

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

In the Matter of)	
)	
Accessibility of User Interfaces, and Video)	MB Docket No. 12-108
Programming Guides and Menus)	

**COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”)¹ hereby responds to the Notice of Proposed Rulemaking in the above-captioned proceeding.²

INTRODUCTION

Section 205 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) directs cable operators and other multichannel video programming distributors (“MVPDs”) to: (1) make available accessible on-screen text menus and guides to customers who are blind or visually impaired; and (2) provide access to closed captioning capability on certain navigation devices.³

The cable industry is committed to working with the Commission to implement this important legislation and to making its products and services more accessible to its customers. At the same time, Congress recognized the considerable technical and other challenges that the legislation posed and thus directed that MVPDs be given “maximum flexibility” in complying

¹ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$200 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

² See *In re Accessibility of User Interfaces, and Video Programming Guides and Menus*, Notice of Proposed Rulemaking, MB Dkt. No. 12-108, FCC 13-77 (May 30, 2013) (“Notice”).

³ See Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 205 (as codified in 47 U.S.C. § 303) (“CVAA”).

with their new responsibilities.⁴ The Commission should keep this admonition firmly in mind as it moves forward in this docket. To the extent possible, the Commission should simply adopt the broad requirements of Section 205 into its rules and give cable operators and other MVPDs maximum flexibility in determining how to satisfy them.

In addition, the Commission should exercise its authority under the legislation to exempt the smallest systems from the requirements of Section 205, and to give additional time to small operators to come into compliance and to benefit from technological developments in this area.

I. CABLE OPERATORS MUST BE GIVEN MAXIMUM FLEXIBILITY IN PROVIDING ACCESSIBLE PROGRAM GUIDES AND MENUS.

Section 205 requires cable operators, no earlier than October 2016, to place in service a means for customers who are blind or visually impaired to gain “audibl[e]” access to the textual information presented in on-screen text menus and guides.⁵ In establishing this new requirement, Congress directed that industry be given “maximum flexibility” to develop solutions that achieve these goals.⁶ It also directed the Commission to avoid technical standards, protocols, procedures and other technical requirements, and made clear that the audible accessibility need not be provided in the set-top box or navigation device itself, but could be provided in a separate device.⁷

Congress’s directive that industry be given maximum flexibility made practical and technological sense. The cable industry today is comprised of thousands of individual community-based systems, relying on a wide variety of network equipment and set-top boxes. Most importantly here, operators have deployed a variety of unique program guides – indeed, a

⁴ CVAA § 205(b)(4)(A).

⁵ 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)).

⁶ CVAA § 205(b)(4)(A).

⁷ See 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)); CVAA § 205(b)(4)(A).

single cable operator may use several different program guides even within its own commonly-owned systems. The technology needed to provide accessible on-screen text menus and guides is nascent, and different operators may devise different solutions that work best with their particular systems.

Notwithstanding these challenges, the cable industry is committed to continuing to improve accessibility for its blind and visually impaired customers. In some respects, however, the *Notice* proposes unnecessary rules that will unduly interfere with operators' ability to achieve that goal.

A. The VPAAC Report Provides Helpful Examples of Accessibility, But the Commission Should Not Dictate a Rigid Set of Requirements.

NCTA actively participated in the Video Programming and Emergency Access Advisory Committee (“VPAAC”), including in the VPAAC’s working group on “User Interfaces, and Video Programming Guides and Menus.” The working group identified certain “essential” user interface functions,⁸ which the *Notice* tentatively concludes “are representative, but not an exhaustive list, of the categories of functions that a navigation device must make accessible.”⁹ The *VPAAC Second Report* provides examples of functionalities that should be made accessible, either through the set-top box or via some other means, and the cable industry stands ready to develop solutions consistent with that approach. But the Commission’s tentative conclusion imposes a rigid set of requirements that conflicts with the flexibility granted cable operators under Section 205 and should not be adopted.

⁸ The eleven “essential” functions are (1) power on/off; (2) volume adjust and mute; (3) channel and program selection; (4) channel and program information; (5) configuration – setup; (6) configuration- closed captioning control; (7) configuration – closed captioning options; (8) configuration – video description control; (9) display configuration info; (10) playback functions; and (11) input selection. *Second Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: User Interfaces, and Video Programming and Menus*, Apr. 9, 2012 at 8 (“VPAAC Second Report”).

⁹ *Notice* ¶ 36.

First, as NCTA’s comments on the *Public Notice* in this proceeding pointed out,¹⁰ the VPAAC’s charge and the Commission’s role here are very different.¹¹ The VPAAC was tasked with recommending “standards, protocols, and procedures,” while Section 205 expressly prohibits the Commission from “specify[ing] the technical standards, protocols, procedures, and other technical requirements for meeting this requirement.”¹² While the VPAAC recommendations will be a useful tool to cable operators as they develop accessible guides and menus, the eleven “essential functions” were not intended to form the basis of a guide and menu mandate.

Nor are they targeted to that purpose. The *VPAAC Second Report* noted that “essential functions” referred to the set of appropriate *built-in apparatus* functions.¹³ Of course, the functions under Section 204 that are required to be made accessible are distinct from what is required under Section 205.¹⁴ Many of the functions identified are not performed by cable operator-provided guides and menus.¹⁵

¹⁰ See NCTA Comments, MB Dkt. No. 12-108 (filed June 4, 2012).

¹¹ Compare CVAA § 201(e)(2)(H) (stating “[w]ith respect to video programming guides and menus, a recommendation for the standards, protocols, and procedures used to enable video programming information and selection provided by means of a navigation device, guide, or menu to be accessible in real-time by individuals who are blind or visually impaired”), with 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)) (“if achievable . . . that the on-screen text menus and guides provided by navigation devices . . . for the display and selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement”).

¹² 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)).

¹³ *VPAAC Second Report* at 7 (stating that “‘essential functions,’ as used in this report, refers to the set of appropriate built-in apparatus functions, see CVAA § 204(a), 47 U.S.C. § 303(aa)(1)”).

¹⁴ Compare 47 U.S.C. § 303(aa) (as amended by CVAA § 204(a) (requiring: (1) accessibility of certain built-in apparatus functions, (2) audio outputs for on-screen text menus and other visual indicators built in to digital apparatus, and (3) access to captioning and video description features through a mechanism), with 47 U.S.C. § 303(bb) (as amended by CVAA § 205(a)) (requiring: (1) accessibility of on-screen text menus and guides provided by navigation devices for the display or selection of multichannel video programming, and (2) access to captioning capability on certain navigation devices through a mechanism).

¹⁵ Several of the essential functions are uniquely related to built-in control functions, such as power on/off and volume adjust and mute.

Pursuant to Section 205’s “maximum flexibility” mandate,¹⁶ navigation devices need not have built-in features for accessing program guides and text menus for those customers who are blind or visually-impaired when accessibility may be achieved through a variety of non-set-top box-based solutions. The Commission must allow experimentation and new innovative solutions to flourish in this area.

Similarly, the Commission cannot and should not dictate that a separate piece of equipment “achieve the same functions as a built-in accessibility solution”¹⁷ The *Notice* provides no justification for imposing this stricture, which could freeze innovation or inhibit the provision of interim solutions in a timely manner. Since the accessibility solution need not be “built-in” to a navigation device, it would be contrary to congressional intent to adopt regulations based on that erroneous parity assumption.

The *Notice* also asks whether operators must provide a solution that works with all of the classes of navigation devices they make available to subscribers.¹⁸ This suggestion is at odds with the CVAA. Cable operators must have an accessibility solution, but it need not work for every navigation device in inventory. As noted, operators do not need to provide accessible set-top boxes in the first instance, and can provide a solution that is not based in a set-top box. And operators can swap out a newer box for a customer’s older box and provide a newer box with accessibility functionality and other features and functions not contained in the older box. Nothing about the CVAA requires operators to create solutions that work with all boxes and menus that they provide.

¹⁶ CVAA §§ 205 (b)(4)(A), (b)(5).

¹⁷ *Notice* ¶ 40.

¹⁸ *Id.* ¶ 53.

Likewise, the Commission should not import guidelines on on-screen text menu and guide accessibility from other unrelated accessibility rules.¹⁹ Section 205 requires on-screen text menus and guides to be “audibly accessible in real-time” and the guidance contained in other accessibility rules is not appropriately tailored to this goal.²⁰

Under these circumstances, the best approach would be for the Commission to simply adopt the language of Section 205 as part of its regulations and refrain from specifying particular functions or standards. Anything more would stray into areas of product design that Congress intended to leave to cable operators and would run afoul of the maximum flexibility that Congress granted to operators.²¹

B. On-Screen Text Menus and Guides Provided by Certain Navigation Devices, Including But Not Limited to Cable Operator-Leased Set-top Boxes, are Covered by Section 205.

We agree with the *Notice* that on-screen text menus and guides provided by cable operator-leased navigation devices are covered by Section 205. The *Notice* asks whether to adopt an interpretation whereby “equipment provided to MVPD subscribers by MVPDs would be covered under Section 205, while all other digital apparatus, including equipment purchased at retail by a consumer to access video programming, would be covered under Section 204.”²² But the accessibility requirements for on-screen text menus and guides fall on the “navigation devices” themselves that offer such features for the display or selection of multichannel video

¹⁹ See *id.* ¶ 37 (referencing guidance implementing Sections 255 and 716 of the CVAA).

²⁰ 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)). While remote controls may be relevant to Section 205’s requirements regarding access to closed captioning capability, the accessibility of remote controls for purposes of on-screen text menus and guides is beyond the scope of Section 205. See *Notice* ¶ 37 (asking whether there are circumstances under which a remote control must be made accessible to the blind). To the contrary, Congress specifically and carefully crafted this provision to be limited to audible accessibility of on-screen text menus and guides.

²¹ See CVAA § 205(b)(4)(A).

²² *Notice* ¶ 7.

programming.²³ And “navigation devices” are defined by reference to Commission rules that plainly apply not only to MVPD-supplied equipment but also to consumer-supplied equipment obtained from an entity other than an MVPD.²⁴ Consumer-owned devices that may be used to access multichannel video programming use a variety of non-standard operating systems, Application Programming Interfaces (“APIs”), software, and other features over which the MVPD has no control. “An entity” is “only []responsible for compliance with the requirements [of Section 205] with respect to navigation devices that it provides to a requesting blind or visually impaired individual,”²⁵ meaning that other (non-MVPD) entities may also provide such devices and would be responsible for their own compliance.²⁶ They are the only entity that is in a position to make retail device on-screen text menus and guides accessible.

²³ See 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)).

²⁴ See CVAA § 206(6); see also 47 C.F.R. § 76.1200(c) (defining “navigation devices” to mean “devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems”). The legislative history of Section 205 confirms that Congress did not single out MVPD-supplied navigation devices for different treatment than other providers of navigation devices with on-screen text menus and guides for the display or selection of multichannel video programming. The House and Senate bills as introduced focused on owners and distributors of such video programming. See Twenty-first Century Communications and Video Accessibility Act of 2009, H.R. 3101, 111th Cong. § 205(a) (as introduced by Rep. Markey on June 26, 2009) (requiring “each provider or owner of video programming [...] and each multichannel programming distributor” to make video programming guides and menus accessible); Equal Access to 21st Century Communications Act, S. 3304, 111th Cong. § 206(a) (as introduced by Sen. Pryor on May 4, 2010) (same). But the law as enacted deleted these references, instead referring to menus and guides provided by the equipment, and referencing “entities” that make the devices containing this information available to consumers. See generally CVAA § 205.

²⁵ CVAA § 205(b)(3).

²⁶ The *Notice*'s effort to refocus Section 205 on only MVPD-supplied navigation devices fails to show otherwise. For example, while Section 205 specifically references an exemption for small “cable systems,” this merely shows that the Commission has authority to exempt a particular category of covered entities. The phrase “placed in service” also fails to support the MVPD-only focus, as the phrase appears several times in the Commission's rules in areas wholly unrelated to MVPD-provided service. See, e.g., 47 C.F.R. §§ 25.216(a)-(d), (f) (limiting emissions from terrestrial receivers and transmitters “placed in service” in satellite networks); § 32.9000 (defining “time of installation” as the date in which a telecommunications plant is “placed in service”); § 80.953(a) (requiring inspections of maritime radio equipment after the equipment is “placed in service”); § 101.141(a)(2) (requiring fixed microwave facilities for voice transmission to be “placed in service, authorized, or applied for” by a certain date). Finally, the *Notice* misinterprets the requirement that an entity “shall provide any such software, peripheral device, equipment, service, or solution at no additional charge and within a reasonable time to such individual” to mean that an entity “with a preexisting relationship” must make set-top boxes available for free. *Notice* ¶¶ 8-9. To the contrary, the “no additional cost” provision relates to situations

Thus, the plain language and legislative history of this provision show that it applies more broadly than just to MVPD-supplied navigation devices. Congress intended that all entities making on-screen text menus and guides available on navigation devices that access multichannel video programming to be subject to the same accessibility requirement. The rules should apply even-handedly in this area.

C. Cable Operator-Developed Applications are Not Subject to the Rules.

The *Notice* asks whether Section 205 applies to “apps” and other software developed by MVPDs, such as Cablevision’s iPad App.²⁷ Cable operators will work to include accessible features in their apps to the greatest extent possible. But Congress adopted a narrowly-focused provision that applies only to certain types of hardware – MVPD-developed applications are plainly not within Section 205’s purview.

Section 205 applies to on-screen text menus and guides provided by “navigation devices” under Section 76.1200 of the Commission’s rules – which, in turn, defines navigation devices as a type of equipment.²⁸ MVPD-developed apps are software²⁹ downloaded by MVPD customers

where an entity relies on “separate equipment or software” to satisfy the Section 205 audible accessibility requirement. CVAA § 205(b)(4)(B).

Moreover, many devices sold at retail carry ongoing relationships. For example, TiVo comes with a TiVo subscription, mobile devices are often accompanied by a subsidy and a contract, and many retail devices come with customized Netflix or other implementations, which in turn carry a subscription. Other retail devices come with a presumption of support and bug fixes, or express or implied warranties of fitness. It is incorrect to exempt an entire category of customer-owned devices on the theory that only a service provider such as an MVPD has a “relationship.”

²⁷ See *Notice* ¶ 24.

²⁸ “Navigation devices” means “devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c) (emphasis supplied).

²⁹ The *Notice* asks whether, if not covered by Section 205, MVPD apps might instead fall under Section 204. See *Notice* ¶ 24. But Section 204 applies only to “digital apparatus,” and only to “built-in” functionality of such apparatus. 47 U.S.C. § 303(aa) (as amended by CVAA § 204(a)). MVPD-supplied apps are not “built-in” to this equipment and thus would not be covered under this section.

to customer-owned devices.³⁰ As the Commission explained in the *ACS Order*, “software programs or applications [are not] referred to as devices.”³¹ MVPD-developed apps are not “navigation devices” as defined by the Commission.

The Commission has consistently interpreted other provisions of the CVAA to exclude apps in these circumstances. It has treated software that is downloaded or otherwise added independently by the consumer after the sale of the device differently than software integrated into the physical device.³² The same approach is warranted here.

Practical reasons also counsel against finding that cable operator-developed apps must comply with this accessibility rule. Cable operators are developing different apps designed to operate on a variety of devices and operating systems. While some of those devices and

³⁰ In an analogous situation, the Commission determined that program guides and menus, by themselves, are not navigation devices. See *Gemstar International Group, Ltd.*, 16 FCC Rcd. 21531, 21542 (2001) (rejecting Gemstar argument that electronic program guides qualify as navigation devices required to be carried by cable operators). Where operators simply provide the guide information on third party devices, they similarly are not providing a navigation device.

³¹ *In re 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, Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision*, Report & Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14590 ¶ 63 (2011) (“*ACS Order*”).

³² See *In re Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report & Order, 27 FCC Rcd 787 ¶ 94 (2012) (“*IP Captioning Order*”) (“declin[ing] to include within the scope of our interpretation of the statutory term “apparatus” third-party software that is downloaded or otherwise added to the device independently by the consumer after sale and that is not required by the manufacturer to enable the device to play video”); *In re Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report & Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871 ¶ 62 (2013) (“*Emergency Information Order*”) (interpreting “apparatus” to include the “physical devices designed to receive, play back, or record video programming transmitted simultaneously with sound, as well as software *integrated* in those covered devices”) (emphasis supplied). The Commission adhered to this principle in its recent decision not to hold carriers responsible for apps downloaded by consumers to customer-owned mobile devices. *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, Declaratory Ruling, CC Dkt. No. 96-115, FCC 13-89 ¶ 32 (June 27, 2013) (“The openness of modern smartphones and the ability that they provide consumers to install applications that they desire has produced tremendous benefits. While those benefits also come with risks to the privacy and security of consumers’ information, those are risks that other parties may have a responsibility to address or that consumers might assume by their use of such applications.”).

operating systems may have accessibility features or functions, many devices may not have the technical capability to support “talking” on-screen menus and guides. For example, certain features of an application may not be able to function on an older operating system or the application may be unable to receive necessary updates to such features. Moreover, other types of changes might adversely affect the accessibility of an operator’s application. For example, customer-owned devices get operating system, firmware, software, and other updates that sometimes “break” applications. Cable operators have no control over these changes, which can (and often do) occur without any prior notice to the operator.

In the highly competitive video marketplace, cable operators have strong incentives to offer interfaces that appeal to all of their customers. But imposing a regulatory obligation on cable operators to ensure the audible accessibility of cable apps will introduce additional complexities and uncertainty in this developing area. Congress did not intend to impose such a requirement and, as it has done in analogous accessibility rules, the Commission should refrain from doing so here.

D. Cable Operators and Programmers are Not Responsible for Providing Program Guide Information to Manufacturers of Third Party Apparatus.

In cases where a device covered under Section 204 does not contain program guide data, the *Notice* asks about its authority to use Section 204 to somehow mandate that MVPDs provide such data to apparatus manufacturers.³³ While both Sections 204 and 205 require audible access to certain information presented on-screen, the *Notice* strays far from the intent of the CVAA in equating the content of the information required to be audibly accessible under both of these sections.

³³ See *Notice* ¶ 33.

Unlike Section 205, Section 204 does not address on-screen menus and guides used to access multichannel video programming. Rather, Section 204 speaks to the accessibility of on-screen textual material regarding the equipment’s built in functionality (such as the accessibility of set-up menus).³⁴ These requirements do not overlap with Section 205, which addresses “on-screen text menus and guides provided by navigation devices . . . for the display or selection of multichannel video programming.”³⁵

Section 205 thus has a specific and narrow purpose with respect to the accessibility in real-time of on-screen text menus and guides. Neither the CVAA nor any other provision of the Communications Act confers authority on the Commission to force cable operators or programmers to provide channel and program information to others for their own use.³⁶ Cable operators often purchase that guide data from third parties and create unique user interfaces for their customers. Those entities who offer their own user interfaces and program guides, like TiVo, may themselves purchase the data from these same guide data providers.

Likewise, Section 205 is focused on making information accessible that *already* is provided in on-screen text menus and guides. If that information is not present, by definition there is no obligation to make it accessible to blind or visually impaired customers. Thus, contrary to the urgings of certain local governments, the Commission cannot use Section 205 or any other provision to require a cable operator to add information to its on-screen text menu and

³⁴ Subsection (1) relates to “control of appropriate built in apparatus functions” being accessible; subsection (2) discusses “on-screen text menus or other visual indicators built in to the digital apparatus . . . used to access the functions of the apparatus described in paragraph (1).” 47 U.S.C § 303(aa)(1)-(2) (as amended by CVAA § 204(a)).

³⁵ 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)).

³⁶ *See Notice* ¶ 33 (asking whether the Commission has authority to require MVPDs to make channel and program information available to apparatus or to “third-party applications”).

guide that is not already there.³⁷ The Commission has no authority, under Section 205 of the CVAA or elsewhere, to dictate what content cable operators must include in those on-screen text menus and guides, for any cable customer.³⁸

E. The Rules Should Incorporate Guidance on Eligibility For Accessible Guides.

To prevent fraud and abuse of the accessibility requirement under Section 205, operators must be able to verify that an individual requesting an accessible solution is eligible. The Commission has previously recognized the importance of such verification.³⁹ In defining qualification criteria, the Commission could consider the verification rules adopted to implement Section 105 of the CVAA – the National Deaf-Blind Equipment Distribution Program. Those rules provide that to be eligible, individuals “must provide verification of disability from a professional with direct knowledge of the individual’s disability.”⁴⁰

³⁷ See *id.* ¶ 36 (asking whether “Section 205 provide[s] . . . authority to require that MVPDs provide programming description information in programming guides for local programs and channels for the purpose of promoting accessibility?”).

³⁸ See 47 U.S.C. § 544(f)(1) (barring the Commission and franchising authorities from “impos[ing] requirements regarding the provision or content of cable services” except as expressly provided in Title VI).

³⁹ See *Emergency Information Order* ¶ 44 (requiring DIRECTV to offer set-top boxes with emergency information functionality “upon request and at no additional cost to customers who are blind or visually impaired” but allowing DIRECTV to “require reasonable documentation of disability as a condition to providing the box at no additional cost.”); see also *In re Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Section 105, Relay Services for Deaf-Blind Individuals*, Report & Order, 26 FCC Rcd 5640 ¶¶ 31-32 (2011) (stating that to facilitate access to the National Deaf-Blind Equipment Distribution Program “by the intended population, while at the same time implementing measures to prevent potential fraud or abuse of this program, we adopt a rule requiring individuals seeking equipment under the NDBEDP to provide verification” of their needs).

⁴⁰ 47 C.F.R. § 64.610(d)(1); see also 36 C.F.R. § 701.6(b)(1) (providing eligibility requirements for the National Library Service’s Talking Books program).

II. SECTION 205 PROVIDES FLEXIBILITY IN ACHIEVING ACCESS TO CAPTIONING.

A. Requiring Access to Captioning in a Single Step Would Conflict with the Flexibility Provided In Section 205.

In addition to its accessible on-screen text menus and guides requirement, Section 205 requires “for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features”⁴¹ This provision also directs that the regulations “shall permit the entity providing the navigation device maximum flexibility in the selection of means for compliance”⁴² The *Notice* proposes to interpret this provision to “require the closed captioning feature to be activated in a single step.”⁴³ While the cable industry will work to ensure ease of access to closed captioning, a “single step” requirement conflicts with the language of Section 205 and should not be adopted.

First, the plain language of Section 205 does not impose such a requirement. Rather, just as with solutions for on-screen text menu and guide accessibility, operators are granted “maximum flexibility” to choose a solution so long as the mechanism achieves a similar means of access as a button, key or icon.⁴⁴ While a dedicated closed captioning button arguably could reach captioning functionality in a single step, nothing about the statutory language requires a single step. Rather, the CVAA does not speak to the number of steps at all. Certainly nothing

⁴¹ 47 U.S.C. § 303(bb)(2) (as amended by CVAA § 205(a)).

⁴² CVAA § 205(b)(5).

⁴³ *Notice* ¶ 43.

⁴⁴ CVAA § 205(b)(5).

about the reference to a button, key or icon implies anything about the number of steps it might take to reach them.⁴⁵

Second, in an effort to improve accessibility, the Commission must take care to not hamper innovation. For example, operators may choose to increase accessibility in the near term by providing remote controls that contain programmable buttons to perform different tasks. It may take more than a “single step” to reach any of those functions, but the final result would be a simple, customized approach tailored to the needs of a specific individual. Or, operators may choose to enhance accessibility by providing, for example, an “accessibility features” icon that generally accesses closed captioning, with additional options to access advanced captioning settings. A single step requirement could deprive operators of the flexibility necessary to present such a “quick menu” option.

Although the Commission claims that its “single step” proposal is “future-proofed,” it actually risks freezing into place generic solutions that consumers will eventually choose to abandon.⁴⁶ Along these lines, there is evidence that consumers may not like the proliferation of buttons on remote controls. As a result, operators and consumer equipment manufacturers are interested in reducing, rather than expanding, the number of buttons on a remote control to simplify and streamline the consumer experience.⁴⁷ Alternatively, operators may eventually

⁴⁵ The *Notice* asks whether to require inclusion of a closed captioning button on a remote control when dedicated physical buttons are used to control volume and channel selection. *See Notice* ¶ 43. But such a requirement would conflict with the Act. Prior versions of the legislation would have required “inclusion of a button on the remote control of such apparatus designated for activating the closed captioning function and the inclusion of ‘closed captions’ and ‘video description’ on the top tier of the on-screen menu of such apparatus.” *See, e.g., Twenty-first Century Communications and Video Accessibility Act of 2008, H.R. 6320, 110th Cong. § 204(a)* (as introduced by Rep. Markey on June 19, 2008). Since Section 205 states that access can be achieved through a key or icon, among other things, the Commission lacks authority to require operators to dedicate a captioning button on a remote control. *See 47 U.S.C. § 303(bb)(2)* (as amended by CVAA § 205(a)).

⁴⁶ *Notice* ¶ 43.

⁴⁷ *See, e.g., Jeff Baumgartner, Cox ‘flareWatch’ Test Targets Cord-Cutters, Multichannel News, July 8, 2013* (explaining that a new service by Cox includes a “button-less, touch-based remote control device”), available at <http://www.multichannel.com/current-issue/cox-%E2%80%98flarewatch%E2%80%99-test-targets-cord->

deploy devices with gesture recognition that will revolutionize accessibility.⁴⁸ It is unclear how such advanced devices would comply with a “single step” mandate. That said, requiring covered entities to ask the Commission for permission to innovate in developing a novel mechanism for accessing captions and other accessibility features before building it into an apparatus or navigation device would insert substantial cost and delay into the process of rolling out new, innovative solutions. Operators should not be required to obtain Commission approval prior to rolling out new guides or hardware.

In short, improved access to captioning can be achieved without unduly limiting operators’ flexibility. The Commission should heed the statutory language and grant operators “maximum flexibility” while taking care not to hamper or delay innovation in accessibility solutions. To implement the provision in a manner that is “future-proof,” the Commission should simply incorporate the “reasonably comparable” statutory language into its implementing regulations.

B. Congress Limited its Section 205 Mandate to Accessing Closed Captioning Capability.

Noting that “Section 204 explicitly requires certain apparatus to provide access to closed captioning and video description features through a mechanism reasonably comparable to a button, key or icon,” and that Section 205 includes a similar requirement, “but references only

[cutters/144274](http://www.multichannel.com/distribution/comcast-brings-x1-baltimore/143941); Jeff Baumgartner, *Comcast Brings X1 to Baltimore*, Multichannel News, June 17 2013 (noting that an advanced Comcast system will feature “a new remote control that possesses voice-based search capabilities”), available at <http://www.multichannel.com/distribution/comcast-brings-x1-baltimore/143941>.

⁴⁸ See, e.g., Steve Donohue, *A Look at Advanced Guides from Cablevision, DirecTV, AT&T, and the Future of Channel Surfing*, FierceCable, Oct. 9, 2012, available at <http://www.fiercecable.com/node/8879/print>. ; Jeff Baumgartner, *iTVTech Unveils Its Plan for Motion-Based Remotes, Joins Crowded Field in Way Consumers Navigate Interfaces*, Multichannel News, July 8, 2013 (noting that, “video user interfaces [are] become increasingly gesture-based”), available at <http://www.multichannel.com/distribution/itvtech-unveils-its-plan-motion-based-remotes/144275>.

closed captioning capability,” the *Notice* asks whether its rules implementing Section 205 should apply to video description features.⁴⁹ They should not.

The text of the CVAA makes clear that Congress intended the obligations under Section 205 of the CVAA to apply only to closed captioning features. First, the plain language demonstrates the limited scope of the provision, specifying that it applies to “navigation devices *with built-in closed captioning capability*” when accessing “*that [built-in closed captioning] capability* through a mechanism”⁵⁰ Also, as stated in the *Notice*, Section 205(b)(5) is titled “User Controls for Closed Captioning,” indicating that the provision is limited to covering closed captioning functions. Moreover, as the *Notice* points out, “video description is not mentioned” in Section 205.⁵¹ Meanwhile, the “comparable provision” in Section 204 specifies that both closed captioning and video description are covered by Section 204.⁵² Indeed, staff working drafts of Section 205 include a reference to “video description,” demonstrating that Congress intentionally narrowed the final provision.⁵³ In sum, Congress did not intend the obligations under Section 205 to provide a mechanism reasonably comparable to a button, key or icon to cover video description.

C. Access to a Captioning Mechanism Only Applies Upon Request.

The *Notice* asks whether it was “Congress’s intent for responsible entities to include the closed captioning mechanism on all applicable devices.”⁵⁴ But Section 205 mandates that the

⁴⁹ *Notice* ¶ 45.

⁵⁰ 47 U.S.C. § 303(bb)(2) (as amended by CVAA § 205(a)) (emphasis added).

⁵¹ *Notice* ¶ 45.

⁵² *See id.* ¶ 45, n.118 (explaining the difference in the two “comparable” provisions).

⁵³ Twenty-First Century Communications and Video Accessibility Act of 2010, S. 3304, 111th Cong. § 205(a) (July 13, 2010) (working draft intended to be proposed by Sen. Pryor on July 15, 2010).

⁵⁴ *Notice* ¶ 51.

obligations therein are triggered only when an individual makes a request to a covered entity.⁵⁵

This interpretation is consistent with Section 205's framework, which emphasizes throughout that responsible entities be provided flexibility in their efforts to comply.⁵⁶

III. THE COMMISSION SHOULD EXEMPT SMALL CABLE SYSTEMS FROM THE REQUIREMENTS OF SECTION 205 AND SHOULD PROVIDE A LONGER PHASE-IN FOR SMALLER OPERATORS.

Congress recognized that smaller systems may not be able to achieve the same level of accessibility as larger systems and provided the Commission authority to exempt systems serving 20,000 or fewer subscribers.⁵⁷ There are good reasons why the Commission should exercise that authority and exempt these small systems from the requirements of Section 205.

As a general matter, small systems have a smaller customer base across which to spread costs. But in this situation, that customer base is smaller still. The number of customers that subscribe to a small system that might request an accessible solution is unknown.

An exemption is especially warranted here since no commercially available solution to provide accessibility has yet been deployed.⁵⁸ And even if a solution is developed for one type of system, smaller systems may not benefit from these developments. If, for example, an accessible set-top box is developed, small systems would only be able to use such a solution if they use similar headend equipment, software and set-top boxes. Even then, the costs to small

⁵⁵ See CVAA § 205(b)(3) (limiting responsibility for compliance to entities providing navigations devices to requesting consumers). The language is confusing in referencing requesting "blind or visually impaired" individuals, and under the circumstances the Commission could reasonably interpret this provision to apply to any customer making such a request.

⁵⁶ See, e.g., 47 U.S.C. § 303(bb)(1) (as amended by CVAA § 205(a)) (specifying that the Commission may not mandate particular "technical standards, protocols, procedures, and other technical requirements"), CVAA § 205(b)(4)(A) (providing that the regulations include several compliance options and provide "maximum flexibility").

⁵⁷ See CVAA § 205(b)(2).

⁵⁸ Therefore, the costs of such a solution are unknown at this juncture. But the development costs of determining a solution would be unaffordable for small systems. Moreover, changes to user interfaces or remote controls to provide improved access to captioning would similarly disproportionately impact small systems.

systems would greatly exceed those of larger systems in relative terms. The Commission is well aware that the different economics faced by systems of smaller size justify different regulatory treatment and it appropriately has relieved them of regulatory obligations in a variety of other settings.⁵⁹ The same reasons warrant an exemption here for systems with 20,000 or fewer subscribers.

While Section 205 specifically provides the Commission authority to exempt small systems, it also grants the Commission flexibility to extend the time frame for compliance by other entities. Even somewhat larger operators should be provided relief in the form of a longer phase-in. Section 205 specifies that affected entities shall have “not less” than 2 years after adoption of the rules to begin placing in services devices that comply with the access to captioning requirements and “not less” than 3 years after adoption of the rules to begin placing in service accessible program guides and menus.⁶⁰ Some operators may well be able to roll-out accessible on-screen menus and guides even before the statutory deadline,⁶¹ but for smaller cable operators, compliance on a three-year time frame for accessible on-screen menus and guides will be a particular challenge.

The Commission well knows that “the need to provide an accessibility feature . . . can have a greater impact on a smaller entity than a larger one.”⁶² Smaller cable operators do not

⁵⁹ See, e.g., *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Fifth Report & Order, 27 FCC Rcd 6529 ¶¶ 20-22 (2012) (finding that small cable operators face financial and technological constraints that justify an exemption from certain regulatory requirements).

⁶⁰ CVAA § 205(b)(6)(A). This provision also makes clear that legacy devices – those manufactured or imported prior to these effective dates – are not subject to these requirements, meaning operators need not retrofit existing equipment.

⁶¹ Comcast has already demonstrated new accessibility features on its advanced platform. See Robert Kingett, *Comcast Making Television More Accessible with Talking Menus*, Digital J., June 17, 2013 (noting that “Comcast demonstrated the nation’s first talking cable TV interface at the 2013 Cable Show”), at <http://www.digitaljournal.com/article/352483> (last visited July 9, 2013).

⁶² *In re 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, Amendments to the Commission’s Rules*

have the financial wherewithal to develop these solutions on their own and typically rely on the research and development efforts of the larger operators prior to deploying new equipment and services to their customers.⁶³ As the Commission has previously recognized, “[l]arge cable operators generally dictate equipment features to manufacturers and commonly get priority in delivery of that equipment.”⁶⁴ Developing solutions to satisfy Section 205 will likely proceed in the same fashion, with larger operators leading the way. Given this uncertainty about the best approach, and the level of training and set-up that will be required, additional time should be provided to smaller operators.

Therefore, the Commission should review the marketplace after the three year phase in to determine whether audible accessibility is “achievable” for smaller operators.⁶⁵ If at that time a solution is achievable, the Commission should then start the phase-in for smaller operators so they have appropriate time to budget and plan for implementation. At that time, the Commission should also examine the development of captioning mechanisms and establish a timetable for implementation by smaller operators.

Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision, Report & Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557 ¶ 133 (2011).

⁶³ See *id.* ¶ 133, n.340 (Smaller companies “[m]ay not have the resources to evaluate all the design considerations that must be considered to make a potential product accessible, even though a larger manufacturer might have the resources to do so as a matter of course.”); *In re Amendment of Part 73, Subpart G, and the Commission’s Rules Regarding the Emergency Broadcast System*, Second Report & Order, 12 FCC Rcd 15503, 15517 (1997) (recognizing that a delay in implementation for smaller companies would lead to a reduction in the price of equipment and would allow smaller operators to benefit in equipment cost reductions resulting from the efforts of larger operators).

⁶⁴ *In re Basic Service Tier Encryption; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Report & Order, 27 FCC Rcd 12786 ¶ 21 (2012) (“*BST Encryption Order*”).

⁶⁵ The Commission should consider any operator below the six largest incumbent cable operators to fall in this category. See *BST Encryption Order* ¶ 21 (determining not to extend additional equipment requirement to the incumbent cable operators smaller than the top six).

IV. PROCEDURES SHOULD BE APPROPRIATELY TAILORED TO FIT THE PROVISIONS OF SECTION 205.

The *Notice* tentatively concludes that the Commission should adopt the same complaint filing procedures that it adopted in the IP-closed captioning context.⁶⁶ However, those complaint procedures should not be imported wholesale but, rather, should be tailored to better reflect the flexibility that Congress granted covered entities in Section 205. For example, to promote efficient and effective resolution of complaints, consumers should first attempt to resolve their disputes with covered entities prior to filing a complaint with the Commission. The Commission expressed a preference for direct resolution in the video description rules, requiring consumers to certify that they “attempted in good faith to resolve the dispute” with the covered entity before filing a complaint with the Commission.⁶⁷ As the Commission has stated, dealing directly with the covered entity may benefit consumers “by fostering a prompt resolution of their complaints.”⁶⁸ Such an approach would be appropriate here.⁶⁹

In addition, IP-closed captioning rules require that certain contact information be made available to customers, including “the name of a person with primary responsibility for IP-closed captioning issues and who can ensure compliance with [the Commission’s] rules; and that person's title or office, telephone number, fax number, postal mailing address, and e-mail address.”⁷⁰ As we have previously explained, publicizing a dedicated complaint number has often resulted in that phone number being misused, wasting valuable resources on issues not at

⁶⁶ See *Notice* ¶ 55.

⁶⁷ 47 C.F.R. § 79.3(e)(vi).

⁶⁸ *IP Captioning Order* ¶ 80.

⁶⁹ The Commission rejected this approach in the IP-closed captioning context because “consumers may have difficulty identifying the manufacturer or provider.” See *Emergency Information Order* ¶ 78, n.334. There is no such difficulty in the instant proceeding.

⁷⁰ *IP Captioning Order* ¶ 90.

all related to accessibility.⁷¹ While cable operators appreciate the need to assist customers who are blind or visually impaired, a rule mandating the availability of specific contact information is not needed to facilitate that assistance. Operators will continue to work with their customer service personnel to establish procedures that ensure that customers who request audibly accessible guides and menus are promptly served.⁷²

Finally, the CVAA provides that if an entity does not rely on a solution that is built-in to a navigation device, upon request of an eligible customer it must provide the ancillary accessible guide solution “within a reasonable time”⁷³ The *Notice* asks whether the rules should define what constitutes a “reasonable time” for fulfilling a request.⁷⁴ Cable operators will strive to provide accessibility solutions as required under Section 205 as soon as possible to requesting customers. At this early stage, however, it is not clear what an accessibility solution might look like or whether a particular operator will receive any requests for such functionality. Given this uncertainty, it is premature at best to establish a regulatory timeframe for making solutions available in response to a request from an eligible customer. Instead, the Commission should monitor developments in this area to determine whether specific timeframes are needed to achieve goals of CVAA.

⁷¹ See, e.g., NCTA Comments, MB Dkt. No. 12-107, at 15 (filed Dec. 18, 2012).

⁷² The *Notice* also asks about ways to publicize the availability of these accessible solutions. *Notice* ¶ 53. The Commission plays an important role in making consumers aware of all the CVAA’s requirements, and it certainly has a significant role to play here. Cable operators may not know which of their customers are likely to benefit from accessibility features. Organizations for the blind and visually impaired can help to make consumers aware of these accessible solutions.

⁷³ CVAA § 205(b)(4)(B).

⁷⁴ *Notice* ¶ 40.

CONCLUSION

For the foregoing reasons, the Commission should adopt rules that meet the accessibility goals of the CVAA while providing cable operators the flexibility Congress intended.

Respectfully submitted,

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