

The 2010 Video Accessibility Act: Meeting PEG and government website obligations



LEGAL OVERVIEW E-NATOA, July 25, 2011

NANCY C. RODGERS, ESQ.
KISSINGER & FELLMAN, P.C.
DENVER, COLORADO
303-320-6100
NANCY@KANDF.COM

Outline



- The Twenty-First Century Communications and Video Accessibility Act of 2010
- The Americans with Disabilities Act of 1990
- Section 504 of the Rehabilitation Act of 1973
- The TV Decoder Circuitry Act of 1990 and the Video Programming Accessibility Act of 1996
- The FCC's 1998 Closed Captioning Regulations
- What law applies?

Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)



- The CVAA (signed Oct. 8, 2010)
- Updated communications laws to ensure that individuals with disabilities are able to fully utilize communications services and equipment, and have better access video programming
- Services and equipment covered in the CVAA
 - Smartphones
 - VoIP
 - Closed captioning (for hearing impaired) and video description (for visually impaired)
 - Emergency announcement and services
 - DVR and other recording devices
 - Internet video programming
- Requires the FCC to adopt regulations
 - Three NPRM issued in early March 2011
 - One of the three relates to the Video Description Regulations originally adopted in 2000 but struck down by the U.S. Court of Appeals (D.C.)

Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”)



- **The CVAA video programming mandates apply to:**
 - Large market broadcast affiliates of the top four national networks
 - Most cable operators
 - DBS (Direct broadcast satellite) providers
 - Commercial video programming presented on the Internet
- **PEG channels do not fit into one of the applicable groups**
 - Therefore, the CVAA video description requirements do not, at this point, apply to PEG channels.
 - However, the CVAA requires the FCC establish an advisory committee to ensure individuals with disabilities have equal access to emergency services
 - ✦ Emergency access regulations could apply to local government PEG channels
 - ✦ First report was issued July 11, 2011
http://vpaac.wikispaces.com/file/view/First+VPAAC+Report+to+the+FCC_7-11-11_FINAL.pdf

The Americans with Disabilities Act of 1990



- **Title II of the Americans with Disabilities Act (ADA)**
 - Prohibits discrimination on the basis of disability by public entities in services of state and local governments
 - ✦ 42 U.S.C. § 12132
 - ✦ DOJ establishes regulations for state and local govt programs
 - Requires local governments to make all programs and services accessible to persons with disabilities.
- **Other Titles**
 - Title I - employment (EEOC establishes regulations);
 - Title III - places of public accommodation (DOJ establishes regulations);
 - Title IV - telecommunications relay services (FCC establishes regulations).
 - ✦ Title IV addresses telephone and television access for people with hearing and speech disabilities.
 - ✦ Captioning is required for federally funded public service announcements

ADA – Title II DOJ Regulations



- Require local governments to make reasonable modifications to policies, practices, and procedures whenever necessary to avoid discrimination, unless such modifications would fundamentally alter the service or program.
 - 28 C.F.R. § 35.130(b)(7).
- Local governments must also take appropriate steps to ensure that they can communicate effectively with people with disabilities, using auxiliary aids and services where necessary.
 - 28 C.F.R. §§ 35.160(a) and (b).

ADA – Closed Captioning



- No specific mandate for closed captioning in the ADA
 - Aside from federally funded public service announcements
 - ✦ Title IV, 47 U.S.C. Sec. 611
- *However*, DOJ’s regulations list open and closed captioning as an example of an “auxiliary aid” that promotes effective communication
 - 28 C.F.R. § 35.104.
- The DOJ Technical Assistance Manual for Title II (1993)
 - “Audio portions of television and video-tape programming produced by public entities are subject to the requirement to provide equally effective communication for individuals with hearing impairments.”
 - “Closed captioning of such programs is sufficient to meet this requirement.”
 - ✦ Tech. Asst. Man. Title II-7.1000.

Section 504 of the Rehabilitation Act of 1973



- Prohibits discrimination on the basis of disability in federal agency programs, programs receiving federal financial assistance, federal employment including employment with federal contractors.
 - 29 U.S.C. § 794.
- Does not specifically mandate closed captioning.
- Each federal agency has its own set of Section 504 regulations.
 - Typical regulatory requirements include
 - ✦ Reasonable accommodation for employees with disabilities;
 - ✦ Program accessibility; and
 - ✦ Effective communication with people who have hearing or vision disabilities.

The TV Decoder Circuitry Act of 1990 and the Video Programming Accessibility Act of 1996



- **The Television Decoder Circuitry Act of 1990**
 - Passed eight months after the ADA
 - Required all television with screens 13” or larger be able to receive and display captions by 1993
 - The FCC adopted standards for closed captioning in 1992
- **The Video Programming Accessibility Act**
 - Part of the Telecommunications Act of 1996
 - ✦ 47 U.S.C. § 613(b)
 - Required the FCC to adopt rules requiring closed captioning of most television programming
 - ✦ Rules became effective on Jan. 1, 1998

The FCC's 1998 Closed Captioning Regulations



- The FCC adopted regulations that, over time, increased the amount of programming requiring closed captioning.
 - 47 C.F.R. § 79.1.
 - These rules went into effect in 1998.
- By 2006, 100% of all new video programming, with some exceptions, was required to be closed captioned
- The FCC's rules on close captioning provides that:
 - “Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel . . .”
 - ✦ 47 C.F.R. § 79.1(b).

The FCC's 1998 Closed Captioning Regulations



- What is a “Video Programming Distributor”?
 - Any television broadcast station *licensed by the Commission*; and
 - Any multichannel video programming distributor, and
 - Any other distributor of video programming for residential reception that delivers such programming directly to the home *and is subject to the jurisdiction of the Commission*.
- PEG channels are not licensed by the FCC and are not subject to the FCC's jurisdiction as a licensed channel.
 - PEG channels are a product of franchise agreements between cable operators and local franchising authorities.
 - The FCC's jurisdiction over PEG channels occurs when the FCC is interpreting Section 611 of the Communications Act and determining whether a cable operator is adhering to the Act and its franchising requirements.
 - Would not fall under the definition of video programming distributor with respect to closed captioning.

The FCC's 1998 Closed Captioning Regulations



- **Exemptions**

- Locally Produce Programming: There is an exemption for locally produced and distributed non-news programming with no repeat value, which may apply to most public programming.
 - ✦ 47 C.F.R. § 79.1(d)(8)
- Educational Programming: Second, there is a specific exemption for educational programming.
 - ✦ 47 C.F.R. § 79.1(d)(13) (Instructional programming that is locally produced by public television stations for use in grades K–12 and post secondary schools.”). *Note – check Dept of Education Regulations*
- Governmental Programming:
 - ✦ There is no specific exemption for governmental programming,
 - ✦ Although depending upon content, some governmental programming may qualify for the exemptions stated above

The FCC's 1998 Closed Captioning Regulations



- **Exemptions**

- General Financial Exemption: In addition to the exemptions above, channels that generate less than \$3 million in revenues in the previous year are exempt from the close captioning requirements.
 - ✦ 47 C.F.R. § 79.1(d)(12). *See also* 47 C.F.R. § 79.1(d)(11) (video programming provider will not be required to expend any money to caption any video programming if the cost to do so would exceed 2% of the channel's gross revenue during the previous calendar year).
- Undue Burden Exemption: A station can petition the FCC for an exemption based on undue burden.
 - ✦ Allows a station to petition the FCC when providing closed captioning would be a significant difficulty or expense.
 - ✦ 49 C.F.R. § 79.1(d)(2).

Which Law Governs? Which Agency Governs?



- **The CVAA**
 - Does not apply to PEG channels at this point
- **The ADA**
 - Require local governments to use auxiliary aids, such as closed captioning
 - But no specific regulations mandating closed captioning.
- **Section 504**
 - Require recipients of federal funding to use auxiliary aids, such as closed captioning
 - But no specific regulations mandating closed captioning
- **The FCC has regulations on closed captioning**
 - Regulations do not apply to PEG channels

Which Law Governs? Which Agency Governs?



- **Option 1: To reduce the risk of a claim asserted under the ADA or Section 504, a PEG channel should plan on close captioning all programs.**
 - Meets the ADA's mandate and DOJ's instruction that local governments must also take appropriate steps to ensure that they can communicate effectively with people with disabilities, using auxiliary aids and services where necessary.
- **Option 2: Analyze your programming and channel operation to determine where they fit under the FCC's regulations.**
 - The general financial exemption will apply to most jurisdictions' PEG channels. Therefore, your station would be exempt from providing closed captioning under the FCC regulations.
 - May provide a defense in an ADA or Section 504 action
 - *However*, the law is unsettled, and it is difficult to say if such a defense would be successful.
 - Therefore, despite being exempt from the FCC regulations, a channel may chose to caption some programs, such as council or board meetings, because of their popularity and importance to the community.

**The 2010 Video Accessibility Act:
Meeting PEG and government website
obligations E-NATOA July 25, 2011**



**NANCY C. RODGERS, ESQ.
KISSINGER & FELLMAN, P.C.
DENVER, COLORADO
303-320-6100
NANCY@KANDF.COM**