

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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The Telecommunications Industry Association (“TIA”)¹ hereby submits comments in response to the Federal Communications Commission’s (“Commission”) Notice of Proposed Rulemaking,² which seeks comment on proposed rules that implement provisions in Sections 202(b-c) and 203 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the “CVAA” or the “Act”).³ TIA supported the passage of the CVAA and commends the Commission for initiating this proceeding to help ensure that all Americans have access to advanced communications services (“ACS”) products.

¹ TIA is the leading trade association for the information and communications technology (“ICT”) industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of policy issues affecting the ICT industry and forges consensus on industry standards. Among their numerous lines of business, TIA member companies design, produce, and deploy a wide variety of devices with the goal of making technology accessible to all Americans.

² *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, MB Docket No. 11-154, FCC 11-138 (rel. Sept. 9, 2011) (“NPRM”).

³ Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (“CVAA”).

I. INTRODUCTION AND SUMMARY

TIA is an ardent supporter of the CVAA and the Commission's associated efforts to implement the Act. The CVAA will help industry enable technologies for persons with disabilities in ways not foreseen by the Americans with Disabilities Act. We agree that an important aspect of enhanced accessibility for persons with disabilities is the extension of closed captioning requirements to IP-delivered content that is also broadcast over television.⁴ TIA believes that the Video Programming Accessibility Advisory Committee (VPAAC) report was developed by a cross-section of industry and accessibility groups, representing a near-consensus view of what is practical and workable, and urges the FCC to follow the VPAAC's recommendations.

In defining the term "apparatus," TIA believes that the Commission should regard such a term to represent only the physical device available at the point of sale, and not to include any software or hardware components. Such a definition would be consistent with Congress' intent and would reflect resource realities. The Commission also should not overextend IP programming captioning to multi-purpose devices which are not used primarily for the viewing of included video programming. To ensure appropriate application, TIA proposes that the Commission first look to the type of programming able to be viewed, and then look to the primary purpose of the device or service.

TIA also encourages the Commission to appropriately use its waiver authority to grant categorical waivers for categorical waivers for these equipment and services, such as those that

⁴ *NPRM* at ¶ 1-2.

have an incidental television programming viewing component that might, standing alone, be subject to the CVAA. Alternatively, at a minimum, waivers should be handled in a manner consistent with those under Section 716.

TIA believes that the FCC appropriately distinguishes between “technical feasibility” and “achievability.” In order to clarify what constitutes “achievability,” TIA at the outset proposes that interference with another device characteristic should establish a *per se* presumption and that closed captioning is not achievable for the device. As with the implementation of Section 716, TIA supports the use of only the four factors enumerated in the statute to make a determination of achievability.

TIA further urges the Commission to allow for the use of industry-developed standards as safe harbors for compliance. Additionally, the Commission should not eliminate the screen size exemption without first allowing for further study and standard development. This would best ensure that any requirements in existence comport with the inclusion of sub-13” screens under these closed captioning rules.

II. TIA MEMBERS SUPPORT ENHANCED ACCESSIBILITY, INCLUDING CLOSED CAPTIONED IP-DELIVERED CONTENT.

TIA member companies have consistently taken steps to work with the ACS user community, including persons with disabilities, to ensure that all consumers may access such advanced services and devices. TIA has and continues to update technology standards,⁵ as well

⁵ For example, TIA’s TR-41 is currently developing an updated standard for Part 68 volume control called conversational gain, a more rational and intuitive way to measure telephone speech amplification than currently-used Receive Objective Loudness Rating (ROLR) requirements, particularly for hard-of-hearing consumers who require an accurate reading on loudness before purchasing terminal equipment. An overview of the most recent TR-8 activity is provided in TIA’s annually released report on its standards activity. *See* TIA, 2010-2011 Standards &

as work with the Commission to ensure that codified references are up to date.⁶ TIA urges the Commission to ensure that the voluntary measures already underway are not derailed by actions taken in this matter,⁷ as these voluntary efforts will offer increased access, including captioning in IP-delivered programming

In addition, a number of TIA members are members of the VPAAC, and were significant contributors to its first report.⁸ The VPAAC's recommendations were developed by a cross-section of industry and accessibility groups, and represent a near-consensus view of what is practical and workable. TIA supports the report submitted by the VPAAC regarding closed captioning of Internet protocol (IP)-delivered video programming and urges the FCC to follow the VPAAC's recommendations.

III. THE COMMISSION SHOULD INCORPORATE FLEXIBILITY INTO ITS INTERPRETATION OF THE SCOPE OF IP-DELIVERED CLOSED CAPTIONING RULES.

TIA believes that it is fundamental that the Commission correctly interpreted the scope of the CVAA's to reflect Congressional intent and to promote the Commission's priorities of reducing barriers to investment and innovation.⁹ The VPAAC has noted that it recommends that

Technology Annual Report (rel. Apr. 2011) at 8-11, available at http://tiaonline.org/standards/about/documents/StarReport_10-11.pdf.

⁶ See, e.g., Ex Parte of TIA, CC Docket No 93-268; CG Docket No. 10-266 (filed Aug. 26, 2011).

⁷ *NPRM* at ¶ 8.

⁸ VPAAC First Report, http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf.

⁹ See The FCC's Broadband Acceleration Initiative: Reducing Regulatory Barriers to Spur Broadband Buildout (rel. Feb. 3, 2011) available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-

the scope of the rules and specific requirements for different devices and platforms be determined in this *NPRM*'s process.¹⁰

A. The Commission Should Define “Apparatus” as a Physical Device, Exempting Hardware Component Manufacturers and Software Developers.

In the *NPRM*, the Commission seeks comment on what constitutes an “apparatus.”¹¹ TIA supports defining the term “apparatus” solely as a physical device, which would not include hardware components or software. Accessibility obligations and performance objectives should apply to the entity offering the application of closed captioning, not the underlying manufacturer or facilities-based service provider, unless the manufacturer or service provider controls the design or function of the application, or relies on the application to meet its accessibility obligations.¹²

From a feasibility and resource standpoint, TIA believes that discussion in the *NPRM* suggesting that the application of closed captioning requirements on the component level¹³ is

[304571A2.pdf](#). See also Remarks of FCC Chairman Julius Genachowski, Broadband Acceleration Conference (Feb. 9, 2011) at 1-2 (“One thing government at all levels can do is ensuring efficient, effective regulation. We need rules that serve legitimate public needs without erecting costly or unnecessary barriers...Overly burdensome rules and regulations can slow down deployment and raise costs. It also can limit businesses ability to invest in new technologies and hire new workers.”).

¹⁰ VPAAC report at 35.

¹¹ *NPRM* at ¶ 49.

¹² As has previously submitted, the Commission should clarify generally that its performance objectives are limited by Section 2(a) of the CVAA to the same extent that the Act’s obligations are limited by that provision. See TIA CVAA Implementation Comments at 2-3, 26-27.

¹³ *NPRM* at ¶ 51.

misguided and would have detrimental effects on the ICT manufacturing industry. An “apparatus” should be represented solely by the offering at the point of sale. Such a determination by the Commission would additionally be consistent with its determinations of scope in its related Title I item implementing the CVAA, where the Commission reasoned that Congress did not intend for the Commission to regulate other than the end user manufacturer and advanced communications services provider, and stating that components, -- be they hardware, operating system, user interface layer, application, network service, assistive technology utilized by the end user, accessibility application programming interface , or web browser,-- were not the regulatory focus of Congress because the manufacturer is the one that purchases those components and is in the best position to ensure that each component supports accessibility.¹⁴

As the Commission is aware, there are multiple types of devices that are used by consumers with disabilities to access video programming. TIA notes that the application of closed captioning requirements to multi-purpose devices that are not used primarily for the viewing of video would result in an unacceptable viewing experience, and may degrade the overall user experience of the device (e.g., unnecessary performance degradations in such areas as battery, dedicated or shared memory, processing power, screen refresh rates, multimedia playback frame rates, and others). Severally and taken together, these degradations would result in an inadequate tradeoff on the benefits of accessibility. Inappropriate application of closed captioning rules would directly result in a loss of functional of other applications and device attributes.

¹⁴ CVAA R&O at ¶ 68-69.

For these reasons, TIA urges that the Commission ensure that the CVAA is applied to devices appropriately, without negatively affecting the development of nascent technologies, through the use of a two-step approach:

First, TIA proposes that the Commission limit the scope on the type of programming that must be supported by manufacturers appropriately. TIA supports a reading of the CVAA concluding that the requirement that a covered apparatus must “be equipped with...capability designed to display closed-captioned video programming”¹⁵ means that the apparatus is not covered unless it displays “video programming delivered using Internet protocol that was published or exhibited on television with captions,”¹⁶ and that Section 203 only requires apparatus manufacturers to display closed captioning contained in programming that was shown on television and also delivered using Internet protocol.¹⁷

Second, TIA urges the Commission to clarify that it will look to the primary purpose of a device or service, using a fact-based determination, when determining whether it is subject to IP-closed captioning requirements contained in the CVAA. This determination should consider such factors as the product’s capabilities and the marketing efforts on the final product being sold.

¹⁵ 47 U.S.C. § 303(u)(1)(A).

¹⁶ 47 U.S.C. § 613(c)(2)(A).

¹⁷ *See* House Report at 30.

Such a construction of Section 203 would agree with the plain meaning of the word “primary”¹⁸ and statutory construction norms.¹⁹

Examples of devices that would meet this two-step determination are dedicated consumer electronics that are designed primarily to play video programming; devices with a 13” or greater monitor that enable reception of video programming using IP at the point of sale; and devices that run operating systems and/or platforms supporting at least one non-proprietary cross-platform industry standard for caption distribution, interchange, and formatting. Also excluded should be mobile devices that do not include physical screens, as well as devices that are shipped without any built-in application for viewing TV programming that was previously broadcast with captions and those that run operating systems and/or platforms that do not support at least one non-proprietary cross-platform industry standard for caption distribution and formatting.

B. The Commission Should Use Its 203(a)(C) Waiver Authority Consistent with the Intent of the CVAA to Afford Manufacturers the Flexibility to Innovate.

If the Commission does not explicitly exclude equipment and services from the definition of “apparatus,” then TIA urges the Commission to use its Section 203(a)(C) authority to grant prospective categorical waivers for these equipment and services, such as those that have an incidental television programming viewing component that might, standing alone, be subject to the CVAA. Congress gave the Commission authority under Section 203 that authorizes the

¹⁸ See *Merriam Webster’s Collegiate Dictionary* 925 (10th ed. 1996) (defining “primary” as “of first rank, importance, or value”).

¹⁹ See, e.g., *Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010) (consulting dictionary definitions to determine “plain meaning” of a statutory term); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (“When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute.”) (quotation omitted).

Commission, either to waive the requirements of Section 303(u) of the Act “for any apparatus or class of apparatus (i) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or“(ii) for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.”²⁰ TIA believes that the Commission is capable of distinguishing between products with incidental television programming viewing capability and products where it is not. Granting categorical waivers would provide manufacturers and industry participants with much-needed certainty that will spur innovation generally in new devices that may have incidental television programming viewing capability, such as gaming consoles, wireless devices such as cellular telephones, and tablet devices which do not have the primary purpose of viewing television programming.

As TIA has previously noted in regard to the CVAA, although the Commission has the authority to address waiver requests on a retrospective and product/model/etc.-specific basis, such waivers would only speak to the distinct conditions of a manufacturer or services provider, and should not be considered a substitute for prospective categorical waivers.²¹ Individualized retroactive waivers create risk and uncertainty for the petitioner, who may choose to stop production on a particular product, or stop the offering of particular features/ functions to the general public, rather than gamble on the waiver process. At the least, the Commission should address waiver requests under Section 303(u) in a manner consistent with those under Section 716 to ensure that uncertainty created in an individualized waiver process do not chill

²⁰ Section 303(u)(2)(C); *See also* See S. Rep. No. 111-386 at 14; H.R. Rep. No. 111-563 at 30.

²¹ TIA CVAA Implementation Comments at 9.

innovation. TIA believes that the waiver which should remain in effect so long as the conditions under which they were granted remain.

IV. THE “ACHIEVABLE” STANDARD SHOULD BE INTERPRETED CONSISTENT WITH CONGRESSIONAL INTENT TO AFFORD INDUSTRY FLEXIBILITY.

As TIA noted in previous comments on the CVAA,²² the FCC should afford manufacturers maximum flexibility in meeting the requirements of the CVAA consistent with congressional intent.²³ TIA is concerned that applying closed captioning requirements to a multi-functional device can interfere with a material aspect of the performance of a device. In the *NPRM* the FCC appropriately distinguishes between “technical feasibility” and “achievability.”²⁴ In order to clarify what constitutes “achievability,” TIA at the outset proposes that interference with another device characteristic should establish a *per se* presumption and that closed captioning is not achievable for the device. As with the implementation of Section 716, TIA supports the use of only the four factors enumerated in the statute to make a determination of achievability.²⁵ The four factors are tailored to create incentives for manufacturers to incorporate accessibility, while providing needed flexibility to allow the Commission to make determinations on a case-by-case basis, in correspondence with the intent of the law. TIA provides additional considerations relevant to each of the four factors below.

²² TIA CVAA Implementation Comments at 10.

²³ See, e.g., H.R. Rep. No. 111-563 at 31 (2010) (“House Report”) (“The Committee intends to afford entities maximum flexibility in meeting the requirement that video programming delivered using Internet protocol be captioned.”).

²⁴ *NPRM* at

²⁵ CVAA R&O at ¶ 15; 47 U.S.C. § 617(g).

Nature and Cost. Section 716(g)(1) instructs the Commission to focus on “the specific equipment or service in question” when evaluating “[t]he nature and costs of the steps needed to meet the requirements” of the CVAA.²⁶ In doing so, the Commission should recognize that the circumstances for each manufacturer and service provider vary. For example, depending on the product, either the manufacturer or the service provider may have more influence on the ultimate determination of which features are included in the product. The Commission should evaluate the specific equipment or service in question and not consider the accessibility of a competing product.

Technical and Economic Impact on Operations. In applying this factor, the Commission should consider the effect of requiring accessibility on the “operation of the *specific* equipment or service in question,” and also “on the development and deployment of new communications technologies.”²⁷ Thus, the Commission should disregard the impact of accessibility features on different or competing products when assessing this factor.

The statute’s explicit direction to consider the impact on new communications technologies underscores Congress’s understanding that new entrants, often introduce new technologies, yet may not initially have resources to incorporate particular accessibility features into their products immediately. The CVAA contemplates this possibility and makes clear the intent of Congress to avoid delaying the introduction of new technologies to the market.

Type of Operations. In considering this factor, the Commission should follow the legislative history, which explains that the Commission should take into account whether the entity offering the product or service in question “has a history of offering [ACS] equipment or

²⁶ 47 U.S.C. § 617(g)(1).

²⁷ 47 U.S.C. § 617(g)(2) (emphasis added).

whether the entity has just begun to do so.”²⁸ TIA reiterates that aside from considering whether or not an entity is a new entrant, the Commission should not presume that a company’s size alone is an indicator of market success or make a company’s size a proxy for determining whether or not accessibility can be achieved.²⁹

Extent to which Offering Has Varied Functions, Features and Prices. The fourth factor, the extent to which a company “offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points,” reflects Congress’s intent that the Commission’s regulations should seek to give individuals with disabilities meaningful choices in accessible products and reward companies who provide such choices.³⁰ Where companies offer a range of accessible products that perform different functions at varied price points, consumers with disabilities will have a range of devices from which to make their purchases of products for which viewing IP-delivered television programming is possible, and in those instances, assuming that the other achievability factors have been met, a company charged with not meeting IP-delivered closed captioning rules should not have to make that specific product accessible. In the design phase of a product, covered entities should not need to consider what is achievable in every product, if the entity offers consumers with the full range of disabilities meaningful choices through a range of accessible products with varying degrees of functionality and features, at different price points.³¹ This interpretation is consistent with the legislative history of Section 716(g)(4) in which the Senate and House Reports state that the Commission should interpret this factor similar to how it has implemented its hearing aid

²⁸ House Report at 25-26.

²⁹ TIA CVAA Implementation Comments at 12.

³⁰ 47 U.S.C. § 617(g)(4).

³¹ TIA CVAA Implementation Comments at 12-13..

compatibility (“HAC”) rules, which allow manufacturers and service providers to ensure that a minimum number of the total handsets offered, rather than all handsets, are HAC-compliant.³² This methodology fittingly rewards companies that make significant efforts in accessible products for broad classes of consumers with broad classes of disabilities, while allowing flexibility to account for marketplace realities.

V. THE COMMISSION SHOULD ADOPT SAFE HARBOR RULES BASED ON INDUSTRY-DEVELOPED TECHNICAL STANDARDS.

TIA reiterates its support for the use of industry-developed technical standards as a safe harbor for compliance to covered products where possible, though not in lieu of more general performance objectives.³³ The VPAAC notes areas in which standards are needed in this effort.³⁴ Safe harbor technical standards are an effective tool to ensure consistency and transparency for entities seeking compliance. TIA again encourages the use of voluntary, consensus-based and open industry standards, such as TIA-1083-A—a standard that defines measurement procedures and performance requirements for the handset generated audio band electromagnetic noise of wireline telephones and digital cordless phones, including VoIP—to be used as safe harbors to guarantee compliance.³⁵ The Commission should continue to encourage industry to propose additional standards, but such standards should not be mandated. While such standards for closed

³² See House Report at 26; S. Rep. No. 111-386 at 8 (2010).

³³ See, e.g. TIA CVAA Implementation Comments at 27-28.

³⁴ VPAAC Report at 22-23.

³⁵ This standard defines measurement procedures and performance requirements for the handset generated audio band magnetic noise of wireline telephones. A telephone complies with this standard if it meets the requirements in this standard when manufactured and can be expected to continue to meet these requirements when properly used and maintained. More information on TIA-1083-A can be found here: <http://engineers.ihs.com/document/abstract/VYHXYBAAAAAAAAAA>.

captioning for IP-delivered television programming are not yet in existence, consideration of such a safe harbor should be encouraged by the Commission.

VI. THE COMMISSION SHOULD NOT ELIMINATE THE SCREEN SIZE EXEMPTION WITHOUT FURTHER STUDY AND STANDARD DEVELOPMENT.

In the *NPRM*, the Commission proposes to remove the screen-size limitation on devices that qualify as apparatus, and seeks comment on how the definition of achievability should apply to apparatus subject to Section 203 of the CVAA.³⁶ TIA believes that a much stronger record is needed to establish that all screens smaller than 13” have the capabilities to meet closed caption requirements, are marketed as primarily playing covered video content, and can result in an optimal user experience.

As noted by the VPAAC, CEA-608/708, a voluntary, consensus-based standard, has facilitated broadcast television captioning.³⁷ For IP-delivered programming, no captioning standard specifically-developed to meet the unique requirements of small screen devices exists, and TIA agrees that where technology advances are incorporated in an advanced standard developed within an open process by recognized industry standard-setting organizations, use of that advanced standard be used.³⁸ Therefore, TIA urges the Commission to ensure that innovation is not hindered as voluntary, consensus-based standards to be developed for programming devices smaller than 13.” The Commission should not conclude that application of

³⁶ *NPRM* ¶¶ 52-53.

³⁷ VPAAC report at 8-9.

³⁸ VPAAC report at 28.

the CVAA to screens smaller than 13” for the display of captions over a video content until a more robust record has first been established on the minimum screen size and characteristics that are useful for persons with disabilities. This was not a question addressed by the VPAAC, and would be best determined via a voluntary, consensus-based process.

Furthermore, should the Commission eliminate the screen size exemption absent established standards for sub-13” screens, it should ensure that existing standards comport with this new requirement. User-defined settings will be best served when available as widely as possible, and should be the same when applied to any covered apparatus. TIA does not recommend that the Commission set its own standard for these capabilities, given the Commission’s technology neutrality policy as well as existence of voluntary, consensus-based standardization efforts already in existence.

VII. CONCLUSION

For the foregoing reasons, as the Commission implements the CVAA to promote accessibility of ACS for persons with disabilities, its rules should also reflect the industry flexibility that Congress intended in order to preserve innovation that will benefit all consumers.

Respectfully submitted,

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