

**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)	
)	
)	

PETITION FOR WAIVER



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I. INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. § 1.3, the American Cable Association (“ACA”) petitions the Media Bureau to waive the Commission’s talking guide requirements on a partial or full basis for certain limited classes of multichannel video programming distributor (“MVPD”) systems.¹ The talking guide requirements, contained in Section 79.108 of the Commission’s rules, require MVPDs that lease or sell navigation devices to make functions of their user interfaces audibly accessible upon request to blind or visually impaired subscribers. Although many mid-sized and

¹ 47 C.F.R. § 79.108(a)(1) & (2). This waiver request is limited to the requirements under Section 79.108 that certain on-screen functions be made audibly accessible through the menus and guides on the navigation device and does not encompass the requirement that MVPDs ensure that certain “button” functions be made accessible. See *id.* § 79.108(a)(3) (manufacturers of navigation devices and MVPDs covered by this section must ensure that the “Power On/Off” and “Volume Adjust and Mute” functions are made accessible to individuals who are blind or visually impaired).

smaller systems will be able to comply by the December 20, 2018 deferred deadline, ACA has identified certain classes of systems that will be unable to partially or fully comply due to the unavailability of compliant solutions in the market that work for these systems. ACA's request meets the Commission's good cause standard and serves the public interest because waiver would avoid significant harms to eligible systems and their customers. Moreover, blind or visually impaired customers of systems receiving a partial waiver will still be able to access the systems' essential video services in accordance with the talking guide requirements. For these reasons, ACA urges the Bureau to grant its Petition for Waiver.

The Commission's rules implementing the accessibility mandates under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA") require MVPDs that lease or sell navigation devices to ensure that on-screen text menus and guides provided for the display and selection of multichannel video programming be audibly accessible in real-time upon request by individuals who are blind or visually impaired.² The rules, promulgated in the 2013 Accessible User Interfaces Order ("2013 Order"), are designed to ensure that blind or visually impaired individuals may audibly access built-in functions controlled via on-screen text menus and guides used in accessing video programming. Covered entities must ensure that nine on-screen functions, identified by the Video Programming Accessibility Advisory Committee ("VPAAC"), are audibly accessible on navigation devices and that two controls, or buttons, necessary to access the covered functions are accessible to blind or visually impaired

² 47 C.F.R. § 79.108(a). The CVAA imposes requirements relating to "digital apparatus" and "navigation devices" in Sections 204 and 205, respectively. *Twenty-First Century Communications and Video Accessibility Act*, Pub. L. 111-260, Oct. 8, 2010, 124 Stat. 2775, §§ 204, 205 ("CVAA"); 47 U.S.C. § 303(aa) & (bb)(1)-(2). See also *Accessibility of User Interfaces, and Video Programming Guides and Menus; 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 and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 (2013) ("Accessible User Interfaces Order").

subscribers upon request.³ If a covered entity offers a navigation device that does not contain any of the nine functions, they need not be added, as the rules only require that functionality already included in the device be made accessible.⁴ However, devices provided upon request to blind or visually impaired subscribers may not offer any fewer service features than offered to other subscribers on non-compliant devices⁵ and must be provided at no additional charge to the requesting subscriber.⁶

Following the CVAA's directive to give special consideration to smaller MVPDs and systems,⁷ the Commission required larger entities to comply with the talking guide requirements by December 20, 2016 and delayed compliance for smaller ones. The Commission recognized that smaller MVPDs "generally lack the market power and resources to drive independently the development of MVPD headend or customer premises equipment" and typically rely on the research and development efforts of larger operators with respect to deploying new equipment

³ 47 C.F.R. § 79.108. The covered functions that must be audibly accessible are: Channel/Program Selection; Display Channel/Program Information; Configuration – Setup; Configuration – CC Control; Configuration – CC Options; Configuration – Video Description Control; Display Configuration Info; Playback Functions; and Input Selection. See Accessible User Interfaces Order, ¶ 58. The "Power On/Off" and "Volume Adjust and Mute" controls must be made accessible but need not be audibly accessible. *Id.*, ¶ 72.

⁴ Accessible User Interfaces Order, ¶ 66. Additionally, if a function is offered through some other means – such as via a dedicated play, rewind or pause feature on a remote control, as opposed to via an on-screen text menu or guide – that function is not covered by the rules. *Id.*, ¶ 68, n.261. The remaining two VPAAC essential functions, "Power On/Off" and "Volume Adjust and Mute," must also be accessible to the extent they are accessed through the guide or menu, but these two functions need not be audible. *Id.*, ¶ 67, n.260.

⁵ *Id.*, ¶ 97 ("if a non-compliant navigation device has any functions that are required to be made accessible pursuant to the rules we adopt in this *Report and Order*, any separate solution relied upon to achieve accessibility must make all of those functions accessible or enable the accessibility of those functions").

⁶ *Id.*, ¶ 99 ("a covered entity that provides separate equipment or software under Section 205(b)(4)(B) may not impose on a requesting blind or visually impaired individual any charges beyond those it has imposed for a non-compliant navigation device").

⁷ 47 U.S.C. §§ 303(bb), 617(h) (directing the Commission to adopt implementing regulations for both apparatus manufacturers and MVPDs and providing it with flexibility to both exempt from the regulations cable systems serving 20,000 or fewer subscribers and to phase-in MVPD compliance deadlines by setting forth only minimum compliance deadlines); Accessible User Interfaces Order, ¶ 114.

and services to consumers.⁸ As a result, the Commission delayed compliance for MVPDs with 400,000 or fewer subscribers, and systems with 20,000 or fewer subscribers that are not affiliated with an MVPD serving more than ten percent of the marketplace, until December 20, 2018.⁹ This phased-in approach reflected the Commission’s expectation that the market for accessible navigation devices would be driven by larger MVPDs, who would develop compliant solutions by their deadline which, in turn, would then “trickle down” to smaller providers at lower costs. The 2013 Order further directed the Media Bureau, on delegated authority, to review the marketplace following the three-year compliance deadline for larger MVPDs in order “to assess whether mid-sized and/or smaller operators will be able to comply within another two years.”¹⁰ The Commission also stated that “if the delayed compliance deadline proves insufficient to allow small systems to implement an affordable solution,” it may consider requests for waiver, and delegated authority to consider such requests to the Media Bureau.¹¹

The Media Bureau initiated its review of the market last September. As ACA then noted, and as described herein, the systems of many smaller MVPDs will be able to comply by the deferred deadline even though the marketplace for accessible guide solutions has not developed as expected. Unfortunately, the solutions available are not viable for all operators of mid-sized and smaller systems that rely upon quadrature amplified modulation (“QAM”). One solution available for these systems requires costly upgrades to meet the guide’s specific network requirements to function properly, which renders it technically incompatible and financially inaccessible for many. The other solutions that are feasible for these systems to

⁸ Accessible User Interfaces Order, ¶ 115.

⁹ 47 C.F.R. § 79.108(b). The requirements have been in effect for larger MVPDs since December 20, 2016.

¹⁰ Accessible User Interfaces Order, ¶ 114.

¹¹ *Id.*, ¶ 165. Specifically, the Media Bureau has delegated authority to review the delayed compliance deadline and to consider requests for extensions of time under the compliance deadlines. *Id.*, ¶¶ 114, 117, n.496, 120, n.480.

provide to customers do not provide accessible access to the full array of functionalities required by the rules.

To address these shortcomings, ACA requests that the Media Bureau waive the requirements of Section 79.108 as they apply to a system's two-way service offerings, if the system: (i) satisfies the definition of a digital cable system under Section 76.640(a) of the Commission's rules; and (ii) is not offering a user guide as of December 20, 2018 that either enables the accessibility of all functions required by Section 79.108 that are offered by the system or for which the provider of such guide has released either a software update or application for a third-party device that alone would enable the accessibility of all such functions offered by the system. Additionally, ACA requests that the Media Bureau grant a full waiver from the requirements of Section 79.108 for a system that (i) qualifies for the partial waiver of Section 79.108 as it applies to a system's two-way service offerings; (ii) has 20,000 or fewer subscribers; and (iii) that, as of December 20, 2018, offers any video programming channels in only an analog format or does not offer broadband Internet access service to its residential video subscribers. If at any time a system no longer meets the criteria of either the partial or full waiver, or if a solution comes to the retail market that alone can enable the accessibility of all covered functions offered by the system, the waiver for which the system no longer qualifies will cease to apply, and such system may not be eligible for such waiver again. Furthermore, systems that do qualify for either a partial or full waiver would be required to provide notice annually to current customers for as long as the system chooses to rely on the waiver and must also provide notice to both current and potential customers when they inquire about accessibility options.

There is good cause to waive the talking guide requirements. For mid-sized and smaller systems that rely on QAM modulation and offer two-way services, a partial waiver will alleviate the significant costs these systems would need to incur to come into full compliance, thereby avoiding having their subscribers absorb these costs through rate increases. Deploying a

partial solution for accessibility that excludes two-way services under the waiver would also only minimally impact blind or visually impaired customers because consumers increasingly prefer to obtain content typically available through two-way services like video-on-demand (“VOD”) from over-the-top (“OTT”) providers rather than cable operators. Similarly, the full waiver provides relief to the small systems that otherwise would incur upgrade costs so great that most would likely discontinue offering any video service, resulting in a loss to existing customers without providing any benefit to blind or visually impaired persons. Given the narrow impact of the relief requested herein and the ability of consumers in the footprint of these systems to subscribe to at least two other MVPDs that offer compliant solutions, it is in the public interest to grant the relief requested.

II. ALTHOUGH THE MARKETPLACE FOR TALKING GUIDE SOLUTIONS HAS NOT DEVELOPED AS EXPECTED, MANY MID-SIZED AND SMALLER SYSTEMS WILL BE ABLE TO FULLY COMPLY BY THE DEADLINE

In response to the Media Bureau’s Public Notice last fall,¹² ACA provided information regarding the state of the marketplace for accessible talking guide solutions and whether the December 20, 2018 compliance deadline should be retained or extended for mid-sized and smaller MVPDs.¹³ ACA explained that the market for talking guides did not develop to the full extent that the Commission had hoped in its 2013 Order; nevertheless, a number of mid-sized and smaller providers have implemented or will implement solutions that will enable them to comply with the December 20, 2018 deadline.

Facing the earlier compliance deadline in late 2016, larger MVPDs developed and deployed a variety of solutions to comply with the talking guide requirements. However, instead

¹² *Media Bureau Seeks Comment on December 20, 2018 Accessible User Interfaces Deadline for Mid-Sized and Smaller MVPDs*, Public Notice, 32 FCC Rcd 7332 (2017) (“Public Notice”).

¹³ See generally *Accessibility of User Interfaces, and Video Programming Guides and Menus*, MB Docket No. 12-108, Comments of the American Cable Association, (filed Oct. 30, 2017) (“ACA PN Comments”); Reply Comments of the American Cable Association (filed Nov. 13, 2017) (“ACA PN Reply Comments”).

of developing solutions that could be utilized on the types of networks they operated in 2013, and that many smaller operators continue to operate today, these large MVPDs spent significant sums to develop their own advanced user interfaces that work exclusively on their networks or to upgrade their networks to run an advanced user interface developed by a third party.¹⁴ Consequentially, these network-specific solutions are not feasible options for some mid-sized and smaller MVPDs.

Notwithstanding the fact that the market did not develop as expected, many mid-sized and smaller MVPDs will be able to comply by the December deadline. To ACA's knowledge, TiVo has developed the only fully compliant user interface that is available for systems that utilize QAM to provide video services and provide advanced two-way features like VOD and functionalities like digital video recorder ("DVR") capabilities.¹⁵ Like many larger MVPDs, some mid-sized and smaller operators have invested significant funds to upgrade their systems to offer this TiVo user interface.¹⁶ Similarly, based on conversations with providers offering video services over Internet protocol ("IPTV") and their third-party vendors, ACA expects vendors who provide user guides for IPTV providers to make available talking guide solutions, particularly apps that run on third-party devices, that will comply with the Commission's requirements by the deadline.¹⁷

Beyond these classes of operators, certain other classes of systems utilizing QAM modulation will also be able to fully comply. These operators will rely on retail devices that can

¹⁴ ACA PN Comments at 12-15.

¹⁵ See *id.* at 16-18.

¹⁶ As previously stated in ACA's comments to the Public Notice, mid-sized and smaller operators who have adopted the TiVo platform have either entered into an individualized agreement with TiVo, or they have opted into a master agreement negotiated by the National Cable Television Cooperative ("NCTC"), the buying group most mid-sized and smaller operators use to purchase video programming and equipment. According to operators who have taken advantage of the NCTC deal, an operator that wishes to deploy the TiVo platform with optional video-on-demand can do so through the NCTC agreement with an initial investment of roughly \$100,000, plus the cost of the devices themselves and ongoing TiVo licensing fees. *Id.* at 17-18.

¹⁷ See ACA PN Reply Comments at 4-5.

be “plugged in” to their existing systems without requiring any costly network upgrades. In particular, TiVo sells a navigation device at retail, the TiVo “Bolt,” which is a CableCARD navigation device that complies with the talking guide requirements and provides DVR capability. For QAM operators offering their entire video programming channel lineup in digital, not offering any two-way services, and providing residential broadband Internet access service, the TiVo Bolt offers a fully compliant solution that the operator can “plug in” upon request, simply by purchasing the device for their customer through a retail provider, providing a CableCARD, and paying for their customers’ TiVo service plan.¹⁸ Moreover, for these same QAM operators who also are not offering any DVR capability, a low-cost navigation device with an audibly accessible user interface is available on the wholesale market that offers a fully compliant solution for such systems.

III. RELIEF IS NECESSARY FOR LIMITED CLASSES OF SYSTEMS THAT CANNOT COMPLY WITH THE TALKING GUIDE REQUIREMENTS

Although the TiVo wholesale solution, IPTV solutions, and available “plug-in” devices can offer fully compliant solutions for some smaller providers, they will not be sufficient for all MVPDs to meet all of the requirements of Section 79.108. First, the TiVo wholesale solution and the IPTV solutions require MVPDs to have specific network configurations; thus, for operators of systems that don’t meet these configurations, these solutions are not viable. Second, because the “plug-in” device solutions are not compatible with certain cable offerings, such as two-way services, those that offer such services cannot use these solutions to make those services accessible to the blind or visually impaired as required. Third, because these “plug-in” devices require service offerings that not all systems offer, like the offering of its entire

¹⁸ While the Bolt is an expensive device that requires a system operator to pay a sizeable monthly fee, it is more economical than the system-wide upgrades that are needed to implement the TiVo wholesale platform for most mid-sized and small systems. The TiVo Bolt has a minimum purchase price of \$199.99 plus a monthly service charge of \$14.99. TiVo also offers service plans on an annual basis for \$149.99 or on a lifetime basis for \$549.99. TiVo, BUY TiVo BOLT VOX, <https://www.tivo.com/shop/buy-bolt> (last visited Jun. 15, 2018).

video programming channel lineup in digital and the provision of broadband Internet access service, systems that either offer one or more programming channels in only an analog format or that do not offer broadband to residential video subscribers will not be able to offer essential aspects of their video service, like providing an electronic program guide and certain channels. Therefore, classes of systems that fall into these categories require regulatory relief.

A. A Partial Waiver of the Talking Guide Requirements as They Apply to a System’s Two-Way Service Offerings Is Warranted for Cable Systems that Utilize QAM and Cannot Otherwise Fully Comply.

The only “plug-in” device options available to operators of mid-sized and smaller systems that utilize QAM, offer two-way services, and have not deployed the TiVo wholesale platform provide only a partial solution to compliance. These device options make the majority of covered functions audibly accessible; however, because they are not compatible with two-way services, those services – and the covered functions utilized to navigate them – would not be accessible.¹⁹ Accordingly, ACA requests the Bureau provide these systems with a partial waiver of the rules.

As a navigation device sold at retail, the TiVo Bolt relies on CableCARD technology, a cable industry development implemented pursuant to the Commission’s conditional access requirements that allows retail devices to “plug in” to systems offering video via QAM to receive and decode scrambled digital channels.²⁰ However, CableCARD technology is unidirectional,²¹

¹⁹ Specifically, ACA has identified three covered functions – Channel/Program Selection, Display Channel/Program Information, and Playback Functions – that are required to be audibly accessible under Section 79.108(a)(2) but will not be accessible for two-way services for subscribers utilizing the “plug-in” devices. Accessible User Interfaces Order, ¶ 58, nn.222, 223, 225. The remaining six audible guide functions and two button features required under the Commission’s rules are still operational with these solutions.

²⁰ See 47 C.F.R. § 76.630 (requiring cable operators to provide conditional access technology to decrypt and access video programming services on navigation devices).

²¹ Despite efforts to develop conditional access security with bidirectional capability, CableCARDs remain unidirectional. See *Video Device Competition, et al.*, Notice of Inquiry, 25 FCC Rcd 4275 (2010) (seeking comment on successor conditional access programs, including those with bidirectional capability). As a result, “[a] consumer using a unidirectional device cannot take advantage of two-way services offered by a cable operator.” *Implementation of Section 304 of the Telecommunications Act of 1996, et al.*, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, ¶ 6 (2010).

meaning it is not compatible with QAM-based video services requiring two-way communications. The most common example of a two-way service is VOD, which requires back and forth communications between the cable headend and the customer premises equipment to communicate a request for content, which is then delivered to the subscriber's device. Although the previously discussed navigation device without DVR capability that is available at wholesale does not depend on CableCARD technology, its underlying technology is likewise not capable of enabling two-way services that utilize QAM modulation.

As a result of the limitations of these available devices for systems that rely upon QAM and offer two-way services, these "plug-in" options provide only a partial solution to the talking guide requirements, as services like VOD would not function. Despite their ability to make many covered functions audibly accessible, including those necessary to provide linear video programming and the electronic program guide and to configure other accessibility features like closed captioning and video description, a subscriber using these solutions will not be able to access any two-way services in contravention to the rules.²²

Because use of the "plug-in" devices offers a majority of the functionality required under the talking guide rules, including the most fundamental accessibility requirements, operators of systems that rely upon QAM modulation, offer two-way services, and have not deployed the TiVo wholesale platform should be permitted to utilize these partial solutions to meet their accessibility obligations. A partial waiver would relieve these systems from the covered function requirements as they apply to their two-way services unless and until such time they adopt the TiVo wholesale platform or a similar platform that allows for a fully functional solution, a software update or an application for a third-party device is released for the electronic program guide

²² Specifically, Section 79.108(a)(7)(i) of the Commission's rules (Covered MVPDs may utilize separate equipment or software to comply with the requirements of this section, provided that the MVPD must "ensure that any software, peripheral device, equipment, service or solution relied upon achieves the accessibility required by this section. If a navigation device has any functions that are required to be made accessible pursuant to this section, any separate solution must make all of those functions accessible or enable the accessibility of those functions.").

offered by the system that would alone allow accessible functionality of the system's two-way offerings, or until a retail solution comes to market that alone can be deployed that would enable the accessibility of all covered functions offered by the system. Specifically, ACA requests that the Media Bureau waive the requirements of Section 79.108 as they apply to a system's two-way service offerings, if the system (i) satisfies the definition of a digital cable system under Section 76.640(a) of the Commission's rules;²³ and (ii) is not offering a user guide as of December 20, 2018 that either enables the accessibility of all functions required by Section 79.108 that are offered by the system or for which the provider of such guide has released a software update that alone would enable the accessibility of all such functions offered by the system. If at any time an MVPD deploys a user guide that would bring a system into full compliance with Section 79.108, such that the system no longer meets the criteria for the partial waiver, this waiver shall cease to apply immediately. Likewise, if at any time a user guide update or application that works on third-party devices is released that alone would allow a system to fully comply, such that the system no longer meets the criteria for partial waiver, this waiver shall cease to apply within 180 days of such release. The 180 days will give the system operator time to deploy such solution. Once a system is no longer eligible for the partial waiver, such system shall not be eligible for such waiver again.

²³ 47 C.F.R. § 76.640(a) ("digital cable systems shall be defined as a cable system with one or more channels utilizing QAM modulation for transporting programs and services from its headend to receiving devices"). This definition includes hybrid digital/analog systems that offer video programming channels in digital in addition to an analog format. It does not include IPTV systems that only utilize IP protocol to transport its video programming channels and services from its headend to consumer premise devices. ACA incorporates the definition in this provision to accurately capture the technological network configuration of systems offering two-way services that are unable to comply with the components of the talking guide rules, as described herein.

B. A Full, Permanent Waiver of the Talking Guide Requirements is Warranted for Certain Cable Systems that Offer Services Utilizing QAM Modulation and Either Offer Some Programming Only in an Analog Format or Do Not Offer Broadband Internet Access Service to Residential Video Subscribers.

Based on the minimum technical requirements required of MVPDs to deploy existing talking guide solutions, there are two classes of small (and likely largely overlapping) systems for whom these solutions will not provide covered functions – in an accessible format or otherwise – that are fundamental to the system’s video offering by December 20, 2018. These systems therefore need a full waiver of the requirements. First, systems that do not offer broadband Internet access service to residential customers will not be able to utilize the “plug-in” devices, as these devices obtain their user guide data via the Internet.²⁴ Second, programming offered by systems only in an analog format cannot be accessed by the “plug-in” solutions because those devices do not have an analog tuner; therefore, a viewer using such a device would not be able to access any of the channels offered in analog.²⁵ Because the available solutions are significantly incompatible with these small classes of systems and the user experience would be so distorted, ACA requests that the Media Bureau grant them the permanent relief as requested herein.

Both “plug-in” devices rely on an electronic program guide that must have Internet connectivity in order to download their guide data. Without any guide data, the device – and its accessibility functions – is rendered essentially useless. Although limited in number, there are

²⁴ See “Why does my TiVo DVR need an Internet connection?” TiVo, https://www.tivo.com/assets/popups/questions/q_why_does_internet.html (last visited Jun. 15, 2018); TiVo Bolt Welcome Center, TiVo, <https://www.tivo.com/quick-links/welcome-center-tivo-bolt/setup-and-connect> (last visited Jun. 15, 2018) (“TiVo Bolt requires an Internet connection so TiVo service can deliver your channel guide updates daily and stream content from providers....”). Lack of a broadband connection would directly impact the Channel/Program Selection, Display Channel/Program Information, and some Playback Functions of the rule’s covered functions. See 47 C.F.R. § 79.108(a)(2); Accessible User Interfaces Order, ¶ 58.

²⁵ The inability to access channels only offered in an analog format would directly impact the Channel/Program Selection, Display Channel/Program Information, and Playback Functions of the rule’s covered functions. See 47 C.F.R. § 79.108(a)(2); Accessible User Interfaces Order, ¶ 58.

some small systems that do not offer residential broadband service; for these systems, the “plug-in” solutions are not viable options for compliance, and no other feasible solutions exist.

Additionally, while most systems offer all programming in a digital format, there are some hybrid analog-digital systems that continue to offer some programming only in analog.²⁶

Pursuant to a waiver granted by the Commission, TiVo devices do not contain an analog tuner;²⁷ the navigation device without DVR capability likewise does not include an analog tuner. Without an analog tuner, these solutions cannot display channels offered by a cable system in an analog format. As a result, these “plug-in” devices are of significantly diminished value to consumers, who primarily subscribe to cable for its available linear programming lineup. For the small number of systems that offer video programming in only an analog format, there are no viable options for compliance, and no other alternative solutions exist.²⁸

For these small (and likely largely overlapping) subsets of systems, none of the “plug-in” devices offer a functional solution for the talking guide requirements. Consumers using these devices would not have access to the most basic service features like program guide information or the system’s entire program lineup. Therefore, the Bureau should waive the talking guide requirements of Section 79.108 for these small subsets of systems, rather than require them to offer accessible guides using devices that cannot function properly and/or deliver all of the channels for which their customers pay. Specifically, ACA requests that the Media Bureau grant a full waiver from the requirements of Section 79.108 for a system that (i) qualifies for the partial waiver of Section 79.108 as it applies to a system’s two-way service

²⁶ While many operators of hybrid systems simulcast their analog channels in digital, thus ensuring that those channels are capable of delivery through the set-top box, some do not simulcast and only provide the analog format. Likewise, some smaller systems only offer programming in analog format.

²⁷ TiVo devices, including the TiVo Bolt, do not include analog tuners, pursuant to Commission waiver. *In the Matter of TiVo, Inc., Petition for Waiver of Sections 15.117(b), 15.118(b), 15.123(b)(1), 15.123(c), and 15.123(d) of the Commission’s Rules*, Memorandum Opinion and Order, 28 FCC Rcd 12181 (2013).

²⁸ Furthermore, analog-only systems that do not offer any programming in a digital format would be unable to utilize these solutions to display any programming.

offerings; (ii) has 20,000 or fewer subscribers; and (iii) that, as of December 20, 2018, offers any video programming channels in only an analog format or does not offer broadband Internet access service to its residential video subscribers.²⁹ If at any time a system offers all video programming channels in digital or begins offering broadband Internet access service to its residential video subscribers, such that the system no longer qualifies for waiver, then this waiver shall immediately cease to apply, and the system may not be eligible for such full waiver again.³⁰

* * *

This Petition focuses on the technical limitations of the accessibility solutions available in the marketplace. ACA believes that the above classes of systems constitute the classes of operators that can partially comply or cannot comply at all with the talking guide requirements by the December 20, 2018 deadline. However, there may be individual MVPDs with unique technical limitations or financial considerations that go beyond the relief requested here and will need to seek individual waivers. Therefore, granting ACA's proposed class-based waivers should not prejudice the Bureau's consideration of any individual waivers that may be sought by operators.

²⁹ Pursuant to the 2013 Accessible User Interfaces Order, nearly all, if not all, analog-only systems are not obligated to comply with the accessibility requirements of Section 79.108 because these systems do not provide navigation devices to their subscribers. Accessible User Interfaces Order, ¶ 44, n.156 ("we clarify that, to the extent that an MVPD does not provide navigation devices to its subscribers, it is not directly subject to the requirements of Section 205"). While it is likely that all analog-only systems are not subject to the requirements of Section 79.108 due to the statute's inapplicability, as noted in the Order, for any all-analog systems that may provide navigation devices, there are no compliant "plug-in" devices available that would allow any of the systems' channels to be displayed. ACA recommends that the Commission make it inarguably clear that all analog-only systems are exempt from the rules, including any that may offer their customer a navigation device, due to the technical constraints of available solutions as described herein. The justifications for providing such an exemption are no less than those for providing a full waiver for systems that may offer some programming in only an analog format.

³⁰ While these systems offering upgrades would no longer qualify for a permanent waiver, some may still qualify for the partial waiver.

C. Cable Systems That Qualify for Either the Full or Partial Waiver of the Talking Guide Requirements Must Notify Customers of Their Inability to Provide a Navigation Device with Audibly Accessible Guides and Menus.

Similar to the notice requirements that the Commission adopted in conjunction with previous waivers of other CVAA accessibility rules,³¹ ACA proposes that the Bureau require operators that qualify for either the full or partial waiver of the talking guide requirements to provide a formal notice to subscribers alerting them to the waiver's applicability.

ACA proposes the following formal notice for operators that qualify for the partial waiver of the talking guide requirements:

[Name of Cable Operator] qualifies for a partial waiver from the FCC that relieves [Name of Cable Operator] from offering audibly accessible functionality for its two-way video services via on-screen text menus and guides for the display or selection of multichannel video programming provided by navigation devices that it leases or sells in real-time upon request by individuals who are blind or visually impaired. Therefore, customers who are blind or visually impaired using [Name of Cable Operator] will not be able to access some of the two-way service functions, such as video-on-demand, in the display or selection of multichannel video programming via on-screen text menus and guides included in the device that [Name of Cable Operator] leases or sells to you. Other television providers in your area may offer navigation devices with complete audibly accessible features. For more information, contact [Name of Cable Operator] at [Phone Number and Email of Cable Operator].

ACA proposes the following formal notice for operators that qualify for the full waiver of the talking guide requirements:

[Name of Cable Operator] qualifies for a waiver from the FCC that relieves [Name of Cable Operator] of the requirement to ensure that on-screen text menus and guides for the display or selection of multichannel video programming provided by navigation devices that it leases or sells are audibly accessible in real-time upon request by individuals who are blind or visually impaired. Therefore, customers who are blind or visually impaired using [Name of Cable Operator] will not be able to audibly access any of the functions in the display or selection of multichannel video programming via on-screen text menus and

³¹ *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; Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Memorandum Opinion and Order, 30 FCC Rcd 5012 (MB 2015); *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; Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 12-107, Memorandum Opinion and Order (rel. May 25, 2018).

guides. Other television providers in your area may offer navigation devices with audibly accessible features. For more information, contact [Name of Cable Operator] at [Phone Number and Email of Cable Operator].

Using the above notification for either a full or partial waiver, as applicable, and for as long as the system chooses to rely on the waiver, MVPDs must (i) provide this targeted notice by directly contacting customers, such as via a billing statement or billing insert, or a phone call or email to customers; and (ii) provide such notice to both current and potential customers when they inquire about accessibility options, such as by directing customers to a notice on its website or to information in its marketing materials, or by having customer service representatives provide the information directly. ACA encourages the Bureau to refrain from requiring a specific means for satisfying the requirement to provide notice. If at any time a cable system ceases to qualify for a waiver, it must, within 30 days of coming into compliance, provide written notification to subscribers³² and display notice on its website that accessible devices are available upon request to those who are blind or visually impaired.³³

IV. THIS PETITION MEETS THE COMMISSION'S STANDARD FOR WAIVER

Section 1.3 of the Commission's rules allows for the suspension, revocation, amendment, or waiver of any of the Commission's rules for good cause shown.³⁴ In this instance, the Commission delegated authority to the Media and the Consumer and

³² ACA encourages the Bureau to make clear that for systems that no longer qualify for a waiver, such system may satisfy the written notification requirement by directly contacting customers, such as via a billing statement or billing insert, or a phone call or email to customers, which is consistent with the ways ACA proposes such system would be permitted to give notice to subscribers about its initial qualification for the waiver.

³³ This requirement is commensurate with the existing requirement that MVPDs provide notice on their official websites about the availability of accessible navigation devices. 47 C.F.R. § 79.108(d)(1)(ii).

³⁴ *Id.* § 1.3.

Governmental Affairs Bureaus to consider all requests for waiver pursuant to Section 1.3.³⁵ For the reasons stated herein, ACA's Petition meets the Commission's standard for waiver and is in the public interest.

Under its waiver rules, the Commission (and by extension the Media Bureau when authority has been delegated, as it has in this instance) has the discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.³⁶ To waive a requirement for good cause, the Bureau must (1) explain why deviating from the general requirement serves the public interest, and (2) explain the nature of the special circumstances.³⁷ The Bureau may also take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁸ As described herein and in other ACA filings, the marketplace has not developed as the Commission expected. Although there are some solutions available that will allow some mid-sized and smaller systems to fully comply, technologically and financially feasible solutions do not exist for other systems leading up to the December 20, 2018 compliance deadline.

There is good cause to grant a partial waiver to systems utilizing QAM modulation that can offer accessible user guides that meet all the rule's functionality requirements except those related to the system's two-way services. First, there would be great public costs to burdening mid-sized and smaller systems with undergoing expensive upgrades to their headends to come into full compliance. Such compliance burdens would result in some operators absorbing the significant cost by raising prices for all their customers and others ceasing to offer video service

³⁵ Accessible User Interfaces Order, ¶ 165. Specifically, the Media Bureau has delegated authority to review the delayed compliance deadline and to consider requests for extensions of time under the compliance deadlines. *Id.*, ¶¶ 114, 117, n.496, 120, n.480.

³⁶ *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁷ See *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Memorandum Opinion and Order, MB Docket No. 12-108, ¶ 26 (rel. Apr. 30, 2018) (granting Honda a waiver of Section 79.107 of the Commission's rules, which requires user interfaces to be accessible to individuals who are blind or visually impaired, on the basis of achievability).

³⁸ *WAIT Radio v. Federal Communications Com.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

altogether – outcomes which are in the public interest to avoid. Second, the requested waiver would result in blind or visually impaired subscribers having accessible functionality for the most essential features of the systems’ service, including its video programming channel lineup and its electronic program guide; only the systems’ two-way services would be inaccessible. Blind or visually impaired consumers of these systems are not likely to be significantly disadvantaged if they cannot use these two-way services, such as VOD, because many small cable operators have been limiting their investments in offering such service (thereby limiting the number of titles offered) as consumers have increasingly turned to OTT providers, like Amazon Prime, for their VOD needs. Moreover, the “plug-in” devices that systems that qualify for this waiver are expected to give to eligible consumers can access the same – and often more – on-demand content from these OTT providers, thereby largely nullifying any disadvantage of not receiving two-way services provided by the system.³⁹ For these systems, providing a “plug-in” device is a more effective implementation of overall policy on an individual basis.

Similarly, a full waiver of the talking guide requirements for two small (and likely largely overlapping) subsets of systems that do not offer broadband Internet access service or that offer any video programming channels only in an analog format is justified under the Commission’s good cause standard. Similar to the reasoning for granting the partial waiver, the burden on these operators to come into compliance would be so significant that most, if not all, would simply cease offering any video service. The imposition of the financial burdens associated with compliance would force these cable systems to shut down, resulting in a loss to existing customers without expanding accessibility options for persons who are blind or visually impaired. This outcome is clearly not in the public interest.

³⁹ The TiVo Bolt device has the ability for users of the box to receive video-on-demand content from services like Amazon Prime, which offers far more titles than those cable operators likely to take advantage of the waiver.

While a partial waiver permits systems that offer their residential customers broadband service and provide their entire channel lineup in digital to utilize “plug-in” solutions as a workable solution, for systems that do not satisfy such criteria, it is in the public interest to provide a full waiver. Although deployment of “plug-in” solutions by systems that qualify for the partial waiver would have a marginal impact on their customers’ service, such as an inability to access VOD, the provision of such solutions by the systems ACA proposes be granted a full waiver would have significant impacts on their customers’ ability to access essential video features like the systems’ electronic program guide and view the systems’ entire video programming lineup. For systems that do not offer broadband Internet access service to residential customers, requiring solutions aimed at making user guides audibly accessible that cannot actually deliver user guide data renders the rule meaningless. Likewise, requiring these systems to provide an accessible user guide that the customer cannot use to access channels offered only in an analog format is absurd, and these disappearing channels would inevitably increase customer confusion. It is therefore in the public interest to grant a full waiver requested herein to avoid the shuttering of systems and other absurd customer experience outcomes that would result from partial compliance with the talking guide requirements by using available “plug-in” solutions for these two classes of small systems.

The classes of systems eligible for the relief requested herein are narrowly tailored so as to balance the CVAA’s accessibility mandates against the feasibility of compliance. First, the universe of cable MVPDs that will qualify for relief under ACA’s proposal is quite small, given that as many as, if not more than, 97 percent of all domestic MVPD subscribers (roughly 92 million households) will be able to request a talking guide that is fully compliant with the Commission’s rules on December 20, 2018.⁴⁰ Second, both waiver requests are limited to

⁴⁰ These numbers are derived from SNL Kagan’s *Report On Market Share Trends, Q1 2017*, SNL KAGAN, https://www.snl.com/web/client?auth=inherit#news/document?id=40667430&s_data=si%3D3%26kpa%3D54a32fe1-4697-480d-bdec-d989019b0136%26sa%3D (subscription required). See ACA PN Comments

account for those covered functions that are directly impacted by the limitations of the available talking guide solutions and their technical specifications. Third, changes in the solutions marketplace, such as a software update released by the provider of the user guide or an application for a third-party device that alone would enable the accessibility of all such functions offered by the system, would impact the waiver's applicability. Finally, if granted, neither relief requested herein will undermine consumers availability to obtain accessible user guides from other MVPDs in the market, which further limits the overall impact of the waiver request on eligible consumers. Nearly 100 percent of all consumers have, and will continue to have, access to two other MVPDs – Dish and DirecTV – that are already offering talking guides pursuant to the accessible guides rule.

For all the reasons stated, there is good cause to grant the relief requested for these small subsets of cable systems.

V. CONCLUSION

As discussed in detail herein and in other filings, despite the marketplace for audible guide solutions not developing as expected, many mid-sized and smaller cable systems have or will be able to come into compliance with the Commission's talking guide requirements prior to the upcoming deadline. Nevertheless, there are some cable systems that can only deploy partially compliant solutions, and others that have no viable options for compliance. To best advance the accessibility goals for blind or visually impaired video customers while balancing

at 5 (“...ACA’s research indicates that between the MVPDs with more than 400,000 subscribers currently subject to the talking guide requirements and the mid-sized and small cable operators serving nearly 2 million that have deployed the TiVo wholesale platform on some or all of their systems and have plans to do so in the near future, it is likely that as many as 97 percent of all domestic MVPD subscribers will have access to three or more MVPDs in their local market that can provide a talking guide that is fully compliant with the Commission’s requirements.”).

the benefits of the regulation against its burdens on small cable systems, it is in the public interest that the Media Bureau adopt the relief requested herein.

Respectfully submitted,

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