaths of online activity it never regulated before. Because of the great changes required by the FCC’s action and the technological and operational difficulty of implementing these changes, the Commission should give the companies a reasonable time to comply.

These special circumstances establish good cause for a deviation from the Commission’s general rule for the limited time period requested.

D. The Waiver Will Serve the Public Interest.

The Commission should grant a waiver when it will serve the public interest.³⁴ The limited nature of this waiver request, which is fifteen months in length and applies only to the requirements of Section 79.4(c)(2)(i) related to the CEA-708 user configurations, means that the Commission will achieve the goal set by Congress: “to help ensure that individuals with disabilities are able to fully utilize communications services and equipment and better access

³⁴ *NetworkIP*, 548 F.3d at 125-28.

video programming.”³⁵ As explained above, it serves the public interest for manufactures of apparatus and software developers to meet this goal at the same time. Importantly, once the IP closed captioning system is built and operating well, it will benefit persons with disabilities for years to come. But forcing VPDs into an unrealistic timeline will result in substantial technical malfunctions and consumer dissatisfaction, undermining consumers’ use of captioning technology. The Commission should therefore ensure that consumers have access to core captioning functionality on its original schedule, but give VPDs the limited additional time they need to properly implement user configuration technologies.

³⁵ See H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 9 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010).

Conclusion

For the reasons stated herein, compliance with specific portions of the Commission's rules by September 30, 2012, forces VPDs into an unrealistic timeline that is inconsistent with their technical abilities, threatens to undermine consumer use of video technologies, is unsupported by record evidence, and was not included in either the VPAAC Report or the FCC's NPRM. Accordingly, the Commission should grant a temporary exemption from, or in the alternative waive for good cause, the second sentence of Section 79.4(c)(2)(i) until January 1, 2014 for all VPDs.

Respectfully submitted,

/s/ Lee Knife

Lee Knife
Executive Director
Digital Media Association
1050 17th Street, NW
Suite 220
Washington, DC 20036
(202) 639-9509

Date: May 8, 2012

Affidavit

I hereby certify that I have read this submission and to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact.

/s/ Lee Knife

Lee Knife
Executive Director
Digital Media Association

Date: May 8, 2012