

**STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART**

Re: *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 12-107, Second Report and Order and Second Further Notice of Proposed Rulemaking.

When disaster strikes, every American must have access to emergency information. For example, when a tornado warning is announced in my home state of Kansas and residents are told to take cover, that message must reach everyone in the twister's path. Mother Nature doesn't discriminate between those who can see and those who are visually impaired.

For this reason, I was pleased two years ago to support rules implementing the Twenty-First Century Communications and Video Accessibility Act (CVAA) by requiring video programmers and distributors to make emergency information accessible to those who are blind or visually impaired.¹ Specifically, we required that when programmers and distributors convey emergency information visually, such as through a crawl on the television screen, they must also use a secondary audio stream to convey that information.

I am glad that we are extending our rules today and ensuring that consumers will receive that secondary audio stream if they access a multichannel video programming distributor's (MVPD's) programming on a tablet, laptop, or similar device. This decision again makes sense. Whether you're using a 65-inch curved Samsung Smart TV or an iPad mini, your need for timely emergency information is the same.

Critically, this decision is consistent with the text of the CVAA. The statute's provisions regarding emergency information make no distinction between programming that is viewed on a traditional television and programming that is viewed on a "second screen," such as a tablet or smartphone. The obligation to make emergency information accessible to those who are blind or visually impaired still applies.

Moreover, it is important to note that the rules we adopt today do not cover video programming distributed over the Internet. Rather, they only pertain to programming distributed over an MVPD's network as part of an MVPD service. Applying our emergency information rules to over-the-top video programming would raise statutory and technical concerns that are not necessary to address here. Those difficult issues are left for another day.

Unfortunately, I am not able to support all of the rules the Commission adopts. Specifically, I must dissent from the requirement that manufacturers of televisions, set-top boxes, and other covered devices include in those apparatuses a mechanism for activating the secondary audio stream for emergency information that is reasonably comparable to a button, key, or icon.

I am doing so for one reason and one reason alone: The Commission does not have the legal authority to impose such a mandate. To be clear, I am not taking a position on the merits of such a requirement, and I am certain that those supporting it are well-intentioned. But at the end of the day, my foremost obligation as a Commissioner is to implement the laws as Congress has written them, not to

¹ *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 12-108, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 4871, 4971 (2013) (Statement of Commissioner Ajit Pai).

rewrite statutes to conform to my own policy preferences.

In the CVAA, Congress specifically addressed under what circumstances apparatus manufacturers and MVPDs must provide consumers with a mechanism that is reasonably comparable to a button, key, or icon for activating accessibility features. In section 204, it required that one set of devices include a mechanism for activating closed captioning and video description capability.² And in section 205, it required that another set of devices (namely, navigation devices) include a mechanism for activating closed captioning capability.³ But nowhere does the CVAA mention anything about devices including a mechanism for activating audible emergency information capability.⁴ The Commission simply pulls such a mandate out of thin air.

To be sure, this item purports to ground the requirement in section 203's language requiring an apparatus to "have the capability to decode and make available emergency information . . . in a manner that is accessible to individuals who are blind or visually impaired."⁵ But this claim withers upon further examination.

First, the Commission's position is inconsistent with the structure of the CVAA. That statute has two entire sections, 204 and 205, devoted to how blind and visually impaired individuals interact with devices, such as through on-screen text menus and guides as well as mechanisms for activating accessibility features⁶—provisions, incidentally, that the Commission concedes will make it easier for them to activate the secondary audio stream containing emergency information.⁷ But those provisions contain no mandate pertaining to emergency information. Section 203, by contrast, addresses the capabilities that devices must have, not the means of activating those capabilities. Indeed, the title of the section is "Closed Captioning Decoder and Video Description *Capability*."⁸ For example, section 203 requires devices to "have the capability to decode and make available the transmission and delivery of video description services." The means of activating that capability, however, is addressed in section 204. Given this critical distinction between the subject matter covered by section 203, on one hand, and sections 204 and 205, on the other, it strains credulity to suggest that Congress hid the mechanism for activating audible emergency capability in section 203.

Second, the Commission's position conflates the concept of an accessibility feature with a mechanism for activating that accessibility feature. Section 203 requires devices to "have the capability to decode and make available emergency information . . . in a manner that is accessible to individuals who are blind or visually impaired."⁹ And for purposes of the statute, emergency information that is presented on a

² See 47 U.S.C. § 303(aa)(3).

³ See 47 U.S.C. § 303(bb)(2).

⁴ See *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 & n.5 (D.C. Cir. 2013) (discussing the *expressio unius* canon of statutory construction, which is "a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative" (quoting BLACK'S LAW DICTIONARY 661 (9th ed. 2009))); *National Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 421 (D.C. Cir. 2009) (stating "the general presumption that omission is intentional where Congress has referred to something in one subsection but not in another").

⁵ See 47 U.S.C. § 303(U)(1)(c).

⁶ Pub. L. No. 111-260, §§ 204, 205, 124 Stat. 2751 (2010).

⁷ See *Second Report and Order and Second Further Notice of Proposed Rulemaking* at para. 30.

⁸ Pub. L. No. 111-260, § 203, 124 Stat. 2751 (2010) (emphasis added).

⁹ See 47 U.S.C. § 303(U)(1)(c).

secondary audio stream is made accessible to those who are blind or visually impaired because it can be heard. The CVAA, however, distinguishes between such an accessibility feature and the mechanism for activating it. Section 204, for example, states that “control of appropriate built-in apparatus functions” must be “*accessible and usable by individuals who are blind and visually impaired.*”¹⁰ This might mean, among other things, that you can control the device’s functions through voice commands. Section 204 then goes on to say that a device must include a mechanism reasonably comparable to a button, key, or icon, for activating closed captioning and video description features. But such a requirement would be superfluous if the mandate to make built-in functions “accessible” empowered the Commission to mandate a mechanism reasonably comparable to a button, key, or icon for activating those features. Again, the accessibility feature itself and the mechanism for activating the accessibility feature are analytically distinct under the statute.¹¹

Third, the Commission’s action today eviscerates the statutory distinction between the mechanism reasonably comparable to a button, key, or icon required by section 204 and the one mandated in section 205. Recall that the mechanism mandated by section 204 must activate closed captioning and video description capabilities. Therefore, requiring a mechanism reasonably comparable to a button, key, or icon to activate the secondary audio stream for emergency information for devices covered by section 204 is duplicative. This is because the mechanism that will activate video description capability will also activate the emergency information capability since both are found on the same secondary audio stream. However, today’s item will have an impact on the separate set of devices covered by section 205. This is because section 205 mandates that navigation devices have a mechanism reasonably comparable to a button, key, or icon for activating closed captioning capability, *but not video description*. Following today’s order, however, navigation devices will have to include a mechanism for activating the secondary audio stream for emergency information, and it just so happens that this same mechanism will also be able to activate the video description feature found on that same secondary audio stream. The Commission is thus effectively transforming the mandate found in section 205 to mirror that of section 204, notwithstanding the different language used in the two statutory provisions. This, in my view, is unlawful. The Commission may not slip through the back door what Congress prevented it from doing through the front door.

Turning from the rules to the Second Further Notice of Proposed Rulemaking, my view is once again mixed. I support asking for comment on whether the Commission should adopt rules governing how emergency information conveyed on secondary audio streams should be prioritized, and if so, how. I similarly welcome whether we should reconsider whether our definition of emergency information should include school closings and changes in school bus schedules. But I respectfully dissent when it comes to seeking comment on whether we should require MVPDs to supply customers with navigation devices that contain a mechanism reasonably comparable to a button, key, or icon for accessing emergency information on the secondary audio stream and if we should require MVPDs to provide such a mechanism when they permit subscribers to view linear programming on tablets, smartphones, and similar devices. For the reasons stated above, I cannot agree with the item’s claim that the Commission has the legal authority to implement such mandates.

¹⁰ 47 U.S.C. § 303(aa)(1) (emphasis added).

¹¹ To be sure, the Commission contends that Congress might not have been aware of the need for there to be a mechanism for activating emergency information capability because the Commission could have chosen to require emergency information to be audible on the primary audio stream. *Second Report and Order and Second Further Notice of Proposed Rulemaking* at para. 29. But the Commission marshals no evidence in support of its fanciful theory, and the idea of requiring emergency information to be audible on the primary audio stream, where it would interrupt programming, was, in fact, never seriously considered by the Commission.