

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY  
APPROVING IN PART, CONCURRING IN PART**

Re: *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010; Closed Captioning of Internet Protocol-Delivered Video Clips*, MB Docket 11-154

Of our nation's 300 million citizens, it is estimated that between 35 million and 50 million have some type of hearing loss. The Commission recently has undertaken a number of steps to ensure that more communications services are available to the deaf and those hard of hearing. I applaud the intent of these efforts to increase accessibility for this community.

To begin, I question whether the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) provided the Commission with the legal authority to promulgate these closed captioning rules for Internet video clips. I do not see statutory language in the Act to impose such requirements, especially when the CVAA is read in combination with the Congressional committee reports that explicitly forbear from applying closed captioning to Internet video clips.<sup>1</sup> The FCC record also contains a significant amount of debate on this question, most of it arguing strenuously that the Commission is not authorized to do so. This, along with the fact that the Commission came to the same conclusion just a few short years ago, leads me to believe that the best course of action here would have been to ask Congress to clarify the issue directly. Instead, this order marks yet another 180 degree turn on its own statutory interpretation, diminishing the agency's credibility. I am also concerned by the process used to get us here today—going straight to order after a mere Public Notice sought comment on a reconsideration petition. Taken together, this strongly implies an ends-justify-the-means approach.

Nevertheless, I have a deep regard for the Senators and House Members who worked on this legislation and I recognize that it was written in a Democrat-controlled Congress. For instance, Senators Mark Pryor (D-AR) and Ed Markey (D-MA), who helped author the law, have formally stated that covering video clips corresponds with their intent.<sup>2</sup> As someone who expects congressional intent to be heeded, I am willing to provide a bit more deference than normal to these views. As such, I will concur in part, rather than dissent, and know that this issue will have to be ultimately resolved by the courts.

Moreover, I believe that the agency had an obligation to do a thorough cost-benefit analysis before regulating. This item should have established the quantitative effects on the deaf and hard of hearing community. It should have determined the actual costs, especially on American video programmers and distributors, of mandating the closed captioning of video clips at the same quality standards that we demand of television content. (Keep in mind, these quality standards are even harder to achieve when captioning Internet clips.) And, most importantly, it should have determined beyond a shadow of a doubt that these rules would not ultimately lead to a reduction of video clips on the Internet. If captioning expenses are too high, content providers will have no choice but to withhold or remove online clips. That isn't a good policy result for anyone—hearing impaired or not. But, in the haste to regulate, the Commission did none of this analysis.

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<sup>1</sup> H.R. REP. NO. 111-563, at 30 (2010) (“The Committee intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.”); S. REP. NO. 111-386 at 13-14 (2010) (“The Committee intends, at this time, for the regulations to apply to full-length programming and not to video clips or outtakes.”)

<sup>2</sup> Letter from Sen. Mark Pryor and Sen. Edward J. Markey, to Tom Wheeler, Chairman, FCC, filed in MB Docket No. 11-154 (Dec. 9, 2013).

I am also troubled that once again the Commission sets compliance deadlines that are aspirational and not based on realities of technological development and deployment. This item repeatedly acknowledges that captioning Internet clips is not easy and no one can estimate with any certainty when better technology will be readily available. This is a precarious way to regulate. The Commission must learn that technology doesn't develop faster simply because this agency wants it to. Fortunately, at my request, the item includes a simplified process to ensure that, if improved technology is not available as hoped, the compliance deadlines will be extended. It also reiterates that for those Internet video players and applications that find compliance too economically burdensome, they can seek immediate relief from the rules while the Commission considers appropriate waivers.

I am pleased that the Chairman also accommodated a number of my other edits to help mitigate any unintended consequences. For these reasons, I approve in part and concur in part, and I thank the Chairman and the staff who went above and beyond to try to address my concerns.