

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Closed Captioning of Internet Protocol-Delivered
Video Programming: Implementation of the
Twenty-First Century Communications and Video
Accessibility Act of 2010
Petitions for Temporary Partial Exemption or
Limited Waiver
MB Docket No. 11-154

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 2012

Released: August 17, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we address two petitions for temporary partial exemption or limited waiver of certain provisions of the Internet protocol ("IP") closed captioning rules of the Federal Communications Commission ("Commission"), filed by the Digital Media Association ("DiMA"). One petition (the DiMA 708 Petition) requests an exemption or waiver,

1 47 C.F.R. § 79.4. See also Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Report and Order, 27 FCC Rcd 787 (2012) ("IP Closed Captioning Order").

2 DiMA Petition for Temporary Partial Exemption or Limited Waiver, MB Docket No. 11-154, filed May 8, 2012 ("DiMA 708 Petition") (DiMA member Google does not join this petition); DiMA Petition for Temporary Partial Exemption or Limited Waiver from the Provisions of Section 79.4(c)(2)(i) Relating to the Rendering of Captions, Including to the Applications, Plug-Ins, or Devices Provided by a VPD, filed May 8, 2012 ("DiMA Rendering Petition") (DiMA members Apple Inc. and Google do not join this petition). DiMA describes itself as "the ambassador for the digital media industry: webcasters, online media, digital services, and technology innovators. DiMA is the leading advocate for a stable legal environment in which to build ideas into industries, and inventions into profits." See www.digmedia.org (last visited Aug. 7, 2012). DiMA lists its membership as including Amazon.com, Apple, Live365, Microsoft, Myspace Music, RealNetworks/Rhapsody, RightsFlow, Slacker, Sony, and YouTube. See id. The Media Bureau placed the two DiMA petitions on public notice and invited comments and reply comments. See Media Bureau Action, Comment Dates Established for Two Petitions for Temporary Partial Exemption or Limited Waiver of Certain Provisions of 47 C.F.R. § 79.4(c)(2)(i), Public Notice, 27 FCC Rcd 5260 (May 16, 2012) ("DiMA Public Notice"). Comments were filed by: Telecommunications for the Deaf and Hard of Hearing, Inc., et al. ("Consumer Groups Opposition"); DIRECTV, LLC ("DIRECTV Comments"); the Motion Picture Association of America, the National Cable & Telecommunications Association, and the National Association of Broadcasters ("MPAA/NCTA/NAB Comments"); and Rovi Corporation ("Rovi Comments"). Reply comments were filed by: the Digital Media Association ("DiMA Reply"); and the Motion Picture Association of America, the National Cable & Telecommunications Association, and the National Association of Broadcasters ("MPAA/NCTA/NAB Reply").

until January 1, 2014, from the provisions of Section 79.4(c)(2)(i) that require applications, plug-ins,³ or devices⁴ provided by video programming distributors and providers (“VPDs”) to comply with the user configuration and formatting requirements of Section 79.103(c) of the Commission’s rules. The other petition (the DiMA Rendering Petition) requests an exemption or waiver, until January 1, 2014, from the provisions of Section 79.4(c)(2)(i) that relate to the rendering, but not the pass-through, of captions, for VPDs that do not currently provide closed captioning.⁵ For the reasons set forth below, we grant the DiMA 708 Petition and we deny the DiMA Rendering Petition.

II. BACKGROUND

2. On October 8, 2010, President Obama signed the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”) into law.⁶ Section 202 of the CVAA directed the Commission to establish closed captioning rules for the owners, providers, and distributors of IP-delivered video programming, while Section 203 of the CVAA directed the Commission to establish closed captioning rules for certain apparatus on which consumers view video programming. In January 2012, the Commission released its *IP Closed Captioning Order* to fulfill these requirements and to “better enable individuals who are deaf or hard of hearing to view IP-delivered video programming, as Congress intended.”⁷

3. Among the rules the Commission adopted were provisions setting forth the obligations of VPDs. Specifically, the Commission’s new rules require each VPD to:

Enable the rendering or pass through of all required captions to the end user, maintaining the quality of the captions provided by the video programming owner and transmitting the captions in a format reasonably designed to reach the end user in that quality. A video programming distributor or provider that provides applications, plug-ins, or devices in order to deliver video programming must comply with the requirements of Section 79.103(c) and (d).⁸

4. Section 79.103(c) of the Commission’s rules contains a list of ten specific technical capabilities that apparatus subject to that section must implement.⁹ These ten technical capabilities include requirements related to presentation, character color, character opacity, character size, fonts, caption background color and opacity, character edge attributes, caption window color, language, and

³ A “plug-in” is defined as “[a] program of data that enhances, or adds to, the operation of a (usually larger) parent program.” See H. Newton, *Newton’s Telecom Dictionary* 642 (20th ed. 2004).

⁴ Although the DiMA 708 Petition references devices, we note that VPD-provided hardware is already subject to the January 1, 2014 deadline. *IP Closed Captioning Order*, 27 FCC Rcd at 821, ¶ 53 (“If a VPD relies on hardware to enable the rendering or pass through of closed captions, the VPD must meet the compliance deadline of January 1, 2014.”). Accordingly, we will treat the DiMA 708 Petition as pertaining to VPD-provided applications or plug-ins, not devices.

⁵ “Rendering” involves decoding the closed captions for display, and “passing through” captions involves making the closed captions available to someone further down the distribution or processing chain to decode for display. See *infra* ¶ 14.

⁶ Pub. L. No. 111-260, 124 Stat. 2751 (2010). See also Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

⁷ *IP Closed Captioning Order*, 27 FCC Rcd at 788, ¶ 1.

⁸ 47 C.F.R. § 79.4(c)(2)(i).

⁹ 47 C.F.R. § 79.103(c).

preview and setting retention.¹⁰ Although the term “apparatus” only applies to hardware and integrated software,¹¹ in the *IP Closed Captioning Order* the Commission determined that VPDs that provide applications or plug-ins (including those provided through the VPD’s website) must comply with the requirements for display of captions set forth in Section 79.103(c) of the Commission’s rules.¹² The Commission also adopted a procedure by which a VPD may petition the Commission for a full or partial exemption from the IP closed captioning requirements if compliance would be economically burdensome.¹³ The exemption procedures were not, however, in effect when DiMA filed its petitions, because the rule contains information collection requirements that require approval by the Office of Management and Budget (“OMB”), and that approval was not received until after DiMA filed its requests. Accordingly, the Commission will evaluate the two DiMA petitions pursuant to its general waiver authority.¹⁴

III. DIMA 708 PETITION

A. Background

5. In the DiMA 708 Petition, DiMA requests, pursuant to Section 1.3 of the Commission’s rules,¹⁵ a limited waiver until January 1, 2014 of the provisions of Section 79.4(c)(2)(i) that require VPD-provided applications or plug-ins to implement the technical capabilities contained in Section 79.103(c).¹⁶ VPDs would be required to make these ten technical capabilities available to end users once captions are required for the IP-delivered video programming at issue; accordingly, pursuant to the deadlines set forth in Section 79.4(b) of the Commission’s rules, the first deadline would be September 30, 2012 for VPDs to make available the technical capabilities for prerecorded programming that is not edited for Internet distribution.¹⁷ DiMA’s requested waiver would apply to all VPDs,¹⁸ and the waiver is broadly supported

¹⁰ *Id.* We refer to the DiMA petition involving these ten technical capabilities as the DiMA 708 Petition because the capabilities at issue mirror technical requirements set forth in a digital television closed captioning standard known as EIA-708-B, “Digital Television Closed Captioning,” Electronics Industries Alliance (Dec. 1999) (“EIA-708-B”). The EIA-708-B standard provides comprehensive instructions for the encoding, delivery, and display of closed captioning information for digital television systems. The standard provides for a larger set of captioning user options than the analog captioning standard, EIA-608, permitting users to control the size, font, color and other caption features. 47 C.F.R. § 79.102. *See also, Closed Captioning Requirements for Digital Television Receivers, Report and Order, 15 FCC Rcd 16788 (2000).* The *IP Closed Captioning Order* relocated this rule from Section 15.122 to Section 79.102 of the Commission’s rules. *IP Closed Captioning Order, 27 FCC Rcd at 858, ¶ 120.*

¹¹ *Id.* at 839-40, ¶ 93; 47 C.F.R. § 79.103(a), Note.

¹² *IP Closed Captioning Order, 27 FCC Rcd at 806, ¶ 27 and 839-40, ¶ 93.*

¹³ 47 C.F.R. § 79.4(d); *IP Closed Captioning Order, 27 FCC Rcd at 825, n. 257.*

¹⁴ 47 C.F.R. § 1.3 (“The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”). DiMA requests in each petition that the Commission grant a temporary exemption pursuant to Section 79.4(d)(1) of the Commission’s rules or, in the alternative, a limited waiver pursuant to Section 1.3 of the Commission’s rules. DiMA 708 Petition at 1-2; DiMA Rendering Petition at 1-2.

¹⁵ 47 C.F.R. § 1.3.

¹⁶ DiMA 708 Petition at 1-2. DiMA requests that the waiver explicitly apply to websites, which we understand to mean a VPD’s own website on which it provides video programming. *Id.* at 1, n. 4. As noted above, applications or plug-ins provided through VPD websites must implement the technical capabilities.

¹⁷ 47 C.F.R. § 79.4(b).

¹⁸ DiMA 708 Petition at 1.

by all segments of the industry, though it is opposed by some consumer groups.¹⁹ According to DiMA, since the technical capabilities required by Section 79.103(c) will not affect the core requirement that captions be provided, consumers will still receive captioned IP-delivered video programming in the time frame established by the Commission.²⁰

6. DiMA explains that many of its member VPDs “simply cannot overcome the significant technical challenges associated with implementing the full suite of user configurations detailed in Section 79.103(c) in the extremely short time allotted by the Commission – a mere six months.”²¹ DiMA states that rewriting software to enable applications or plug-ins to provide the required technical capabilities is a complex task, that significant changes to software systems generally require much more than six months of planning, and that the task will involve a number of different platforms and third-party vendors.²² According to DiMA, the VPD industry did not expect this early deadline for technical capabilities specified in Section 79.103(c), since it was not in the Commission’s Notice of Proposed Rulemaking or the Video Programming Accessibility Advisory Committee (“VPAAC”) Report.²³ DiMA explains that the extension would harmonize the deadline for VPD technical capabilities with the January 1, 2014 deadline imposed on apparatus manufacturers to meet these same requirements.²⁴

B. Discussion

7. We find that there is good cause to waive Section 79.103(c) as applied to VPDs until January 1, 2014, as requested by the DiMA 708 Petition and supported by commenters.²⁵ To waive a requirement for good cause, the Commission must (1) explain why deviating from the general requirement serves the public interest, and (2) explain the nature of the special circumstances.²⁶ We agree with DiMA that a short-term waiver of the existing deadline serves the public interest because a limited 15-month extension would avoid “forcing VPDs into an unrealistic timeline [that could] result in substantial technical malfunctions and consumer dissatisfaction, undermining consumers’ use of

¹⁹ See DIRECTV Comments; MPAA/NCTA/NAB Comments; Rovi Comments; DiMA Reply; MPAA/NCTA/NAB Reply; Consumer Groups Opposition.

²⁰ DiMA 708 Petition at 2.

²¹ *Id.*

²² *Id.* at 5, 9, 12.

²³ *Id.* at 2, 5. See also First Report of the Video Programming Accessibility Advisory Committee on the Twenty-First Century Communications and Video Accessibility Act of 2010: Closed Captioning of Video Programming Delivered Using Internet Protocol, July 12, 2011, available at http://transition.fcc.gov/cgb/dro/VPAAC/First_VPAAC_Report_to_the_FCC_7-11-11_FINAL.pdf (“VPAAC Report”). The CVAA required the Commission to establish an advisory committee, which became known as the VPAAC. Pub. L. No. 111-260, § 201(a). The VPAAC, which prepared and submitted to the Commission the statutorily mandated VPAAC Report, included VPDs among its members. See VPAAC Members, <http://vpaac.wikispaces.com/Members> (last visited Aug. 7, 2012).

²⁴ DiMA 708 Petition at 2-3.

²⁵ DIRECTV Comments at 1-2; MPAA/NCTA/NAB Comments at 2; Rovi Comments at 2-8; MPAA/NCTA/NAB Reply at 1-3. We note that VPD-provided hardware is already subject to the January 1, 2014 deadline. *IP Closed Captioning Order*, 27 FCC Rcd at 821, ¶ 53 (“If a VPD relies on hardware to enable the rendering or pass through of closed captions, the VPD must meet the compliance deadline of January 1, 2014.”). The waiver applies to VPD-provided applications or plug-ins, and we interpret this to include applications or plug-ins provided on a VPD’s own website on which it provides video programming. See *supra* ¶ 4.

²⁶ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

captioning technology.”²⁷ We also agree with DiMA that special circumstances justifying the waiver include: (1) the need for additional time to avoid software malfunctions; (2) the fact that the delay in requiring the technical capabilities of Section 79.103(c) will not impact the basic provision of closed captions; and (3) that the regulations affect companies not previously regulated by the Commission, and those companies need a reasonable time to comply.²⁸

8. The record created in response to the DiMA 708 Petition supports DiMA’s argument that the current September 30, 2012 deadline is unrealistic due to technical difficulties.²⁹ Individual VPDs lack direct control over many of the links in the distribution chain, which creates further complexity in achieving compliance with the required technical capabilities.³⁰ Specifically, a VPD may rely on a number of individual entities involved in the transmission process, and these entities all need to coordinate to implement the technical capabilities, which necessitates additional time.³¹ Based on the record developed in this proceeding, we are persuaded that the January 1, 2014 deadline applicable to apparatus should also apply to VPDs that must implement the same technical capabilities.³² As stated above, Section 79.4 of the Commission’s rules requires VPD-provided applications or plug-ins (including those provided through the VPD’s website) to comply with the display of captions requirements for apparatus set forth in Section 79.103 of the Commission’s rules.³³ Commenters explain that VPDs should be provided the same deadline to meet these requirements as apparatus because the engineering involved in both contexts is the same, both types of entities may rely on the same software platforms, and apparatus manufacturers have more end-to-end control than VPDs which makes it easier for the manufacturers to comply with the new requirements related to technical capabilities.³⁴ Extension of the deadline will also avoid inducing VPDs who are unable to make the user tools and formatting features available by September 30, 2012 to cease providing the associated programming via IP altogether.³⁵

²⁷ DiMA 708 Petition at 18-19.

²⁸ *Id.* at 18. The IP closed captioning rules apply to some entities that may not previously have dealt with Commission compliance issues, such as online video distributors. *See, e.g., IP Closed Captioning Order*, 27 FCC Rcd at 802, ¶ 22 (“Importantly, the IP closed captioning provisions of the CVAA reach a broader class of VPDs than the video programming distributors subject to the [] television closed captioning rules . . .”).

²⁹ DIRECTV Comments at 1; MPAA/NCTA/NAB Comments at 3, 5-12; Rovi Comments at 2-6; MPAA/NCTA/NAB Reply at 2, 3-4; Letter from Diane B. Burstein, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (June 11, 2012) (“NCTA *et al.* June 11 *Ex Parte* Letter”); Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, at 1 (June 12, 2012) (“Disney June 12 *Ex Parte* Letter”); Letter from Lee Knife, Executive Director, Digital Media Association, to Marlene H. Dortch, Secretary, FCC, at 1 (June 13, 2012) (“DiMA June 13 *Ex Parte* Letter”); Letter from Gerald J. Waldron, Covington & Burling, to Marlene H. Dortch, Secretary, FCC, at 1 (June 18, 2012) (“DiMA June 18 *Ex Parte* Letter”).

³⁰ MPAA/NCTA/NAB Comments at 8; MPAA/NCTA/NAB Reply at 3; NCTA *et al.* June 11 *Ex Parte* Letter at 2; Disney June 12 *Ex Parte* Letter at 1.

³¹ MPAA/NCTA/NAB Comments at 8-9; MPAA/NCTA/NAB Reply at 3-4.

³² MPAA/NCTA/NAB Comments at 13-14; Rovi Comments at 3-4; MPAA/NCTA/NAB Reply at 2, 4-5; NCTA *et al.* June 11 *Ex Parte* Letter at 1; Disney June 12 *Ex Parte* Letter at 1-2.

³³ *See supra* ¶¶ 3-4.

³⁴ MPAA/NCTA/NAB Comments at 13; Rovi Comments at 3.

³⁵ Rovi Comments at 7. This differs from the effect of granting the DiMA Rendering Petition, discussed below, because the grant of that petition would lead to inaccessibility of even basic closed captions to end users. An additional difference is the decreased level of record support for the DiMA Rendering Petition as compared to the DiMA 708 Petition, indicating that fewer VPDs recognize a need for the grant of the DiMA Rendering Petition. It would not be in a VPD’s economic interest to cease providing IP-delivered video programming to avoid compliance

(continued....)

9. We emphasize that the waiver is temporary and will merely extend the earliest applicable deadline (for prerecorded programming that is not edited for Internet distribution) by 15 months.³⁶ We agree with DiMA that, once the waiver elapses on January 1, 2014, the next upgrade to VPD-provided software will be considered a new application and thus will trigger the required implementation of the technical capabilities.³⁷ We recognize that the technical capabilities of Section 79.103(c) are desirable to viewers who are deaf or hard of hearing,³⁸ and we do not wish to defer availability of these features any longer than necessary. We stress that granting this waiver will not have any effect on the deadlines by which VPDs must enable the rendering or pass through of basic closed captions, and thus consumers will be able to view basic closed captions on IP-delivered video programming.³⁹

10. We reject the Consumer Groups' claim that the DiMA petitions "impermissibly attempt[] to bend the Commission's individualized waiver process to seek a blanket waiver for the entire industry."⁴⁰ The provisions cited by the Consumer Groups⁴¹ do not preclude the Commission from providing a temporary waiver of the required technical capabilities for all VPDs under its general waiver

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with the rendering requirements discussed below, given that a number of VPDs are already able to render the closed captions of IP-delivered video programming, whereas the same cannot be said for VPDs' current ability to make available the technical capabilities at issue in the DiMA 708 Petition.

³⁶ See, e.g., *Anglers for Christ Ministries, Inc.*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, 26 FCC Rcd 14941, 14952, ¶ 23 (2011) ("[P]rior to the *Anglers Order*, no petitioner had ever received a permanent exemption from the [television] captioning rules."). See also DiMA June 13 *Ex Parte* Letter at 3.

³⁷ *IP Closed Captioning Order*, 27 FCC Rcd at 821, ¶ 53 (indicating that, "[i]f a VPD uses software to enable the rendering or pass through of captions," our IP closed captioning rules only make the VPD responsible "for software it deploys after the applicable compliance dates. . . ."); *id.* at 821, n. 227 ("We will consider upgrades to VPD software to be new applications.").

³⁸ Consumer Groups Opposition at 23; Letter from Blake E. Reid, Counsel to Telecommunications for the Deaf and Hard of Hearing, Inc., to Marlene H. Dortch, Secretary, FCC, at 3 (June 4, 2012) ("Consumer Groups June 4 *Ex Parte* Letter"); Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, at 2 (June 14, 2012) ("Consumer Groups June 14 *Ex Parte* Letter"); Letter from Andrew S. Phillips, Policy Attorney, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC, at 2 (June 22, 2012) ("Consumer Groups June 22 *Ex Parte* Letter"); Letter from Andrew S. Phillips, Policy Counsel, National Association of the Deaf, to Marlene H. Dortch, Secretary, FCC (July 11, 2012) ("Consumer Groups July 11 *Ex Parte* Letter").

³⁹ DIRECTV Comments at 2; Rovi Comments at 8; MPAA/NCTA/NAB Reply at 1.

⁴⁰ Consumer Groups June 4 *Ex Parte* Letter at 2; Consumer Groups June 14 *Ex Parte* Letter at 2; Consumer Groups June 22 *Ex Parte* Letter at 2. See also Consumer Groups Opposition at iii ("DiMA's petitions are procedurally irregular and improper, conflating the Commission's authority to grant categorical exemptions for classes of entities as part of a rulemaking with its separate authority to grant individual waivers to particular entities pursuant to a petition."), 2 ("DiMA cannot seek an exemption from the Commission's existing rules under section 713(c)(2)(D)(ii) outside of a rulemaking, nor can it seek a categorical exemption for an entire class of entities under section 713(d)(3) and rule 79.4(d)'s process for individual exemption petitions."). As noted above, we are considering the DiMA 708 Petition under Section 1.3 and not Section 79.4(d) of the Commission's rules. We find that it is appropriate to grant an industry-wide waiver pursuant to Section 1.3 because: (1) the record reflects that the vast majority of VPDs will need additional time to provide the required technical capabilities; (2) it would be impractical for the Media Bureau to process what otherwise would likely be hundreds of waiver requests prior to the initial September 30, 2012 deadline; and (3) in any event, to the extent any VPD is already providing the technical capabilities on certain of its applications or plug-ins, it is unlikely that it would cease doing so because of the extended deadline.

⁴¹ Consumer Groups Opposition at 1-2 (citing Section 713(c)(2)(D)(ii) of the Communications Act, which permits the grant of categorical exemptions through a rulemaking, and Section 713(d)(3) of the Communications Act, which permits the grant of individual exemptions applicable to particular entities).

granting authority. The DiMA 708 Petition is not an “untimely petition[] for reconsideration” as the Consumer Groups assert,⁴² but rather, requests a temporary waiver of a compliance deadline pursuant to Section 1.3 of the Commission’s rules.⁴³ Grant of the waiver for all VPDs is consistent with past actions in which the Commission issued industry-wide waivers of compliance deadlines.⁴⁴ We emphasize the narrow nature of the waiver, given that VPDs will still by the initial deadlines be required to comply with the requirements that they “[e]nable the rendering or pass through of all required captions to the end user, maintaining the quality of the captions provided by the video programming owner and transmitting captions in a format reasonably designed to reach the end user in that quality.”⁴⁵

11. Although much of the Consumer Groups’ objection to the DiMA 708 Petition is procedural, as discussed above, they also make certain substantive arguments that we reject, as explained below. Specifically, the Consumer Groups argue that the Commission considered and rejected DiMA’s requests to delay compliance with the required technical capabilities as part of the *IP Closed Captioning Order*.⁴⁶ Since the adoption of the VPD deadline in the *IP Closed Captioning Order*, however, additional information provided in response to the DiMA petitions (including, as described above, that the vast majority of VPDs will be unable to provide the technical capabilities by September 30, 2012, and that a temporary waiver of this requirement is broadly supported by the industry), demonstrates the need for a limited extension until January 1, 2014 for VPDs to provide the required technical capabilities. We also reject the argument that DiMA should have been on notice that the deadlines agreed upon by the VPAAC would apply to the provision of technical capabilities.⁴⁷ We disagree, finding instead that the schedule of deadlines that the VPAAC proposed was limited to the implementation of basic captioning, and was not

⁴² Consumer Groups June 4 *Ex Parte* Letter at 3.

⁴³ 47 C.F.R. § 1.3. *See also* DiMA June 13 *Ex Parte* Letter at 2, 4; DiMA Reply at 3-4 (explaining that DiMA does not seek to reverse or amend any Commission rules, and that the Commission’s authority to waive any provision of its rules is broader than the exemption standard contained in the CVAA); MPAA/NCTA/NAB Reply at 3 (noting “the agency’s settled authority to waive its own rules for good cause, on a ‘blanket’ basis if needed”) (footnote omitted).

⁴⁴ *See, e.g., Telephone Number Portability*, Order, 23 FCC Rcd 2425 (2008). We note that courts have previously upheld agency decisions to institute new deadlines by adjudication, rather than in the context of an Administrative Procedure Act (“APA”) rulemaking, where the factors for the APA’s “good cause” exception were satisfied. *See Mobil Exploration and Producing North America, Inc. v. FERC*, 881 F.2d 193, 198-199 (5th Cir. 1989). Good cause may exist to extend the compliance date of a rule outside the context of an APA rulemaking where such a rulemaking would be “impracticable, unnecessary or contrary to public interest.” 5 U.S.C. § 553(b). *See also National Federation of Federal Employees v. Devine*, 671 F.2d 607, 610-612 (D.C. Cir. 1982); *Children’s Television Obligations of Digital Television Broadcasters*, Order Extending Effective Date, 20 FCC Rcd 20611, 20612, ¶ 4 (2005). We find that the extension of the deadline here would be in the public interest, as explained above, and that a notice and comment rulemaking would have been impractical given the need to provide VPDs with certainty as to their obligations prior to the initial September 30, 2012 deadline. Further, we find that a notice and comment rulemaking would have been unnecessary in extending the deadline. Specifically, to the extent that the Commission should have proceeded through notice and comment rulemaking, we find that any failure to comply with APA notice and comment procedures did not prejudice interested parties but rather constituted “harmless error.” *See City of Arlington, Texas v. FCC*, 668 F.3d 229, 243-246 (5th Cir. 2012); *U.S. Telecom. Ass’n v. FCC*, 400 F.3d 39, 40-42 (D.C. Cir. 2005). The DiMA Public Notice was publicly available, and responsive comments were filed by interested parties, including consumer groups and representatives of VPDs that are subject to the applicable rule. The Commission fully considered the Consumer Groups Opposition in deciding to grant the DiMA 708 Petition as it also took those comments into consideration in determining that the DiMA Rendering Petition should be denied.

⁴⁵ 47 C.F.R. § 79.4(c)(2)(i).

⁴⁶ Consumer Groups Opposition at 6-7.

⁴⁷ *Id.* at 7-9.

intended to cover the provision of technical capabilities.⁴⁸ We also disagree with Consumer Groups' assertion that grant of the DiMA 708 Petition would "severely impact the public interest . . . by denying necessary user controls to viewers who are deaf-blind or visually impaired."⁴⁹ As explained above, while we recognize that the technical capabilities of Section 79.103(c) are desirable, we find that, on balance, it is preferable to provide additional time for compliance so that the technical capabilities are adequately developed and tested to ensure a seamless viewing experience. We emphasize that the waiver will not have any effect on the date by which VPDs must enable the rendering or pass through of basic closed captions.

12. We are persuaded that an industry-wide waiver is both justified by the record and a more efficient mechanism in this instance than requiring every VPD to file an individual waiver request.⁵⁰ Moreover, in the absence of a waiver, we are concerned that VPDs may purposefully delay providing updates to their applications or plug-ins so as to avoid having to provide the technical capabilities of Section 79.103(c). We are concerned that if VPDs delay updates to their applications until this enhanced capability is available, the VPDs will also necessarily delay the availability of basic captioning by VPDs not currently providing such functionality. This outcome would be contrary to the public interest.

13. Although we grant the DiMA 708 Petition, we encourage VPDs to provide some or all of the technical capabilities in advance of the new deadline of January 1, 2014, to the extent possible. In particular, we encourage VPDs to provide a means for consumers to adjust the font size and color of captions, which may enable viewers who have vision disabilities as well as hearing disabilities to have access to the programming. We expect that different VPDs will become able to comply with the technical capabilities of Section 79.103(c) at different times and, as the January 1, 2014 deadline approaches, we expect an increasing number of VPDs will make those technical capabilities available before they are required to do so.

IV. DIMA RENDERING PETITION

A. Background

14. In the DiMA Rendering Petition, DiMA requests that the Commission, pursuant to Section 1.3 of the Commission's rules,⁵¹ waive until January 1, 2014 the provisions of Section 79.4(c)(2)(i) that relate to the rendering, but not the pass-through, of captions.⁵² In short, "rendering" involves decoding the closed captions for display, whereas "passing through" captions involves making the closed captioning data available to a hardware or software component further down the distribution or processing chain to decode for display. In order for a consumer to view closed captioning, the captions

⁴⁸ VPAAC Report at 34.

⁴⁹ Consumer Groups Opposition at iv.

⁵⁰ See *supra* n. 40 (finding that it would be impractical for the Media Bureau, prior to the deadline, to process hundreds of waiver requests from VPDs that would be unable to meet the deadline for the provision of technical capabilities). We emphasize that the DiMA Rendering Petition would apply to a smaller class of VPDs (namely, those that do not currently provide closed captioning).

⁵¹ 47 C.F.R. § 1.3.

⁵² DiMA Rendering Petition at 1-2. This includes the rendering requirement in the first sentence of Section 79.4(c)(2)(i) and the entire second sentence of Section 79.4(c)(2)(i) which mandates compliance with Section 79.103(c) – (d). *Id.* at 4. The grant of the DiMA 708 Petition renders the portion of the DiMA Rendering Petition involving compliance with Section 79.103(c) moot. We note that more recently, DiMA indicated that at a minimum a six month extension of the rendering requirement would be necessary. Letter from Lee Knife, Executive Director, Digital Media Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Aug. 2, 2012) ("DiMA Aug. 2 *Ex Parte* Letter").

must be rendered by either the VPD or the device.⁵³ DiMA's requested rendering waiver would apply to all VPDs that do not currently provide closed captioning.⁵⁴ According to DiMA, "the technological challenge to develop and deploy applications, plug-ins, or devices to render captioning for [VPDs] that have not provided closed captioning previously imposes significant difficulty to achieve by September 30, 2012."⁵⁵

15. DiMA claims that the rendering obligations of Section 79.4(c)(2)(i) would be technically difficult to achieve by the current deadline, particularly since some VPDs may need to tailor certain software, applications, or plug-ins for hundreds of different devices.⁵⁶ According to DiMA, there are limited numbers of programmers, designers, and engineers available to make the complex software changes, and the short deadline would lead to increased likelihood of bugs and other errors.⁵⁷ DiMA states that testing of new software alone often takes longer than six months.⁵⁸ The obligations placed on VPDs will be particularly difficult for those VPDs that have not previously provided closed captions, according to DiMA.⁵⁹

B. Discussion

16. We deny the request to waive until January 1, 2014 the rendering requirements of Section 79.4(c)(2)(i) for VPDs that have not previously provided closed captioning. We find that there is insufficient evidence to support the waiver request because it is overly broad.⁶⁰ Even DiMA recognizes that there are some VPDs that do not currently provide closed captions that would not need the relief sought by the DiMA Rendering Petition.⁶¹ In fact, DiMA members Apple Inc. and Google do not join this petition. We find that DiMA's attempt to limit the class to "VPDs whose video programming services, including their applications, plug-ins or devices, are accessible through multiple platforms or devices,"⁶² is unavailing because the class still would be overly broad, encompassing a large number of

⁵³ Since many devices currently do not render captions, viewers may not have access to any captions if the VPD does not render them.

⁵⁴ DiMA Rendering Petition at 1.

⁵⁵ *Id.* at 1-2.

⁵⁶ *Id.* at 3-5.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.*

⁵⁹ *Id.* at 8.

⁶⁰ The *IP Closed Captioning Order* implemented provisions of the CVAA pertaining to the availability of exemptions due to economic burden on a case-by-case basis. *IP Closed Captioning Order*, 27 FCC Rcd at 824-828, ¶¶ 61-66. See also 47 C.F.R. § 79.4(d). The Commission rule pertaining to such exemptions became effective on August 6, 2012. *Notice of Effective Date of IP Closed Captioning Rules Requiring OMB Approval*, Public Notice, DA 12-1271 (rel. Aug. 6, 2012). Accordingly, individual VPDs may petition the Commission for an exemption of the rendering requirements if compliance would be economically burdensome. Such an exemption must be supported with sufficient evidence to demonstrate that compliance with the rendering requirements would impose significant difficulty or expense. 47 C.F.R. § 79.4(d)(2). Given the availability of exemptions due to economic burden, we are not persuaded by DiMA's claim that the September 30, 2012 deadline is "especially difficult" given the start of the holiday season, and that "VPDs may be forced not to release an otherwise beneficial update of their platform and applications, plug-ins, or devices" because they really need "at minimum, an additional six months . . . to comply." DiMA Aug. 2 *Ex Parte* Letter at 2.

⁶¹ See, e.g., DiMA Rendering Petition at 10 ("The September 30, 2012 deadline for full compliance is not realistic for *some* VPDs.") (emphasis added).

⁶² DiMA Aug. 2 *Ex Parte* Letter at 3.

VPDs that may not actually need to take advantage of the waiver. Even if we assume that coming into compliance with the rendering requirement is a lengthy process, VPDs have been aware of the rendering requirement since Congress passed the CVAA in October 2010. Given the over-breadth of the DiMA Rendering Petition, we cannot find that special circumstances would warrant waiving the rendering requirements.⁶³ We emphasize that, unlike in the context of the DiMA 708 Petition pursuant to which consumers will still receive basic closed captions but without advanced technical capabilities, the grant of the DiMA Rendering Petition would cause captions to be entirely inaccessible to end users of certain IP-delivered video programming until January 1, 2014. This would not serve the public interest.

17. We reject DiMA's claim that VPDs were not aware during the rulemaking process that the rendering requirements would apply as of September 30, 2012.⁶⁴ The VPAAC, whose members include VPDs,⁶⁵ proposed compliance deadlines by which basic captions would be required six months after the rules are published in the Federal Register for programming that is prerecorded and not edited for Internet distribution, 12 months after the rules are published in the Federal Register for live and near-live programming, and 18 months after the rules are published in the Federal Register for programming that is prerecorded and edited for Internet distribution.⁶⁶ Pursuant to the CVAA, a VPD's role in making basic closed captions available is to "enable[] the rendering or pass through of closed captions."⁶⁷ If a VPD does not "render" closed captions, those captions often will not be available to end users because merely "passing through" the captions has no practical effect for end users if a VPD's application or plug-in is necessary to view the captions but fails to render them.⁶⁸ Accordingly, we agree with the Consumer Groups that if we were to waive the VPD rendering requirement, the deadlines that the VPAAC agreed upon would be entirely meaningless since consumers would see scant improvement to accessibility of IP-delivered video programming as of those deadlines. It is implausible that, in proposing deadlines by which basic captions should be required, the VPAAC did not actually intend to make those captions available to end users. Accordingly, we find the existing deadlines for rendering to be consistent with the VPAAC Report.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 4(j) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j) and 613, and Sections 0.283 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.283 and 1.3, this *Order* IS ADOPTED.

⁶³ See *IP Closed Captioning Order*, 27 FCC Rcd at 830, ¶ 70 (rejecting requested categorical exemptions because "[n]one of these parties demonstrates that compliance with the IP closed captioning requirements would be an economic burden for an entire category of entities.").

⁶⁴ DiMA Rendering Petition at 10.

⁶⁵ See *supra* n. 23.

⁶⁶ VPAAC Report at 30.

⁶⁷ 47 U.S.C. § 713(c)(2)(D)(vi).

⁶⁸ Consumer Groups Opposition at 21; Consumer Groups June 4 *Ex Parte* Letter at 3 ("Because nearly all IP-delivered video must be rendered on devices, plug-ins, or applications provided by VPDs, extending the deadlines for rendering would effectively vitiate the six-, twelve-, and eighteen-month deadlines carefully negotiated by the industry and consumer representatives on the [VPAAC] and undo the Commission's careful deliberation and implementation of the captioning requirements for VPDs in this proceeding."); Consumer Groups June 14 *Ex Parte* Letter at 2 (same); Consumer Groups June 22 *Ex Parte* Letter at 2 (same). We reject Rovi's argument that failure to grant the relief sought in the DiMA Rendering Petition may cause VPDs to cease providing their content online because this is unlikely to be in their economic interest, given that a number of competitor VPDs are already rendering closed captions. See Rovi Comments at 8. This differs from the context of the DiMA 708 Petition, since the vast majority of VPDs are not yet able to make available all of the required technical capabilities.

19. IT IS FURTHER ORDERED that the petition for a temporary partial exemption or limited waiver for all VPDs from the technical capabilities required by Sections 79.4(c)(2)(i) and 79.103(c) of the Commission's rules, 47 C.F.R. §§ 79.4(c)(2)(i), 79.103(c), filed by the Digital Media Association, IS GRANTED to the extent discussed above.

20. IT IS FURTHER ORDERED that the petition for a temporary partial exemption or limited waiver for certain VPDs from the rendering requirements of section 79.4(c)(2)(i) of the Commission's rules, 47 C.F.R. § 79.4(c)(2)(i), filed by the Digital Media Association, IS DENIED.

21. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau