

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

In the Matter of )  
 )  
Closed Captioning of Video Programming ) CG Docket No. 05-231  
 )

ORDER SUSPENDING EFFECTIVE DATE

Adopted: September 8, 2009

Released: December 11, 2009

By the Commission:

I. INTRODUCTION

1. In this Order, we temporarily stay the effective date of 47 C.F.R. § 79.1(g)(3), relating to complaints about closed captioning of television programs. That amended rule, adopted in November 2008,<sup>1</sup> requires video programming distributors in certain circumstances to forward closed captioning complaints to third parties. Such a requirement, however, appears to conflict with certain provisions of the Communications Act (Act) that prohibit disclosure of personally identifiable information to third parties. To avoid placing video programming distributors in the untenable position of having to choose whether to comply with the closed captioning rule or with a conflicting statutory provision, we are temporarily suspending the effective date of the rule while we consider how to revise it.<sup>2</sup>

II. DISCUSSION

2. Amended section 79.1(g)(3), adopted in November 2008, but not yet effective, requires that:

Complaints sent to a video programming distributor regarding programming by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to paragraph (e)(9) of this section, shall be forwarded by the video programming distributor within seven (7) days of receipt to the entity responsible for closed captioning of the programming at issue. The video programming distributor must also notify the complainant and the Commission that it has forwarded the complaint.<sup>3</sup>

<sup>1</sup> *Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receivers*, CG Docket 05-231 and ET Docket 99-254, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674 (Nov. 7, 2008) (*November 2008 Order*). In the *November 2008 Order*, the Commission revised its rules governing closed captioning complaint procedures by substantially amending section 79.1(g)

<sup>2</sup> This rule is scheduled to become effective upon publication in the Federal Register of a notice that the Office of Management and Budget has approved under the Paperwork Reduction Act the information collection implemented by the rule. *Id.* at 16692, para. 52. Because such Federal Register publication has not yet occurred, the rule has not yet taken effect.

<sup>3</sup> *Id.* at 16693.

3. Section 631(c)(1) of the Act, however, appears to prohibit compliance with the rule.<sup>4</sup> Section 631(c)(1) provides that “a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.”<sup>5</sup> Similarly, section 338(i)(4) of the Act, which applies to satellite carriers, provides that “a satellite carrier shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.”<sup>6</sup>

4. Amended section 79.1(g)(3) appears to conflict with the prohibitions contained in sections 631(c) and 338(i) of the Act. In particular, cable or satellite operators would violate these provisions if they complied with section 79.1(g)(3) by forwarding complaints containing a subscriber’s personal information without first obtaining the subscriber’s consent to disclose personally identifiable information. Given this apparent conflict, we find good cause to suspend the effective date of section 79.1(g)(3) temporarily without prior notice and comment. Because allowing this rule to take effect would subject companies to conflicting legal obligations, we find that seeking comment on whether to suspend the rule would be impractical, unnecessary, and contrary to the public interest.<sup>7</sup>

5. The Commission intends to issue a notice of proposed rulemaking in the near future to seek comment on a revised rule for handling closed captioning complaints, to replace section 79.1(g)(3) as adopted in the *November 2008 Order*. In the interim, the other rules adopted in the *November 2008 Order* are not affected, and will take effect as scheduled.<sup>8</sup>

### III. CONCLUSION

6. We find good cause to suspend temporarily the effective date of section 79.1(g)(3), without prior notice and comment. Therefore, that rule will not take effect, pending completion of further rulemaking proceedings to determine how the closed captioning complaints at issue should be handled.

### IV. PROCEDURAL MATTERS

7. *Persons with Disabilities.* 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](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). This *Order Suspending Effective Date* also can be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb/dro/caption.html>.

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<sup>4</sup> On June 10, 2009, Time Warner Cable filed an *ex parte* letter in which it raised this issue and suggested that the Commission should provide further guidance on how to comply with the rule. See Letter from Christina Pauzé, Vice President, Federal Regulatory Affairs, Time Warner Cable, to Amelia Brown, FCC, dated June 10, 2009.

<sup>5</sup> 47 U.S.C. § 551(c)(1). There are some listed exceptions to this prohibition, none of which appears to apply to the situation at hand.

<sup>6</sup> 47 U.S.C. § 338(i)(4)(A). As with section 631, there are some listed exceptions, but they do not appear to apply.

<sup>7</sup> 5 U.S.C. § 553(b)(3)(B)(notice and comment not required when an agency for good cause finds “that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest”).

<sup>8</sup> This includes other subsections of amended 47 C.F.R. § 79.1(g). We further clarify that although we are suspending temporarily the effective date of amended section 79.1(g)(3), the previous version of section 79.1(g)(3) will not remain in effect. When the other rules adopted in the *November 2008 Order* take effect, the iteration of section 79.1(g)(3) in existence since prior to the *November 2008 Order* will be eliminated.

8. *Congressional Review Act.* The Commission will send a copy of this *Order Suspending Effective Date* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>9</sup>

**V. ORDERING CLAUSE**

9. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 613, this *Order Suspending Effective Date* IS ADOPTED. IT IS FURTHER ORDERED that this *Order Suspending Effective Date* SHALL BE EFFECTIVE UPON PUBLICATION IN THE FEDERAL REGISTER.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>9</sup> See 5 U.S.C. § 801(a)(1)(A).