Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] hereby submits these reply comments in response to initial comments on the *Notice of Proposed Rulemaking* ("*Notice*") to implement the Commercial Advertisement Loudness Mitigation Act or CALM Act.[2] As NAB's initial comments explain, the broadcast television industry is working to implement practical solutions to manage the perceived loudness of commercials and comply with the CALM Act.

Differences among commenters in the initial round are confined to matters of implementation. All agree with the general goal of the CALM Act. But, the commenters also note that some of the conclusions proposed in the *Notice* go beyond the scope of the Commission's statutory authority, interpret the CALM Act's safe harbor provision too narrowly, and overlook the importance of notice-and-comment rulemaking procedures when adopting successors to A/85.

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[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] Pub. L. No. 111-311, § 2(a) (Dec. 15, 2010) ("CALM Act").

Like Verizon, NAB urges the Commission to follow the same practical, restrained approach taken by Congress, which "struck a carefully balanced and specific compromise" to address the issue of excessively loud commercials without imposing unduly burdensome obligations on stations and multichannel video programming distributors ("MVPDs").[3] Below, we address some specific issues raised in the comments.

I. COMPLIANCE WITH ANNEX J OF A/85 SATISFIES THE GOALS OF THE CALM ACT.

NAB agrees with the National Cable & Telecommunications Association ("NCTA") that the relevant portion of the Advanced Television Systems Committee's A/85, for purposes of this proceeding, is Annex J, because it "contains all the courses of action necessary to perform effective loudness control of digital television commercial advertising."[4] As NAB and NCTA explained in initial comments, this approach is supported by the statute's mandate that the Commission incorporate A/85 into its rules "only insofar as such recommended practice concerns the transmission of commercial advertisements."[5]

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[3] Comments of Verizon on the CALM Act, filed July 8, 2011, at 3 ("Verizon").

[4] *See* Comments of the National Association of Broadcasters, filed July 8, 2011, at 3 ("NAB"); Comments of the National Cable & Telecommunications Association, filed July 8, 2011, at 3–4 ("NCTA"); Advanced Television Systems Committee's ("ATSC") A/85: "ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television," Annex J (May 25, 2011), available at http://www.atsc.org/cms/index.php/standards/recommended-practices/185-a84-techniques-for-establishing-and-maintaining-audio-loudness-for-digital-television.

[5] CALM Act, § 2(a).

To be clear, however, NAB disagrees with the position of some commenters that MVPDs are only responsible for the commercials they insert.[6] Rather, NAB agrees with Verizon that an MVPD is certainly responsible for all the commercials that it transmits *if* it alters the bit stream in any manner.[7] Re-encoding the audio or changing the metadata in any way alters the bit stream, regardless of whether the alteration is intended to be harmless.[8] DIRECTV, for example, explains how it increases the gain when transmitting broadcast programming for its legacy equipment.[9] In such circumstances, it is appropriate for the MVPD to remain responsible for ensuring compliance with the Commission's rules because its actions may affect both the actual and the perceived loudness of the commercials.[10]

II. COMMENTERS GENERALLY AGREE THAT THE SAFE HARBOR SHOULD APPLY AS LONG AS THE ENTITY FOLLOWS "COMMERCIALLY REASONABLE" PRACTICES.

NAB, the American Cable Association ("ACA"), AT&T, DIRECTV, NCTA, and Verizon all agree that safe harbor eligibility should be based on whether the entity

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[6] *See* Comments of the American Cable Association at 12–16 ("ACA"); Comments of DIRECTV, Inc., filed July 8, 2011, at 15–16 ("DIRECTV"); NCTA at 7, 13.

[7] *See* Comments of Verizon at 11, 13. *See also* Comments of Qualis Audio, filed July 5, 2011, at 3.

[8] *See* Comments of Harris Corporation and DTS, Inc., filed July 7, 2011, at 6–7 ("Even if the audio data is not intentionally modified by a broadcaster or MVPD between the time in which they receive and transmit audio content, metadata can still be unintentionally corrupted.") ("Harris/DTS").

[9] *See* DIRECTV at 17–18.

[10] Like stations, these MVPDs may rely on the Act's safe harbor provision as long as they install, utilize, and maintain the appropriate equipment and associated software in a commercially reasonable manner.

follows "commercially reasonable" practices.[11] As NAB explained in our initial comments, this approach is supported by the legislative history of the CALM Act, which states that the "FCC should presume that an entity is in compliance with its rule where the entity can demonstrate that it has properly installed and is properly maintaining all needed equipment."[12] Specifically, NAB urges the Commission to deem a station's practices to be "commercially reasonable" if it:

- obtains and readies for use equipment that measures the loudness of commercials transmitted to consumers consistent with ATSC A/85 Annex J;
- for commercials that it inserts, uses the equipment in the ordinary course of business to properly measure the loudness of the content and to ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer; and
- performs periodic calibration of its equipment to ensure that the equipment continues to function in a proper manner and repairs malfunctioning equipment.[13]

In addition, many of the commenters agree that entering into contractual agreements with upstream video programming providers to ensure compliance with A/85 Annex J is a commercially reasonable practice that should be covered under the safe harbor provision.[14] For example, NAB's initial comments urge the Commission to find a broadcaster eligible for the safe harbor for commercials contained in third-party programming as long as the station:

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[11] *See* NAB at 3–9; ACA at 26; AT&T at 9–11; DIRECTV at 12–13; NCTA at 9; Verizon at 15–16.

[12] H.R. Rep. No. 111-374, at 6 (2009); S. Rep. No. 11-340, at 4 (2010); *see also* NAB at 5–6.

[13] NAB at 7–8.

[14] *See* NAB at 3–9; ACA at 26; AT&T at 11–12; DIRECTV at 13; NCTA at 9–11.

- contractually requires that the third party make the measurements of the loudness of the commercials and the program content in a manner that is compliant with ATSC A/85 Annex J;

- contractually requires that the third party either communicate the measured values to the broadcaster or conform the audio to a uniform loudness value; and

- performs regular quality control measurements of the delivered audio to ensure that the third-party programming provider is meeting these contractual obligations.[15]

Only Harris/ DTS, providers of monitoring and logging equipment, seem to suggest that contractual agreements are insufficient and that, instead, every broadcaster and MVPD should be required to actively monitor, log, and adjust any video programming that it transmits.[16] NAB and Verizon explain that such a requirement would be unnecessarily burdensome and impractical and would far exceed the requirements of the text and legislative history of the CALM Act.[17]

III. THOSE COMMENTING ARE UNANIMOUS IN URGING THE COMMISSION TO FOLLOW NOTICE-AND-COMMENT RULEMAKING PROCEDURES WHEN ADOPTING SUCCESSORS TO A/85.

Those commenting on the subject are unanimous that the Commission must comply with notice-and-comment rulemaking procedures when adopting successors to A/85.[18] As NAB explains, the Administrative Procedure Act demands that notice-and-comment rulemaking procedures be followed under such circumstances, and NAB

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[15] NAB at 7.

[16] *See* Harris/DTS at 1–2, 6. NAB also disagrees with Hammett & Edison that equipment certification or verification is necessary. *See* Comments of Hammett & Edison, Inc., filed July 5, 2011, at 3-4. As the Notice properly recognizes, certification or verification of equipment would be administratively burdensome and time consuming. *See* Notice, ¶ 19.

[17] *See* NAB at 5-6; Verizon at 3-6.

[18] *See* NAB at 14–15; ACA at 16–17; AT&T at 14–15; DIRECTV at 16–17; NCTA at 19.

agrees with DIRECTV that, "just as this proceeding has provided an opportunity for the Commission to determine how best to apply the statutory mandate in different contexts, so too would a notice and comment period be an appropriate opportunity for similar consideration in the event of future revisions."[19] Accordingly, NAB urges the Commission to remove the phrase "and any successor thereto" in Sections 73.682(e)(1) and 76.607(a) of the proposed rules and to follow notice-and-comment rulemaking procedures before adopting any successor to A/85.

CONCLUSION

In sum, the commenters generally agree that the proposals set forth in the *Notice* upset the careful balance struck by Congress in adopting the CALM Act and take procedural shortcuts that are prohibited by the Administrative Procedure Act. To address these concerns, NAB requests that the Commission:

- confirm that television stations will be subject only to the requirements of Annex J in ATSC A/85;
- focus on commercially reasonable efforts when applying Annex J's requirements and the CALM Act's safe harbor compliance provision; and

[19] DIRECTV at 17.

- follow notice-and-comment rulemaking procedures when adopting successors to A/85.[20]

Respectfully submitted,

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[20] As described in our initial comments, NAB also urges the Commission to (1) adopt a blanket waiver for stations that are "small businesses," as defined by the Small Business Administration, or that are located in television markets 150 to 210; (2) apply a reasonable deadline for requesting waivers in advance, and (3) avoid any interpretation requiring stations that qualify for the safe harbor to demonstrate compliance on a per-commercial basis.