

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

In the Matter of )  
 )  
Implementation of the Commercial ) MB Docket No. 11-93  
Advertisement Loudness Mitigation (CALM) )  
Act )

**COMMENTS  
OF  
THE ORGANIZATION FOR THE PROMOTION AND  
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES,  
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION, AND  
THE WESTERN TELECOMMUNICATIONS ALLIANCE**

**I. INTRODUCTION**

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),<sup>1</sup> the National Telecommunications Cooperative Association (NTCA)<sup>2</sup> and the Western Telecommunications Alliance (WTA)<sup>3</sup> (the Associations) hereby submit these comments in the above-captioned proceeding.<sup>4</sup> Members of the Associations increasingly serve as small multichannel video programming distributors (MVPDs),<sup>5</sup> often utilizing new broadband technologies and bundling broadband Internet access services with video subscription services.

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<sup>1</sup> OPASTCO is a national trade association representing approximately 460 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

<sup>2</sup> NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

<sup>3</sup> WTA is a trade association that represents more than 250 rural telephone companies operating west of the Mississippi River. Most members serve fewer than 3,000 access lines overall, and fewer than 500 access lines per exchange.

<sup>4</sup> *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Notice of Proposed Rulemaking (rel. May 27, 2011) (NPRM).

<sup>5</sup> The NPRM's Initial Regulatory Flexibility Act Analysis (IRFA) notes that for the purposes of this proceeding, "small" companies may be defined as those with 1,500 or fewer employees (IRFA, ¶7), those serving 400,000 or fewer subscribers nationwide (IRFA, ¶8), or those serving fewer than one percent of all subscribers in the United States that are not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000 (IRFA, ¶9). Virtually all of the Associations' members meet any of these criteria.

The NPRM seeks comment on proposals regarding compliance, waivers, and other issues related to the implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act.<sup>6</sup>

The Associations are supportive of the goals of the CALM Act. However, as the NPRM recognizes, small MVPDs and/or those that use alternative technologies may face challenges complying with the CALM Act's mandate to implement the Advanced Television Systems Committee's (ATSC) A/85 Recommended Practice (ATSC A/85 RP), which was designed to manage television audio levels. The Associations therefore request a simplified waiver process for those MVPDs for whom compliance with this requirement would result in financial hardship. The Associations also request that any enforcement action be directed against the party that is the source of unacceptably loud commercials and not against small MVPDs that may inadvertently transmit those commercials to consumers.

## **II. A SIMPLIFIED WAIVER PROCESS SHOULD BE AVAILABLE TO SMALL MVPDS USING OLDER EQUIPMENT FOR WHOM COMPLIANCE WITH THE RULES WOULD BE FINANCIALLY BURDENSOME**

MVPDs affiliated with rural LECs are dedicated to achieving the goals of the CALM Act. Regardless of the source of disproportionately loud commercials, consumers look to their retail video service provider for relief. MVPDs have every incentive to alleviate customers' concerns, to the extent that it is financially and technically feasible to do so.

However, some rural LEC-affiliated MVPDs provide service via traditional coaxial cable systems or Internet protocol television (IPTV) that often utilize equipment that is several years or (in the case of coaxial cable) even decades old. In these instances, the hardware and software upgrades necessary to comply with the ATSC A/85 RP would be prohibitively expensive. For example, IPTV providers often receive video signals through integrated receiver decoders (IRDs) that are remotely controlled by the programmer, and the signals must be sent from the IRD to an

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<sup>6</sup> Pub. L. No. 111-311, 124 Stat. 3294 (2010) (codified at 47 U.S.C. § 621).

encoder that converts them into the Motion Picture Expert Group (MPEG) video format for delivery to the consumer. Older encoders do not provide MVPDs with the ability to adjust the dialnorm setting, making these companies reliant on the programmer to achieve compliance. Depending on head end and distribution platform considerations, it is the Associations' understanding that the cost of new encoders can range from \$2,500 to \$10,000 per channel. MVPDs that deliver video via coaxial cable plant using older equipment may face similar expenditures in order to comply with the ATSC A/85 RP. This level of expenditure would be detrimental to many small MVPDs and would place a great deal of upward pressure on end-user rates.

Both the CALM Act and the NPRM correctly recognize that waivers from the proposed rules may be appropriate for a variety of reasons.<sup>7</sup> However, the NPRM's proposed process for seeking a waiver due to financial hardship would be unnecessarily complicated and burdensome for small MVPDs. Specifically, the NPRM proposes that waiver applicants provide financial statements, cost estimates to achieve compliance, a detailed statement explaining how an applicant's financial situation justifies postponement, and an estimate of how long it will take to achieve compliance, along with supporting information.<sup>8</sup> Many small MVPDs with few employees would either have to engage financial and technical consultants to compile this information or dedicate considerable staff time to the task. In either case, scarce resources would have to be diverted away from the provision and improvement of service to customers in order to complete this waiver filing process. Furthermore, under the NPRM's proposed section 2(b)(2)

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<sup>7</sup> NPRM, ¶¶5-6 (quoting CALM Act, sec. 2(b)(2-3)); *see also* NPRM, ¶¶38-41.

<sup>8</sup> *Id.*, ¶39.

waiver process this procedure would need to be repeated after a one-year period<sup>9</sup> further straining small MVPDs' limited financial and manpower resources.

Therefore, the Commission should instead adopt a streamlined waiver process, pursuant to its authority under section 1.3 of its rules, which are explicitly preserved by section 2(b)(3) of the CALM Act.<sup>10</sup> Small providers utilizing older equipment or alternative technologies such as IPTV should be granted an automatic waiver upon a showing that compliance with the ATSC A/85 RP would be financially burdensome. More specifically, a small MVPD should be granted a waiver upon filing a certification with the Commission indicating that: 1) it uses non-compliant IPTV equipment or cable equipment that is more than five years old; and 2) that any upgrades would be financially burdensome. The certification-waiver process would minimize the filing burden on small companies that are certain to qualify for a waiver under any standard. Most importantly, this certification would permit small providers to concentrate their resources on deployment and service to customers rather than regulatory filings. The goals of the CALM Act would still be achieved, as all companies will become compliant as equipment is replaced during normal business cycles.

Small MVPDs that would not otherwise qualify for a waiver under this certification process should be permitted to avail themselves of a streamlined waiver provision. The streamlined waiver should require small MVPDs to describe the equipment purchases needed to comply with the ATSC A/85 RP and an estimate of the costs associated with the purchase, installation and maintenance of that equipment. No superfluous financial statements, supporting documentation or detailed explanations should be required.

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<sup>9</sup> *Id.*, ¶38.

<sup>10</sup> *Id.*, ¶6.

It should be stressed that the Associations do not seek a perpetual waiver for rural LEC-affiliated MVPDs. As the NPRM recognizes, the ATSC is considering amendments to the ATSC A/85 RP that will encompass a wider array of technologies and situations.<sup>11</sup> When this process is completed, many rural LEC-affiliated MVPDs will have the opportunity to incorporate new hardware or software that is compatible with the updated recommended practice during their normal course of business. This will assist in minimizing the financial burden that would result from having to invest in costly upgrades for the sole purposes of achieving short-term compliance with the CALM Act.

Finally, should the Commission choose to require rural LEC-affiliated MVPDs to apply for financial hardship waivers pursuant to section 2(b)(2) of the CALM Act, the streamlined process proposed above should be utilized. As noted above, the process contained in the NPRM<sup>12</sup> would be unnecessarily burdensome for small, rural MVPDs and would divert resources away from these carriers' investments in improving the quality of their video and broadband services.

### **III. THE COMMISSION SHOULD FOCUS ENFORCEMENT EFFORTS ON THE SOURCE OF LOUD COMMERCIALS, AS PERMITTED BY THE CALM ACT**

The NPRM takes the position that the CALM Act does not distinguish between commercials that an MVPD "inserts" into the programming stream and commercials inserted by the programmer from whom an MVPD obtains video content.<sup>13</sup> Thus, according to this interpretation, an MVPD will be responsible for controlling the volume of all commercials that it transmits to its subscribers. While the Commission is correct that the language of the CALM Act does not expressly distinguish between commercials inserted by the MVPD and those

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<sup>11</sup> *Id.*, ¶12.

<sup>12</sup> *Id.*, ¶39.

<sup>13</sup> *Id.*, ¶10.

inserted by a video programmer, neither does the statute expressly mandate the interpretation expressed in the NPRM.<sup>14</sup> In fact, section 2(a) of the CALM Act simply mandates adoption of the “Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television (A/85)...only insofar as such recommended practice relates to the transmission of commercial advertisements by a...multichannel video programming distributor.” The CALM Act’s sole reference to the “transmission of commercial advertisements by a...multichannel video programming distributor” is merely a limit on the Commission’s authority, directing the Commission to make mandatory the ATSC A/85 RP only for the purposes of controlling the volume of commercials. This language does not specify the particular commercials to which Congress intended the CALM Act regulations to apply. The CALM Act is in fact silent on that issue, and the statute’s silence on this assignment of responsibility therefore grants the Commission the discretion to make that determination.

Therefore, when a small MVPD receives a commercial from an outside programming source (*i.e.*, the small MVPD did not insert the commercial itself) that deviates from the appropriate loudness setting any resulting enforcement action should focus on the source of the offending material. Small MVPDs face enormous challenges to their operations including obtaining content at reasonable costs and under reasonable conditions.<sup>15</sup> They should not have to bear the additional burden of facing enforcement actions resulting from any rule violations committed by others.

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<sup>14</sup> *Id.*

<sup>15</sup> The NPRM also contemplates at ¶24 that MVPDs may negotiate indemnification clauses in their agreements with programmers. However, as the Commission has previously recognized, small MVPDs have insufficient market power to exercise leverage in negotiations (MB Docket Nos. 07-29, 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17862-17863, ¶120 (2007)). While this approach may be helpful in some cases, the lack of leverage held by small MVPDs leaves the effectiveness of this course of action in doubt for these companies.

#### IV. CONCLUSION

In order to alleviate severe financial burdens on small MVPDs that currently use older equipment a streamlined waiver process should be available to these companies. The Associations also request that any enforcement action be directed against the party that provides unacceptably loud commercials and not against small MVPDs that may inadvertently transmit those commercials on to customers.

Respectfully submitted,

#### **THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

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July 8, 2011



**CERTIFICATE OF SERVICE**

I, Brian Ford, hereby certify that a copy of the comments of OPASTCO, NTCA, and WTA was sent via electronic mail on this, the 8th day of July 2011, to those listed on the attached sheet.

By: /s/ Brian Ford  
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**SERVICE LIST**  
**MB Docket No. 11-93**  
**FCC 11-84**

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