

ALERT

FCC Allocates Responsibility for Closed Captioning Quality Between Video Programmers and Video Programming Distributors and Establishes Complaint Procedures

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At its February 18, 2016 Open Meeting, the Federal Communications Commission (FCC or Commission) adopted the Second Report & Order on Closed Captioning Quality (Order), which amends its closed captioning rules. Among other things, the Order allocates responsibility for the quality of closed captions between video programmers and video programming distributors (VPDs), makes video programmers' certifications of compliance mandatory and requires that they be filed with the FCC, establishes a burden-shifting framework and three-tiered compliance ladder for the resolution of captioning complaints, and requires video programmers to register with the Commission.

Shared Responsibility for Captioning Quality

The Order amends the Commission's captioning rules to allocate responsibility for captioning quality between VPDs and video programmers. The new rules place "responsibility on each entity for those aspects of closed captioning quality over which they primarily have control." VPDs will be held responsible for captioning problems related to faulty equipment or the failure to pass through captions. Video programmers will be responsible for captioning problems stemming from the production or transmission of captions up to the point where they are handed off to distributors. However, VPDs will continue to have primary responsibility for the provision of closed

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captions, including the obligation to pass through programming with the original closed captioning data intact in a format that can be recovered and displayed by consumers.

Video Programmer Certifications

Under the current captioning rules, video programmers are required to provide two separate types of certifications – one related to the provision of closed captions and one related to captioning quality. In the Order, the Commission collapses these requirements into a single certification that must be filed with the FCC. Video programmers must certify that their programming (1) complies with the obligation to provide closed captioning *and* (2) either complies with the captioning quality standards or adheres to the Best Practices for video programmers with respect to captioning quality.

For exempt programming, video programmers must submit a certification stating that their programming is exempt and specifying which exemption (or exemptions) is claimed. Programmers must specify only those exemptions claimed and need not provide specific details, such as the names of the affected shows and timeslots. The same categories of exemptions present in the current captioning rules will continue to apply. Video programmers must file their certifications electronically with the Commission when they first launch and thereafter annually on or before July 1.

VPDs will be allowed to rely upon video programmers' certifications to fulfill their obligation to ensure the provision of closed captions so long as (1) the VPD passes through the closed captions intact to viewers; and (2) the VPD did not know or did not have reason to know that such certification was false.

Complaint Procedures

The Order also revises complaint procedures to reflect the shared responsibilities of distributors and programmers for receiving, serving, and resolving closed captioning complaints. Consumers will continue to be able to file captioning complaints either with the FCC or directly with the VPD.

Captioning Complaints Filed with the FCC

Consumers filing captioning complaints with the Commission in the first instance must provide the following information: (1) the channel number; (2) the channel name, network, or call sign; (3) the name of the MVPD, if applicable; (4) the date and time that the captioning problem occurred; (5) the name of the program involved; and (6) a detailed description of the problem.

VPD's Responsibilities

Once a complaint is received, the Commission will notify the named VPD and appropriate video programmer simultaneously. The VPD must conduct an initial investigation to determine whether the issues raised in the complaint are within its control. Concurrently, the video programmer may, but is not required to, voluntarily begin its own inquiry into the source of the captioning problem. As part of its investigation, the VPD must, at a minimum, check both its program stream and processing equipment to determine whether either is causing

the problem. If the VPD's investigation indicates that the problem may lie with the consumer's "customer premises equipment" (e.g., set-top box), the VPD must check the end user equipment, either remotely or at the consumer's residence. The Commission will defer to the VPD's good faith judgement about whether there is an indication that the customer's equipment might be the source of the problem and whether it is necessary to go to the customer's residence to check.

If the VPD's investigation reveals that the closed captioning problem is within its control, the VPD must correct the problem and provide a written response to the Commission, the video programmer and the consumer acknowledging such responsibility and describing the steps taken to correct the problem. The complaint must be resolved and the written response sent within 30 days after the date the FCC forwards the complaint to the VPD.

If the VPD's investigation reveals that the closed captioning problem is not within the VPD's control and appears to have been present in the program stream when received by the VPD, the burden for addressing the complaint will shift to the video programmer. To shift the burden, the VPD must certify to the Commission, the video programmer, and the consumer that it has exercised due diligence to identify and resolve the source of the captioning problem and that the problems raised in the complaint are not within its control. The certification may be provided at any time during the VPD's investigation, but no later than 30 days after the date the FCC forwarded the complaint.

In addition, if at any time during the complaint resolution process, the VPD's investigation reveals that the closed captioning problem appears to be the result of causes outside of its control or that of the programmer, such as a faulty third-party DVR, television, or other third-party device, the VPD must certify to the Commission, the video programmer, and the consumer that it has exercised due diligence to identify and resolve the source of the captioning problem by conducting an investigation, and that the problems raised in the complaint were caused by a third party device or other causes not within the control of either the VPD or the video programmer. The certification may be provided at any time during the VPD's investigation, but no later than 30 days after the date the FCC forwarded the complaint.

Video Programmer's Responsibilities

After the responsibility for resolving the complaint shifts to the video programmer, the video programmer must investigate and attempt to resolve the problem to the extent that doing so is within its control. VPDs are required to assist the video programmer with resolving the complaint, as needed. Within 30 days after the date of certification from the VPD, the video programmer must provide a written response to the complaint that either describes the steps taken to rectify the problem, or certifies that it has exercised due diligence to identify and resolve the captioning problem by conducting an investigation and that the problems raised in the complaint are not within its control. Such response must be submitted to the Commission, the VPD, and the consumer.

If the video programmer certifies that the program stream contained fully functioning captioning at the time the program stream was handed off to the VPD, and the VPD has not determined that the problem resulted from a third party source, the VPD and the video programmer must then work together to determine the source of the captioning problem. Once the source of the problem is determined, the VPD and video programmer must correct those aspects of the problem within their respective control. After consultation with the video programmer, the VPD will then be required to report to the Commission and the complainant the steps taken to fix the captioning problem. The report must be submitted within 30 days after the date that the video programmer certified that the cause of the problem was not within the video programmer's control.

Captioning Complaints Made Directly with the VPD

VPD's Responsibilities

When a VPD receives a complaint from a consumer, it must investigate the complaint with the same due diligence and in the same manner as required for complaints initially filed with the Commission. If, after conducting its initial investigation, the VPD determines that the captioning issue raised is within its control, it must take the necessary steps to resolve it and notify the consumer of such resolution within 30 days after the date of the complaint. If (1) the consumer does not receive a response to the complaint within the 30-day period, or (2) the consumer is not satisfied with the VPD's response, the consumer may file the complaint with the FCC within sixty days after the time allotted for the VPD to respond to the consumer.

If a VPD determines that an issue raised in the complaint is not within its control, the VPD, within 30 days after the date of the complaint, must either forward the complaint to the video programmer or other responsible entity, such as another VPD. In so doing, the VPD must either redact the consumer's personally identifiable information from the complaint, or provide the video programmer or other responsible entity with information sufficient for the programmer/responsible entity to conduct an investigation and resolve the issue. In addition, the VPD must provide the video programmer/responsible entity with an explanation of why the cause of the captioning problem is not within the control of the VPD.

Video Programmer's Responsibilities

Once a video programmer/responsible entity receives a complaint and notification from a VPD that the issue described in the complaint is outside the VPD's control, the burden will shift to the video programmer/responsible entity to investigate and resolve the complaint. However, as with complaints initially filed with the Commission, VPDs must continue to assist the video programmer/responsible entity in resolving the complaint as needed and to conduct additional checks of the program stream to confirm resolution of the problem.

The video programmer/responsible entity must respond in writing to the VPD within 30 days after the forwarding date of the complaint in a form that can be forwarded to the consumer. The VPD must then forward this response to the consumer within ten days. If the video programmer/responsible entity fails to respond to the VPD within 30 days, the VPD must inform the consumer of the video programmer's or other responsible entity's failure to respond within 40 days after the forwarding date.

If the video programmer/responsible entity fails to respond to the VPD within the time allotted, or if the VPD fails to forward the video programmer's or other responsible entity's response to the consumer, or if the consumer is not satisfied with that response, the consumer may file the complaint with the FCC within sixty days after the time allotted for the VPD to either forward the video programmer's or other responsible entity's response to the consumer or inform the consumer of the video programmer's or other responsible entity's failure to respond. Upon receipt of the complaint from the consumer, the Commission will forward such complaints to the appropriate VPD and video programmer.

Compliance Ladder

Additionally, the Order establishes a "compliance ladder" to encourage companies to take informal, prompt, and direct action to resolve captioning problems, thereby making enforcement action by the Commission unnecessary. The compliance ladder will be used for captioning quality complaints received by the FCC that indicate a "pattern or trend" of noncompliance:

- If the Commission notifies a VPD or video programmer that the FCC has identified a pattern or trend of possible noncompliance with the Commission's closed captioning quality rules, the VPD or video programmer must respond to the Commission within 30 days describing corrective measures taken, including those measures the VPD or video programmer may have undertaken in response to informal complaints and inquiries from viewers.
- After the initial 30 day period, if the Commission subsequently notifies the VPD or video programmer that there is further evidence indicating a pattern or trend of noncompliance, the VPD or video programmer must submit to the Commission, within 30 days, a written action plan describing additional measures it will take to bring its closed captioning performance into compliance with the FCC's rules. In addition, the VPD or video programmer must conduct captioning spot checks and report the results of its action plan and spot checks within 180 days.
- If, after the date for submission of the report on the results of an action plan, the Commission finds continued evidence of a pattern or trend of noncompliance, the FCC will then consider, through its Enforcement Bureau, appropriate enforcement action, including admonishments, forfeitures, and other corrective actions as necessary.

Despite establishing this compliance ladder, the FCC adopted an additional rule allowing the Consumer and Governmental Affairs Bureau (CGB) to refer a captioning quality rule violation directly to the Enforcement Bureau, or for the Enforcement Bureau to pursue an enforcement action on its own, without first going through the compliance ladder, "for a systemic closed captioning quality problem or an intentional and deliberate violation of the Commission's closed captioning quality standards." In making such a determination, CGB or the Enforcement Bureau will "take into consideration all relevant information regarding the nature of the violation or violations and the VPD or video programmer's efforts to correct them."

Video Programmer Registration

Finally, the rules adopted by the Commission in the Order require video programmers to file certain contact information (including the name of the person with primary responsibility for captioning issues and his/her title, phone number, fax number, and email address) with the FCC through a web form located on the FCC's web site. The contact information will be used by the Commission or VPDs when addressing closed captioning complaints and must be updated within ten business days of any changes. Video programmers must also submit their required compliance certifications through a web form located on the Commission's web site. The FCC has tasked CGB with developing one or more web forms (or expanding the VPD registry) for contact information and compliance certifications and with providing filing guidance, procedures and deadlines in a subsequent Public Notice.