

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

In the Matter of
Closed Captioning and Video Description
of Video Programming
Implementation of Section 305 of the
Telecommunications Act of 1996
Video Programming Accessibility
MM Docket No. 95-176

ORDER ON RECONSIDERATION

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By the Commission: Chairman Kennard issuing a separate statement.

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## I. INTRODUCTION

1. In this *Order on Reconsideration*, the Commission addresses nine petitions for reconsideration<sup>1</sup> of the *Report and Order*<sup>2</sup> in this proceeding implementing Section 713 of the Communications Act of 1934, as amended ("Communications Act").<sup>3</sup> Section 713, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996 ("1996 Act") and generally requires that video programming be closed captioned to ensure that it is accessible to persons with hearing disabilities.<sup>4</sup>

## II. BACKGROUND

2. Section 713 required the Commission to prescribe rules and implementation schedules for the closed captioning of video programming<sup>5</sup> regardless of the entity that provides the programming to consumers

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<sup>1</sup>Appendix A is a list of parties filing petitions for reconsideration, oppositions to petitions for reconsideration and replies to oppositions to petitions for reconsideration.

<sup>2</sup>*Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272 (1998) ("*Report and Order*").

<sup>3</sup>47 U.S.C. § 613.

<sup>4</sup>Pub. L. 104-104, 110 Stat. 56 (1996).

<sup>5</sup>Closed captioning is an assistive technology designed to provide access to television for persons with hearing disabilities. Closed captioning is similar to subtitles in that it displays the audio portion of a television signal as printed words on the television screen. To assist viewers with hearing disabilities, captions may also identify speakers, sound effects, music and laughter. Unlike subtitles, however, closed captioning is hidden as encoded data transmitted within the television signal. For a more complete description of closed captioning, see *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Report, 11 FCC Rcd 19214 (1996) ("*Report*") and *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Notice of Proposed Rulemaking, 12 FCC Rcd 1044 (1997) ("*Notice*").

or the category of programming.<sup>6</sup> Section 713 required the Commission to adopt rules including implementation schedules to ensure that: (1) video programming first published or exhibited after the effective date of such regulations ("new programming") is fully accessible through the provision of closed captions; and (2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations ("pre-rule programming") through the provision of closed captions.<sup>7</sup>

3. The statute directed the Commission to adopt exemptions from the general captioning requirements for programs, classes of programs, or services for which we determine that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.<sup>8</sup> In addition, under Section 713, a provider of video programming or the owner of any program carried by the provider is not obligated to supply closed captions if such action would be inconsistent with contracts in effect on February 8, 1996, the date of enactment of the 1996 Act.<sup>9</sup> The statute also states that a provider of video programming or program owner may petition the Commission for an exemption from closed captioning when these requirements would impose an undue burden, which is defined as significant difficulty or expense.<sup>10</sup> Section 713 also gave the Commission exclusive jurisdiction with respect to any complaint under this section.<sup>11</sup> To implement Section 713, the Commission added a new Part 79, Closed Captioning of Video Programming, to the rules, which became effective on January 1, 1998.<sup>12</sup>

4. Petitions for reconsideration of the closed captioning requirements seek changes to several aspects of the rules including: (a) the transition rules for new video programming; (b) the transition rules for pre-rule video programming; (c) the measurement of compliance with the closed captioning rules; (d) exemptions based on the economically burdensome standard; (e) exemptions based on the undue burden standard; and (f) enforcement and compliance mechanisms.

### III. DISCUSSION

#### A. Transition Rules for New Programming

5. Section 713(b) requires the Commission to ensure that "video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed

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<sup>6</sup>Notice 12 FCC Rcd 1048 ¶ 5; *Report and Order* 13 FCC Rcd 3276 ¶ 6.

<sup>7</sup>47 U.S.C. § 613(b) and (c).

<sup>8</sup>47 U.S.C. § 613(d)(1).

<sup>9</sup>47 U.S.C. § 613(d)(2).

<sup>10</sup>47 U.S.C. § 613(d)(3) and (e).

<sup>11</sup>47 U.S.C. § 613(h).

<sup>12</sup>For a more complete summary of the rules, see *Report and Order* 13 FCC Rcd 3280-82 ¶ 18. See also 47 C.F.R. Part 79.

captions, except as provided in subsection (d)."<sup>13</sup> We adopted an eight year transition period for the captioning of new nonexempt programming (i.e., that first published or exhibited on or after January 1, 1998, the effective date of the rules).<sup>14</sup> During this transition period, distributors will be required to increase over time the amount of closed captioned video programming they distribute until full accessibility of new programming is achieved. In the *Report and Order*, we defined "full accessibility" as the closed captioning of 95% of all new nonexempt programming. At that time, the Commission concluded that it was reasonable to define full accessibility at the end of the transition period as slightly less than 100% of all new nonexempt programming to accommodate unforeseen difficulties that could arise that might unintentionally result in video programming providers being unable to provide such new programming with captions.<sup>15</sup>

6. The eight year transition schedule phases in closed captioning for new nonexempt video programming period with benchmarks set at two year intervals.<sup>16</sup> Captioning is measured on a per channel, calendar quarter basis.<sup>17</sup> To ensure that video programming distributors have sufficient time to make the necessary arrangements to comply with the closed captioning requirements, the initial benchmark for captioning is set for the first calendar quarter of 2000.<sup>18</sup> As set forth in Section 79.1(b), the requirements for the closed captioning of new nonexempt programming are as follows:

(1) Requirements for new programming. Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2000, and December 31, 2001, video programming distributors shall provide at least 450 hours of captioned video programming, or if the video programming distributor provides less than 450 hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions;

(ii) Between January 1, 2002, and December 31, 2003, video programming distributors shall provide at least 900 hours of captioned video programming, or if the video programming distributor provides less than 900 hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions;

(iii) Between January 1, 2004, and December 31, 2005, video programming distributors shall provide at least an average of 1350 hours of captioned video programming, or if the video programming

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<sup>13</sup>47 U.S.C. § 613(b)(1). Section 713 (d) authorizes the Commission to exempt certain programming from these requirements by regulation. See 47 U.S.C. § 613(d).

<sup>14</sup>47 C.F.R. § 79.1(a)(5); *Report and Order* 13 FCC Rcd 3292-93 ¶¶ 41-42.

<sup>15</sup>*Id.* at 3293-94 ¶ 43.

<sup>16</sup>47 C.F.R. § 79.1(b)(1). See also *Report and Order* 13 FCC Rcd 3294 ¶¶ 44-45.

<sup>17</sup>47 C.F.R. § 79.1(e)(1).

<sup>18</sup>*Report and Order* 13 FCC Rcd 3294 ¶ 44.

distributor provides less than 1350 hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions; and

(iv) As of January 1, 2006, and thereafter, 95% of the programming distributor's new nonexempt video programming must be provided with captions.

In addition, to ensure that the level of captioning is generally increasing, the rules require video programming distributors to continue to provide closed captioning at substantially the same level as the average level of captioning that they provided during the first six months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.<sup>19</sup>

### *1. Definition of Full Accessibility*

7. NAD/CAN seeks reconsideration of the definition of full accessibility as the captioning of 95% of all new nonexempt programming.<sup>20</sup> NAD/CAN argues that the Commission lacks the authority to create a "5% de minimis exemption" under the 1996 Act,<sup>21</sup> that Congress already provided for exemptions under Section 713(d)<sup>22</sup> and that 95% does not constitute the full accessibility intended by Congress.<sup>23</sup> NAD/CAN also argues that the 5% allowance is unnecessary since captioning agencies are capable of handling last minute complications, production schedules can be adjusted to accommodate closed captioning problems<sup>24</sup> and undue burden exemptions are available for individual situations.<sup>25</sup> Moreover, NAD/CAN states that 5% cannot be considered de minimis, noting that a video programming provider would be permitted to not caption one hour of programming each day.<sup>26</sup> As an alternative to accommodate unforeseen difficulties, NAD/CAN proposes that video programming providers be required to file a statement with the Commission briefly explaining the

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<sup>19</sup>47 C.F.R. § 79.1(b)(3); *Report and Order 13* FCC Rcd 3294-95 ¶ 46. We stated that we will expect reasonable compliance with this provision and recognize that differences in programming schedules may result in the need to approximate previous levels. *Id.* at n. 122.

<sup>20</sup>NAD/CAN and others discussing this issue generally refer to this definition as a "de minimis exemption," although the Commission does not consider this to be an exemption. *See, e.g.*, NAD/CAN Petition at 2-7; ALTV Opposition at 3-4; NCTA Opposition at 3-8. SHHH, COR and University support NAD/CAN's reconsideration request. SHHH Petition at 2; COR Opposition at 5; University Opposition at 2-4.

<sup>21</sup>NAD/CAN Petition at 2-3.

<sup>22</sup>*Id.* at 4. *See also* University Opposition at 2-3.

<sup>23</sup>NAD/CAN Petition at 4.

<sup>24</sup>*Id.* at 4-5.

<sup>25</sup>NAD/CAN Reply at 3.

<sup>26</sup>NAD/CAN Petition at 5-6. COR claims that, coupled with the late night exemption, 21% of all programming is automatically exempt, a result that is inconsistent with Congressional intent. COR Opposition at 5.

difficulty shortly after (e.g., within seven days) the occasional uncaptioned program is distributed.<sup>27</sup> According to NAD/CAN, this would: (a) encourage providers to comply with the rules and strive for the intended full accessibility; (b) allow providers the flexibility to handle unforeseen problems; (c) still hold providers accountable for patterns of noncompliance by allowing the Commission to monitor and enforce compliance; and (d) provide an additional tool for consumers to use when filing complaints.<sup>28</sup>

8. A number of parties representing broadcasting and cable interests oppose NAD/CAN's request for reconsideration of this issue and state that the Commission has the authority to define full accessibility in this manner. NAB argues that the decision to adopt a 5% allowance is within the discretion Congress provided the Commission in Section 713 to implement the statute consistent with the objective of increasing captioning without imposing economic and undue burdens.<sup>29</sup> NAB and NCTA state that maintaining the 5% allowance will reduce video programming providers' compliance burden and eliminate the need for the Commission to consider undue burden petitions for particular programs (e.g., one-time events).<sup>30</sup> NCTA rejects NAD/CAN's contention that a truly *de minimis* allowance for unforeseen difficulties might be .05%, rather than 5%,<sup>31</sup> noting that CAN proposed an exemption for "no more than three percent of otherwise non-exempt programming" in earlier comments in this proceeding.<sup>32</sup> ALTV further asserts that NAD/CAN's allegation that video programming providers would have a daily caption-free hour has no basis since this estimate is based on a full program schedule and not on a percentage of new nonexempt programming.<sup>33</sup> It also believes that programmers will not use this allowance on a daily basis, but rather save it (i.e., "bank" it) for use as needed.<sup>34</sup> ALTV further states that the alternative reporting requirement suggested by NAD/CAN would impose a burden that the Commission sought to avoid, would require justification of every uncaptioned minute and would likely result in providers' loss of flexibility to choose programming as they would run captioned programs regardless of circumstances.<sup>35</sup>

9. On reconsideration, we conclude that our decision to consider the captioning of 95% of each channel's new nonexempt video programming to be fully accessible is not consistent with the statutory mandate

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<sup>27</sup>NAD/CAN Petition at 6; NAD/CAN Reply at 4. *See also* University Opposition at 6.

<sup>28</sup>NAD/CAN Petition at 6.

<sup>29</sup>NAB Opposition at 4-5. For example, NAB states that Congress could have required the Commission to add specific provisions to the rules and notes that the 1996 Act required the Commission to adopt particular radio ownership rules. *Id.* at 4. *See also* NCTA Opposition at 4-5; GSN Opposition at 9-10.

<sup>30</sup>NAB Opposition at 5; NCTA Opposition at 5-7.

<sup>31</sup>NAD/CAN Petition at 5 n.4.

<sup>32</sup>NCTA Opposition at 7 citing CAN Reply Comments on the *Notice of Proposed Rulemaking*, filed March 31, 1997, at 8.

<sup>33</sup>ALTV Opposition at 3-4.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* at 4. *See also* NAB Opposition at 5.

in Section 713 nor Congress' objective when it enacted Section 713. As stated in the legislative history, the goal is "to ensure that all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace."<sup>36</sup> We concur with NAD/CAN that a requirement for the captioning of less than 100% of new nonexempt programming will not meet this goal.<sup>37</sup> We also note that "full" is generally construed to mean all. Accordingly, we define full accessibility to be the captioning of 100% of all new nonexempt video programming and will require all such programming to be captioned at the end of the eight year transition period. We amend Section 79.1(b)(1) to require that, between January 1, 2000, and December 31, 2001, a video programming distributor must provide at least 450 hours of captioned video programming on each channel during each calendar quarter; between January 1, 2002, and December 31, 2003, a video programming distributor must provide at least 900 hours of captioned video programming on each channel during each calendar quarter; and between January 1, 2004, and December 31, 2005, a video programming distributor shall provide at least an average of 1350 hours of captioned video programming on each channel during each calendar quarter. Effective January 1, 2006, 100% of the programming distributor's new nonexempt video programming must be provided with captions. To the extent that the number of hours of new nonexempt programming on a channel during a calendar quarter is less than the benchmarks specified during the transition period, then 100% of all new nonexempt programming on that channel must be captioned.<sup>38</sup>

10. We recognize that there may be times when it will be difficult for a video programming provider to present 100% of its new nonexempt programming with captions. There are a variety of circumstances where captioning may be problematic. Such situations could include, but are not limited to, equipment failures, the inability to obtain captioning resources on short notice or the receipt of programming without the expected captions. We also are aware that local programming distributors, such as television stations, may need to show an occasional program without captions to satisfy communities' demands or may be unable to reformat the captions of captioned programming they edit consistent with community standards. We expect, however, that such situations will be limited, especially as captioned programming becomes the norm and captioning becomes as integral a part of program production as the video and audio. We intend to enforce this requirement in a manner that ensures that we do not penalize video programming distributors that are generally in compliance with the rules except for a de minimis amount of uncaptioned programming. In considering whether an alleged violation has occurred, we will consider any evidence provided by the video programming distributor in response to a complaint that demonstrates that the lack of captioning was de minimis and reasonable under the circumstances.

11. We reject the proposal by NAD/CAN to require video programming distributors to file with the Commission when they fail to caption programming due to unforeseen or emergency circumstances. We believe that such a reporting requirement would simply impose an administrative burden on video programming distributors and the Commission without serving to increase captioning since every occurrence of new nonexempt programming without captioning would require a submission. Alternatively, our enforcement of this provision will require us to evaluate only those situations where there has been a complaint and the matter

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<sup>36</sup>H.R. Report 104-458, 104th Cong., 2d Sess. ("Conference Report") at 183-184.

<sup>37</sup>NAD/CAN Petition at 2-6. *See also* University Opposition at 2-4; COR Opposition at 5.

<sup>38</sup>For example, if a channel has 400 hours of new nonexempt programming, then beginning with the first calendar quarter of 2000 all of that programming must include closed captioning.

cannot be resolved by the video programming distributor. This will minimize the administrative burdens on all affected parties.

## 2. *Transition Schedule*

12. SHHH states that an eight year transition period is too long, but, at a minimum, Section 79.1(b)(1) should be amended to set the first benchmark in 1999, rather than 2000.<sup>39</sup> Specifically, SHHH recommends that captioning requirements begin on January 1, 1999, with a minimum of 100 hours the first quarter of that year, 200 in the second quarter, 300 in the third quarter, and 400 in the fourth quarter.<sup>40</sup> SHHH claims that there is no provision for progressive implementation of closed captioning by video providers under the rules adopted by the Commission.<sup>41</sup> SHHH also states that it understands from captioning agencies that programmers are deferring implementation of captioning for the longest possible time under current rules.<sup>42</sup> By not requiring a more immediate phase in during the transition period, SHHH argues the pool of stenocaptioners will not grow, the price of captioning services will not decline and the market will not become more competitive as the Commission envisions.<sup>43</sup>

13. NAB, NCTA and Outdoor Life oppose SHHH's request and state that it would largely destroy the benefits of flexibility afforded video programmers under the Commission's rules.<sup>44</sup> NAB states that SHHH's hypothesis that programmers will wait until the last minute to add to their captioning capabilities has no basis and it cites the voluntary efforts of broadcasters to provide captioning prior to the 1996 Act to demonstrate that there is no need for additional benchmarks.<sup>45</sup> NCTA and Outdoor Life assert that the level of captioning required by the rules cannot be achieved overnight and the Commission's transition schedule provides the time needed for video programming distributors to determine the availability of programming with closed captioning and to make arrangements to ensure that the required benchmarks are met in 2000.<sup>46</sup> Further, NAB believes that under SHHH's approach, there will be requests for waivers if the captioners do not become available on the precise schedule it envisions.<sup>47</sup>

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<sup>39</sup>SHHH Petition at 2-3. This request is supported by COR. COR Opposition at 4.

<sup>40</sup>SHHH Petition at 3.

<sup>41</sup>*Id.* at 3-4.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 4-5.

<sup>44</sup>NAB Opposition at 3; NCTA Opposition at 20; Outdoor Life Opposition at 2-3.

<sup>45</sup>NAB Reply at 3.

<sup>46</sup>NCTA Opposition at 20-21; Outdoor Life Opposition at 3. *See also* NAB Opposition at 3-4.

<sup>47</sup>NAB Opposition at 4.



14. Outdoor Life asks the Commission to modify the transition schedule to specify the benchmarks in terms of percentages of new nonexempt programming instead of hours of such programming.<sup>48</sup> Outdoor Life states that the Commission's approach using hours would require additional captioning for many networks, especially those that rely heavily on pre-rule programming that will have to caption virtually all of their programming at the first benchmark.<sup>49</sup> For example, A&E explains that regardless of whether a network airs 500 hours of new nonexempt programming or 1500 hours of such programming, the first benchmark will require the captioning of the same amount of programming.<sup>50</sup> GSN states that result will discourage the production of new programming by new networks.<sup>51</sup> Outdoor Life also claims that, while this rule change will affect all programmers, it will have a disproportional effect on new networks because of their limited financial resources.<sup>52</sup> As an alternative to using percentage benchmarks throughout the transition period, Lifetime proposes that the Commission adopt an initial compliance benchmark that requires the captioning of a minimum of 25% of a channel's new nonexempt programming, but not less than 100 hours of captioned programming per quarter, with subsequent benchmarks increased proportionally to provide a reasonable transition for programmers that offer a mix of new and pre-rule programming.<sup>53</sup>

15. We reaffirm the transition schedule for new programming adopted in the *Report and Order*. The transition schedule was established after careful consideration of the needs of persons with hearing disabilities to have access to an increasing amount of programming with captions and the efforts that need to be undertaken by the video programming industries to implement any captioning requirements we adopted. We reject the proposal to add benchmarks for 1999 because we believe our decision that video programming providers needed time to determine the availability of programming with closed captioning and to make whatever arrangements are necessary to ensure that they are able to provide programming with closed captioning was correct.<sup>54</sup> Video programming providers will not have had an opportunity to prepare for an additional requirement and it might interfere with their ability to comply with the existing transition framework. We further disagree with SHHH's contention that the transition schedule does not provide for progressive

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<sup>48</sup>Outdoor Life Petition at 10-11. A&E, Lifetime, GSN and NCTA concur with this request. See A&E Opposition at 14-16; Lifetime Opposition at 4-7; GSN Opposition at 4; NCTA Opposition at 21. In the *Notice*, the Commission proposed a percentage benchmark approach that would require the captioning of 25% of new nonexempt at the first benchmark, 50% at the second benchmark and 75% at the third benchmark. See *Notice* 12 FCC Rcd 1048-49, 1066 ¶¶ 6, 41.

<sup>49</sup>Outdoor Life Petition at 10. NCTA and Lifetime contend that this approach denies such networks the benefit of the eight year transition period. NCTA Opposition at 21; Lifetime Opposition at 5, 7.

<sup>50</sup>A&E Opposition at 15-16. A similar analysis is provided by Lifetime. Lifetime Opposition at 5-6. In addition, Outdoor Life states that a network with a 75%/25% mix of new and pre-rule programming will have to caption an average additional 218 hours of new programming between 2000 and 2005 under the absolute hours approach compared to the proposed percentage approach. Outdoor Life Petition at 10.

<sup>51</sup>GSN Opposition at 4.

<sup>52</sup>Outdoor Life Petition at 10-11. See also GSN Opposition at 4.

<sup>53</sup>Lifetime Opposition at 6-7.

<sup>54</sup>*Report and Order* 13 FCC Rcd 3294 ¶ 44.

implementation and note that the transition rules require an increasing amount of captioning over the eight year phase-in period. The record does not reflect "industry sources" indicating that programmers are delaying implementation. We observe that, while no set amount of captioning is required between 1998 and 2000, effective January 1, 1998, we require providers to maintain captioning at substantially the same level as the average level of captioning that they provided during the first six months of 1997. There is a captioning requirement during the first two years of the transition, albeit not a specific benchmark. Programming producers providing new programming have an incentive to caption that programming in order to preserve any repeat value it may have in the future.

16. While the Commission initially proposed transition benchmarks in terms of percentage of total programming, after consideration we adopted benchmarks specified in hours. We reaffirm this decision. We decided to specify the transition benchmarks in hours to more fairly distribute the obligation to provide closed captioned programming among video programming providers. We continue to believe this approach provides a fair balance between the interests of persons with hearing disabilities and video programming interests. We provided video programming providers sufficient time (i.e., two years) before the benchmark requirements to prepare for compliance, we placed the same burden on all providers until all their new nonexempt programming is captioned, and we ensured that persons with hearing disabilities benefitted because the total amount of captioning across channels will be higher early on in the eight year transition period.

### 3. *Maintain Current Levels of Captioning*

17. ALTV requests that the Commission eliminate or relax the requirement that video programming providers continue to provide substantially the same amount of captioning as they offered during the first six months of 1997.<sup>55</sup> Specifically, with respect to broadcast television stations, ALTV asserts that stations will make programming decisions based on the availability of captioning rather than audience demand because of this "no decrease" provision of the rules, which it argues is based on the faulty premise that programming changes little from year to year.<sup>56</sup> ALTV contends that this requirement especially limits the flexibility of unaffiliated stations to provide responsive and competitive service and that stations which have provided the most captioning in the past will lose the most discretion with respect to their programming choices.<sup>57</sup> ALTV further argues that since all stations will be required to achieve the requisite benchmark levels of captioning, that the Commission has deemed adequate to serve the public interest, no station should be required to provide more captioning.<sup>58</sup> NAD/CAN urges the Commission to reject ALTV's request, noting that this requirement is consistent with Congress' intent to increase, not decrease, captioning.<sup>59</sup> NAD/CAN also disputes ALTV's contention that this requirement limits stations' flexibility, as nothing in the rules specifies

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<sup>55</sup>ALTV Petition at 5.

<sup>56</sup>*Id.* ALTV contends that this requirement is especially problematic for stations not affiliated with a network because their schedules include more syndicated programming with, presumably, less captioning. *Id.*

<sup>57</sup>*Id.* at 6.

<sup>58</sup>*Id.*

<sup>59</sup>NAD/CAN Opposition at 11.

which programs must be captioned, and questions why stations would not want to caption programs that are most responsive to community demand.<sup>60</sup>

18. We will retain the requirement that video programming providers continue to provide captioned video programming at substantially the same level as the average level of captioning that they provided during the first six months of 1997. We think it important to generally maintain the level of captioning to ensure that captioning provided to satisfy our transition requirements, and eventually our permanent requirements, represents an increase in captioning as envisioned by Congress when enacting Section 713. We do not believe that Congress intended for persons with hearing disabilities to have access to less closed captioned programming following enactment of Section 713. The premise of the terms "substantially the same level" ensures flexibility in the application of the requirement. We clarify that we did not intend for the exact same programming or the programming distributed during a specific time period necessarily continue to be captioned, but based the requirement on the amount of captioning. A video programming distributor could comply with this requirement to maintain the level (amount) of captioned programming by captioning programming distributed at a different time of day (e.g., while this year's syndicated show between 9-10 p.m. is not captioned as last year's was, the program now shown between 4-5 p.m. is captioned when its predecessor was not). In this way, programming providers have flexibility to select the actual programming used to satisfy this requirement.

19. We stated that we expected "reasonable compliance with the provision and recognize that differences in programming schedule may result in the need to approximate previous levels."<sup>61</sup> This statement recognized that video programming providers, especially television stations, purchase syndicated programming or movie packages that change from year to year. While we expect video programming providers that have demonstrated an ability to caption their programming to continue to do so, this rule is intended to be flexible to accommodate those situations where the change in actual programs results in a slight difference in the amount of captioning.

## **B. Transition Rules for Pre-rule Programming**

20. Section 713 requires that we maximize the accessibility of video programming first published or exhibited prior to the effective date of our rules through the provision of closed captions.<sup>62</sup> Programming published or exhibited prior to January 1, 1998, is defined as pre-rule under our closed captioning rules.<sup>63</sup> In the *Report and Order*, we stated that the relevant date of first exhibition or publication of a program is its first exhibition or publication, by any distribution method.<sup>64</sup> Because final standards for high definition and digital television ("DTV") receivers did not yet exist, making it difficult for entities preparing to broadcast or transmit

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<sup>60</sup>*Id.* at 10-11. ALTV explains in reply that stations are not in a position to add captioning to their syndicated programming. ALTV Reply at 1-2.

<sup>61</sup>*Report and Order* 13 FCC Rcd 3294-95 n.122.

<sup>62</sup>47 U.S.C. § 613(b)(2).

<sup>63</sup>47 C.F.R. § 79.1(a)(6)(i).

<sup>64</sup>*Report and Order* 13 FCC Rcd 3200-01 ¶ 60.

to such receivers to format closed caption content for these uses, we defined material prepared for such transmission as "pre-rule" until the time the necessary decoder standard rules have been adopted by the Commission and are effective.<sup>65</sup>

21. We established a ten year transition period for captioning of pre-rule programming, and required that 75% of all pre-rule nonexempt programming delivered to consumers during the first quarter of 2008 and thereafter must be captioned.<sup>66</sup> The requirement for pre-rule nonexempt programming applies to such programming that is actually aired by distributors.<sup>67</sup> As with new programming, compliance with the 75% requirement for pre-rule programming as of 2008 will be measured channel-by-channel, averaged over each calendar quarter.<sup>68</sup> Unlike the transition period for new programming, this transition period does not have interim benchmarks, although we stated that we expect distributors to make reasonable efforts to increase incrementally the amount of captioned older programming prior to the pre-rule captioning deadline.<sup>69</sup> We indicated that we would monitor distributors' efforts to increase the amount of captioning of pre-rule programs to determine whether channels are progressing toward the 75% requirement. If sufficient progress is not evident, we indicated that we may institute specific percentage requirements for the remaining years of the transition period. We also stated that we plan to reevaluate the 75% requirement after four years to determine whether it is appropriate or whether a different percentage should be required.<sup>70</sup>

### *1. Definition of Pre-rule Programming*

22. ALTV seeks clarification of the definition of pre-rule programming.<sup>71</sup> It believes that the Commission should specifically indicate that "exhibition or publication, by any distribution means" includes theatrical or home video release of movies.<sup>72</sup> ALTV states that this clarification is fully consistent with the *Report and Order* and is practical in terms of application of the rule.<sup>73</sup> ALTV also seeks to clarify that

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<sup>65</sup>47 C.F.R. § 79.1(a)(6)(ii); *Report and Order* 13 FCC Rcd 3300-01 ¶ 60. The Commission also stated that we will reexamine issues relating to digital television, technological changes that affect the closed captioning process and other matters relating to technological change that may affect our captioning requirements in a subsequent proceeding. *Report and Order* 13 FCC Rcd 3384-86 ¶¶ 247-251.

<sup>66</sup>47 C.F.R. § 79.1(b)(2); *Report and Order* 13 FCC Rcd 3301-02 ¶ 61-63.

<sup>67</sup>*Id.* at 3301 ¶ 61.

<sup>68</sup>47 C.F.R. § 79.1(e)(1).

<sup>69</sup>*Report and Order* 13 FCC Rcd 3301 ¶ 64.

<sup>70</sup>*Id.*

<sup>71</sup>ALTV Petition at 10-11. A&E supports this ALTV's request. A&E Opposition at 9.

<sup>72</sup>ALTV Petition at 11.

<sup>73</sup>*Id.* In addition, ALTV asserts that only a relatively limited number of movies released right before January 1998, but not exhibited or distributed on video until after January 1998 will be affected and that by 2008 the number of such movies successful enough to be in use by local television stations is likely to be negligible. *Id.* See also ALTV Reply (continued...)

"published" for purposes of determining pre-rule programming includes programming (including series) offered or sold in syndication before January 1, 1998, even if some episodes were produced after that date.<sup>74</sup> It argues that otherwise stations will have to treat episodes of the same programming differently.<sup>75</sup> ALTV claims that this will cause confusion for stations trying to comply with the rules, as well as for monitoring compliance.<sup>76</sup> In support of this interpretation, ALTV states that "publication" is defined in copyright law as the distribution of a program as well as the offering of a program for exhibition (i.e., syndication).<sup>77</sup>

23. NAD/CAN states that the Commission should not adopt the clarifications sought by ALTV.<sup>78</sup> NAD/CAN states that to tie exhibition or publication to any distribution method other than through television transmission is inconsistent with the plain meaning of the 1996 Act.<sup>79</sup> It also argues that "publish" should be considered synonymous with "exhibit,"<sup>80</sup> and should be interpreted consistent with the Webster's dictionary definition of "to place before the public."<sup>81</sup> Based on this definition, NAD/CAN also states that ALTV's proposal to define "publication" to include as pre-rule programming any program that was distributed or offered for distribution (i.e., programs or series offered in syndication) prior to January 1, 1998, should be rejected.<sup>82</sup>

24. In the *Report and Order*, we stated that for purposes of defining pre-rule programming "the relevant date of first exhibition or publication of a program is its first exhibition or publication, by any distribution method."<sup>83</sup> We intended this definition to mean theatrical and home video release as well as television distribution. Nothing in the statute or its legislative history defines "publish" or "exhibit" solely in terms of distribution on television and the requested clarification is consistent with the Commission's intent

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<sup>73</sup>(...continued)  
at 4.

<sup>74</sup>ALTV Petition at 10.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 10-11.

<sup>77</sup>*Id.* at 10 citing Section 101 of the Copyright Act, 17 U.S.C. § 101 which defines publication as "[T]he distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." The definition also states that "[T]he offering to distribute copies . . . to a group of persons for purposes of further distribution, public performance, or public display, constitute publication."

<sup>78</sup>NAD/CAN Opposition at 12.

<sup>79</sup>*Id.*

<sup>80</sup>In reply, ALTV contends that Congress would not have used both terms if this were the case. ALTV Reply at 3-4.

<sup>81</sup>NAD/CAN Opposition at 12.

<sup>82</sup>*Id.*

<sup>83</sup>*Report and Order* 13 FCC Rcd 3300-01 ¶ 60.

when we decided to consider any distribution means the applicable criterion. Indeed, such distribution clearly satisfies the criterion of "put before the public" cited by NAD/CAN as a definition of "publish."

25. It would be inconsistent with the statutory language, however, to include in the definition of pre-rule programming all episodes offered in syndication when some were first exhibited or published after January 1, 1998, as requested by ALTV. Programming first produced on or after January 1, 1998, even if it were presold to distributors, does not satisfy the condition of being published or exhibited before the effective date of the rules. Section 713 is explicit on this distinction between new and pre-rule programming. To modify the pre-rule definition would contravene Section 713 and its provisions that are independent of any definitions used in other federal laws, such as copyright. We recognize that some episodes of existing television series will be classified as pre-rule and others post-rule, although the record does not indicate this to be a broad problem. We think the law requires that owners of programming be aware when the individual programs in a series were first exhibited or published to determine the applicability of the captioning requirements.

## 2. *DTV as Pre-rule Programming*

26. NAD/CAN seeks reconsideration of the decision to classify DTV transmissions as pre-rule programming until the Commission mandates that television receivers be equipped with circuitry that can display closed captioned DTV transmissions.<sup>84</sup> NAD/CAN observes that interim specifications for advanced television closed captioning have already been adopted.<sup>85</sup> In addition, it states that television programs will be transmitted in both analog and digital formats for many years and, consistent with Congressional intent to ensure accessibility to persons with hearing disabilities, closed captioning should be available at the earliest stages of digital transmission.<sup>86</sup> Specifically, NAD/CAN seeks clarification that the Commission plans to approve the currently proposed standards for digital television and the extent to which programs exhibited in both analog and digital format must contain captioning.

27. In response to this request for clarification, we emphasize that the distinction created in the rules,<sup>87</sup> defining certain types of programming as "pre-rule programming" until standards relating to the preparation of digital programming for display on digital receivers are complete, is intended to be narrow in scope. It has nothing to do with programming that is transmitted in a digital format for display on conventional analog television receivers.<sup>88</sup> Thus, for example, programming digitally distributed directly to subscribers over

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<sup>84</sup>NAD/CAN Petition at 24. ALTV comments that the Commission's decision to reexamine issues relating to DTV is correct. It believes that DTV matters should be subject to further study and that today's rules should not be applied by default. ALTV Petition at 14.

<sup>85</sup>NAD/CAN Petition at 24.

<sup>86</sup>*Id.* at 24-25.

<sup>87</sup>Section 79.1(a)(6)(ii) defines "pre-rule programming to include: "[V]ideo programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission and exhibition prior to the date on which such television receiver must, by Commission rule, be equipped with built-in decoder circuitry designed to display closed-captioned digital television transmissions."

<sup>88</sup>Under Section 303(u) of the Communications Act, apparatus designed to receive television pictures broadcast  
(continued...)

direct broadcast satellite ("DBS"), cable or broadcast facilities for final display on analog/NTSC receivers is not treated as "pre-rule" programming by virtue of this provision. It seems likely that almost all of the programming content that becomes available in the early years of the transition to digital video reception will also be available in analog form and thus captions will need to be created on at least some versions of the programming in accordance with the schedule for new programming. This narrow exemption means only that the version of the program prepared or formatted "for display on television receivers equipped for display of digital transmission" prior to the applicable date will fall within the pre-rule category and be subject to captioning in accordance with the pre-rule schedule. With this clarification, we believe the existing rule properly accounts for the brief period of time during which the standards process can be completed.

### 3. *Transition Benchmarks for Pre-rule Programming*

28. NAD/CAN requests that the Commission reverse its decision not to require benchmarks during the transition period for pre-rule programming.<sup>89</sup> NAD/CAN argues that the Commission should recognize that the failure of market forces to respond to the demand for increased captioning led Congress to require video programmers to maximize access to such programming through legislation.<sup>90</sup> While the Commission states that it will monitor video programming distributors' efforts to increase the percentages of captioning of pre-rule programs, NAD/CAN is concerned that, without obligations that providers monitor and pace themselves, compliance with this rule will be negligible over the next ten years.<sup>91</sup> In conjunction with this request, NAD/CAN also asks that providers be required to maintain public records tracking compliance with pre-rule benchmarks and that the Commission clarify the extent consumers have the right to complain about the failure to caption pre-rule programming during the transition period.<sup>92</sup>

29. NCTA supports the Commission's decision to rely on market forces to increase the amount of captioned pre-rule programming and to monitor video programming providers efforts in this regard.<sup>93</sup> It contends that this approach is consistent with Congressional intent that captioning requirements for pre-rule programming not interfere with the ability to distribute that programming.<sup>94</sup> According to NCTA, experience indicates that the amount of programming over ten years old that is distributed is reduced over time and that

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<sup>88</sup>(...continued)

simultaneously with sound with a television picture size of 13 inches or greater are required to have built-in decoder circuitry designed to display closed captioning. 47 U.S.C. § 303(u).

<sup>89</sup>NAD/CAN Petition at 23. COR, SHHH and University support this proposal. COR Opposition at 4; SHHH Petition at 2; University Opposition at 6.

<sup>90</sup>NAD/CAN Petition at 23.

<sup>91</sup>*Id.*

<sup>92</sup>*Id.* at 23-24.

<sup>93</sup>NCTA Opposition at 19-20.

<sup>94</sup>*Id.* at 19 referencing H.R. Report 104-204, 104th Cong., 1st Sess. ("House Report") at 114.

the amount of classic programming that is captioned has increased, even in the absence of captioning requirements.<sup>95</sup>

30. In the *Report and Order*, we stated that we would monitor the implementation of closed captioning for pre-rule programming and conduct a review of the industry's progress in four years.<sup>96</sup> We reiterate our intent to conduct such a review. Upon further reflection, we also conclude that, in order to comply with the statutory mandate to ensure that video programming providers or owners maximize the accessibility of pre-rule video programming through closed captioning, it is necessary to establish at least one benchmark for pre-rule programming. We believe that the statutory language (i.e., full accessibility versus maximum accessibility) allows us to have different requirements for new and pre-rule programming and different phase-in schedules for new and pre-rule programming. We believe that our decision to establish a ten year transition period for pre-rule programming and to establish a requirement that 75% of pre-rule nonexempt programming be captioned after the end of the transition period is consistent with the statutory mandate. We now are persuaded, however, that we would not fulfill the statutory mandate to maximize the accessibility of pre-rule programming unless we establish some captioning requirement during the transition period. We note that the statute requires that the rules "include an appropriate schedule of deadlines for the provision of closed captioning."<sup>97</sup> A transition benchmark will ensure that an increasing amount of pre-rule programming includes captions consistent with the statutory requirement to maximize the captioning of pre-rule programming. We believe that the adoption of at least one transition benchmark for pre-rule programming is needed to encourage video programming providers to begin the process of captioning such programming and foster the development of captioning resources that will be needed to ensure that programming is captioned in the future. Considering the length of the transition period for pre-rule, a benchmark requirement is necessary to meet the statutory mandate that "video programming providers or owners maximize the accessibility" of pre-rule programming.<sup>98</sup>

31. We establish one benchmark requirement for the closed captioning of pre-rule programming half way through the ten year transition period. However, in recognition of the economic and logistical concerns about captioning large amounts of pre-existing programming,<sup>99</sup> and in recognition that almost one year of the ten year transition has passed, we set this benchmark at less than half of the 75% final requirement for closed captioning of pre-rule programming. We will amend the rules to require at least 30% of a channel's pre-rule programming be provided with captions beginning on January 1, 2003.<sup>100</sup> To the extent that the amount of pre-rule programming captioned to comply with the requirement that a video programming distributor provide captions at substantially the same level as the average level of captioning that it provided during the first six months of 1997 exceeds this 30% benchmark, a distributor must continue to caption such

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<sup>95</sup>NCTA Opposition at 20.

<sup>96</sup>*Report and Order* 13 FCC Rcd 3302 ¶ 44.

<sup>97</sup>47 U.S.C § 613(c).

<sup>98</sup>47 U.S.C. § 613(b)(2).

<sup>99</sup>*Report and Order* 13 FCC Rcd 3302 ¶ 63.

<sup>100</sup>Pursuant to Section 79.1(e)(5), we permit video programming distributors to count any pre-rule exempt programming, except that distributed during late night hours, to count towards compliance with this requirement. 47 C.F.R. § 79.1(e)(5); *Report and Order* 13 FCC Rcd 3310 ¶ 82.



programming at the existing level consistent with our prior decision. We believe that this interim benchmark requirement will not be unduly burdensome as we generally expected video programming providers to increase the amount of captioning of pre-rule programming during the transition period.<sup>101</sup>

### C. Measuring Compliance with the Rules -- ENR

32. The Commission established several rules and procedures for measuring compliance with the closed captioning requirements adopted in the *Report and Order*.<sup>102</sup> In particular, we determined that we would allow video programmers to count, as part of compliance with the closed captioning rules, any captions created using the electronic newsroom ("ENR") methodology.<sup>103</sup> ENR is commonly used for live programming, especially newscasts, and creates captions from a news script computer or teleprompter. Only material that is scripted can be captioned using this technique and, thus, within a program live field reports, breaking news, sports and weather may remain uncaptioned.<sup>104</sup>

33. NAD/CAN seeks reconsideration of the Commission's decision to count programming captioned using ENR when measuring compliance with the rules.<sup>105</sup> NAD/CAN argues that ENR does not provide "full access" as Congress intended because it cannot provide captioning of live interviews, field reports, sports and weather updates and other late-breaking news that is not pre-scripted.<sup>106</sup> It asserts that the Commission's urging programmers to script additional portions of their live newscasts may be insufficient to change programmers' practices and to improve upon the shortcomings of ENR.<sup>107</sup> NAD/CAN notes that the Commission based its decision not to require real-time captioning of live newscasts on concerns regarding the costs of real-time captioning and the availability of stenocaptioners or technology to provide live captioning from remote locations.<sup>108</sup> It contends that without a real-time captioning requirement, however, an increase in the number of stenocaptioners and a decrease in the cost of captioning is unlikely to occur.<sup>109</sup> NAD/CAN requests that the Commission require real-time captioning for live news and public affairs after January 1, 2000.<sup>110</sup> It states that with such a mandate, real-time captioning should become more feasible for

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<sup>101</sup>*Report and Order* 13 FCC Rcd 3309-13 ¶ 64.

<sup>102</sup>47 C.F.R. § 79.1(e); *Report and Order* 13 FCC Rcd 3309-13 ¶¶ 79-86.

<sup>103</sup>47 C.F.R. § 79.1(e)(3); *Report and Order* 13 FCC Rcd 3311-12 ¶ 84.

<sup>104</sup>*Report* 11 FCC Rcd 19231,19235 ¶¶ 44, 51.

<sup>105</sup>NAD/CAN Petition at 14-17.

<sup>106</sup>*Id.* at 15.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* at 16 citing *Report and Order* 13 FCC Rcd 3311-12 ¶ 84.

<sup>109</sup>NAD/CAN Petition at 16.

<sup>110</sup>*Id.*

those stations able to handle the costs of providing this type of captioning.<sup>111</sup> Until the Commission requires real-time captioning, NAD/CAN further proposes that the Commission require 90% of each live news program be captioned.<sup>112</sup> NAD/CAN also urges the Commission to require stations currently using real-time captioning to continue to use this methodology and not substitute ENR.<sup>113</sup>

34. NAB, RTNDA and NCTA state that the Commission's decision to permit the use of ENR balanced the disadvantages of ENR against the high cost of live captioning at least initially.<sup>114</sup> ALTV opposes NAD/CAN's proposal, noting that the Commission recently rejected a real-time captioning requirement and indicated that it would review the matter as the closed captioning requirements were implemented.<sup>115</sup> NAB asserts that if the Commission requires the use of real-time captioning far more local stations, particularly in smaller markets, will find the cost of captioning burdensome and will either seek waivers or reduce the amount of local news.<sup>116</sup> NCTA similarly claims that the costs of real-time captioning would overwhelm budgets for cable network news programming and less, not more, captioning will result in resources being diverted from newsgathering functions.<sup>117</sup> ALTV contends that real-time captioning requirements will impose additional start-up costs on the many local television stations that are in the process of initiating local newscasts, regardless of the size of their markets or their budgets, and they should not have to be saddled with these additional costs especially at the time when they are faced with the considerable cost of constructing new digital transmission facilities.<sup>118</sup> NAB contends that captioning of substantial portions of local newscasts using ENR is preferable to waiving the requirements leaving news programs uncaptioned.<sup>119</sup> Alternatively, according to NAB, stations might simply reduce the amount of local news, a result contrary to Congress' directive that the Commission captioning rules not result in a loss of programming choices.<sup>120</sup> NAB states that NAD/CAN's

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<sup>111</sup>*Id.* NAD/CAN state that stations with smaller budgets can petition the Commission to continue to use ENR for their news and public affairs programming. *Id.* at fn. 16.

<sup>112</sup>*Id.* COR supports NAD/CAN's proposal regarding real-time captioning requirements. COR Opposition at 6.

<sup>113</sup>NAD/CAN Petition at 16-17. *See also* Letter from Carole A. Trapani, Deaf Services Director, Center for Independent Living, Inc., to Meryl Icove, Director, Disabilities Issues Task Force, Federal Communications Commission (February 16, 1998).

<sup>114</sup>NAB Opposition at 9; RTNDA Opposition at 6-7; NCTA Opposition at 13.

<sup>115</sup>ALTV Opposition at 4. In ALTV's view, such a review would be premature. *Id.*

<sup>116</sup>NAB Opposition at 9. *See also* RTNDA Opposition at 4-5. In its reply, NAD/CAN alternatively suggests that real-time captioning be required in larger markets that can afford it and that stations unable to meet such expenses be permitted to caption using ENR. NAD/CAN Reply at 8-9.

<sup>117</sup>NCTA Opposition at 13.

<sup>118</sup>ALTV Opposition at 5.

<sup>119</sup>NAB Opposition at 9-10. RTNDA observes that programming elements not captured by ENR can be communicated in other ways, such as graphics or crawls. RTNDA Opposition at 5.

<sup>120</sup>NAB Opposition at 10 citing Conference Report at 183, "the Commission shall balance the need for closed  
(continued...)

proposal should be rejected since it would prevent stations from experimenting with new captioning technologies, such as voice recognition, that may become viable options.<sup>121</sup> RTNDA also states that a requirement that stations continue to use real-time captioning does not take into account the changes in the availability and possible loss of sponsorship for such captioning.<sup>122</sup>

35. On reconsideration, we find that we should strike a different balance with regard to the use of ENR captioning. As we recognized in the *Report and Order*, ENR captioning is not ideal. It can only be used to convert the dialogue included on a teleprompter script into captions. As many live newscasts use interviews, field reports and late-breaking weather and sports that cannot be scripted or presented in textual or graphical form, persons with hearing disabilities do not have full access to this programming when ENR is used.<sup>123</sup> Indeed, it was this concern, in large part, that caused the Commission to initiate a separate rulemaking proceeding on the appropriate rules and policies to ensure the accessibility of televised emergency information, including reports that interrupt regularly scheduled programming and late-breaking reports during live news programming.<sup>124</sup>

36. After review of the comments on reconsideration, we are persuaded that we should limit the circumstances where we will count the use of ENR captioning as a substitute for real-time captioning, and eventually phase out our recognition of ENR captioning. We continue to believe that in initially establishing the rules to implement the many facets of Section 713 and recognizing the wide disparity among types of programming and programming providers, our rules should allow video programming providers flexibility. In the area of ENR captioning, however, we find that the approach outlined below is more consistent with the statutory intent than the one adopted in the *Report and Order*.

37. We recognize the concerns expressed by NAB, NCTA and ALTV that a real-time captioning requirement could impose an economic burden on smaller entities since resources are likely to be limited, costs for real-time captioning remain high and methods for remote real-time captioning are still being developed.<sup>125</sup> Nonetheless, we conclude that there are video programming providers for which a real-time captioning requirement would not impose an economic burden even at the initial stages of the transition. Thus, we believe that a better balance of the desire to ensure accessibility of video programming against the reality of resource limitations, is to find that certain video programming providers, i.e., those most likely to have access to real-time captioning resources and for which such a requirement will not impose an economic burden, should not

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<sup>120</sup>(...continued)

captioned programming against the potential for hindering the development and distribution of programming."

<sup>121</sup>NAB Opposition at 10. In response to this point, NAD/CAN observes that voice recognition technology cannot provide high quality captions at this time nor is it expected to do so in the foreseeable future. NAD/CAN Reply at 9, fn. 7.

<sup>122</sup>RTNDA Opposition at 6.

<sup>123</sup>*Report and Order* 13 FCC Rcd 3311-12 ¶ 84.

<sup>124</sup>*Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Further Notice of Proposed Rulemaking, 13 FCC Rcd 5628 (1998).

<sup>125</sup>*See, e.g.*, NAB Opposition at 9; NCTA Opposition at 13; ALTV Opposition at 5.

be allowed to use ENR in lieu of real-time captioning. In addition to our conclusion that this change from the *Report and Order* is more consistent with statutory intent, we also believe that the change will help stimulate growth of real-time captioning and, in turn, lead to lower captioning costs. Moreover, it will improve accessibility to important information to a significant portion of the population.

38. We recognize that without findings on an individual basis, it is difficult to determine precisely which video programming providers have sufficient resources such that real-time captioning would not be an economic burden. Nonetheless, in recognition of the goal of Section 713 to ensure full accessibility, we have made our best effort to identify a class of video programmers for whom a real-time captioning requirement would not be economically burdensome.<sup>126</sup> To this end, we conclude that we should impose a real-time captioning requirement on a limited group of the largest video programming providers, including, the four major national broadcast networks (i.e., ABC, CBS, Fox and NBC), broadcast stations affiliated with these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas ("DMAs"), and nonbroadcast networks serving 50% or more of the total number of multichannel video programming distributor ("MVPD") households.<sup>127</sup> Accordingly, beginning January 1, 2000, at the first benchmark, these video providers, will not be allowed to count ENR captioned programming toward compliance with captioning requirements.<sup>128</sup> Whenever a broadcast television station, a broadcast television network or a nonbroadcast network satisfies one of these criteria, it becomes subject to the limitations we are placing on the use of ENR for compliance with the rules.

39. The balance we strike is consistent with the record and our general approach to exemptions from the closed captioning requirements. The national broadcast networks reach virtually every television household. The top 25 television markets cumulatively include approximately 50% of all television households. Similarly, for the cut-off for nonbroadcast networks, we select the same percentage of homes reached.<sup>129</sup> We believe that this class of video programming providers are best situated to provide real-time captioning without the imposition of an economic burden consistent with the statutory mandate given the significant number of homes they reach.<sup>130</sup> As a general rule, large networks are more likely to be able to bear the costs of captioning. Moreover, by placing a limit on the use of ENR by these video programming providers, we ensure greater accessibility for a significant portion of the American population.

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<sup>126</sup>47 U.S.C. § 613(d)(1).

<sup>127</sup>We intend to reassess this class of providers during the transition period.

<sup>128</sup>As individual cable systems serve significantly fewer homes than either national programming networks and broadcast stations, we will not place any limitations on the ability of individual cable systems to count ENR towards compliance for the programming they produce. For example, only the largest cable system serves more homes (i.e., New York City with 1.1 million subscribers) than the affiliates in DMA market number 25 (i.e., Indianapolis with 957,050 DMA households). *Television & Cable Factbook*, 1998 ed., at A-1, I-99.

<sup>129</sup>This group affects approximately 35 national nonbroadcast networks, out of about 170 such networks, although not all networks carry programming that would be affected by this change.

<sup>130</sup>The Commission based its construction schedule for DTV on a similar rationale. *See Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service*, MM Docket No. 87-268, Fifth Report and Order, 12 FCC Rcd 12810, 12840-848 (1997).

40. We believe that not counting ENR captioning for this group of video programming providers will promote our efforts to move toward full real-time captioning. We encourage such providers to use real-time captioning even when it would not otherwise be required by the benchmark. In addition, we are hopeful that other providers will voluntarily use real-time captioning and thus, a large proportion of the population should have complete captioning for news programming, at least by the last years of the transition period and afterward. We also expect that, as we move through the transition period, we will continue to review the rules and expand the class of providers that cannot count ENR for compliance with the rules. We expect that the ability to use ENR will by far be the exception rather than the general rule, and that only those entities that are so small or who present unusual circumstances will be permitted to continue to use ENR because live closed captioning would be an economic burden.

41. To the extent that we continue to permit the use of ENR to count towards compliance with our captioning requirements, we reject NAD/CAN's proposal to adopt criteria for the amount of programming that must be captioned using this method.<sup>131</sup> Measuring and monitoring a specific percent, e.g., minutes, words or some other criteria, is unclear. Such additional restrictions would impose unnecessary burdens on programming providers and the Commission to implement and enforce. We again urge programming providers using ENR to be aware of its limitations and to consider additional graphical and textual information as a supplement to captioning to provide greater accessibility to persons with hearing disabilities. In addition, we expect that video programming providers that have used real-time captioning in the past will likely continue to use this methodology for programming captioned to comply with the requirement that the captioning levels be maintained at substantially the same level as was offered during the first six months of 1997. We further note that in this context we use the term "real-time" captioning to mean any methodology that converts the entire audio portion of a live video program to captions. Currently, such captions are created by stenocaptioners. However, we recognize that in the future there may be other techniques for captioning live programming that provide full access (e.g., voice recognition).

42. We finally note that video programming providers are afforded ample flexibility to select which programming will be captioned during the transition period when considerably less than 100% of all programming must be captioned. During the eight year transition period, ENR can be used to caption any programming in excess of the benchmark requirements and we assume that some video programming providers will continue to use this method for programming not used to meet the benchmarks. However, we encourage video programming providers to recognize the importance of the information provided in newscasts to persons with hearing disabilities as to all viewers<sup>132</sup> and to begin the trend towards the use of real-time captioning and the elimination of reliance on ENR. We expect that, as the costs of real-time captioning decline, many video programming distributors who are permitted to count ENR captioning under the rules will begin to use real-time captioning to better serve their viewers with hearing disabilities. In addition, we believe that under the

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<sup>131</sup>NAD/CAN Petition at 16-17.

<sup>132</sup>We have received much correspondence expressing frustration over the lack of closed captioning of local news programming. See, e.g., Letter from Carole A. Trapani, Deaf Services Director, Center for Independent Living, Inc., to Meryl Icove, Director, Disabilities Task Force, Federal Communications Commission (February 16, 1998); e-mail from George A. Adams III to Anita Wallgren, Legal Advisor to Commissioner Ness, Federal Communications Commission (July 24, 1998); letter from Sheri Farinha Mutti, Executive Director, NorCal Center on Deafness to Governor Pete Wilson, California (December 4, 1997) attached to NorCal Center for Deafness comments filed in MM Docket No. 95-176, February 23, 1998.

transition rules video programming providers will have sufficient leeway to experiment and use new captioning techniques and we reject NAB's contention that a real-time captioning requirement will prevent such experimentation.<sup>133</sup>

#### **D. EXEMPTIONS BASED ON THE ECONOMICALLY BURDENSOME STANDARD**

43. Section 713 directs the Commission to "exempt by regulation programs, classes of programs, or services" for which the Commission determines that "the provision of closed captioning would be economically burdensome."<sup>134</sup> In the *Report and Order*, we established a number of exemptions for specific classes of programming where we determined that captioning would be economically burdensome. As we stated, these classes would include situations where providing captioning would be difficult or technically infeasible, would not add significantly to the information that is already available visually, would create severe logistical problems, or the economic support for the programming is inherently fragile.<sup>135</sup> These exemptions include: non-English language programming that cannot be captioned using the ENR technique; primarily textual programming; programming distributed in the late night hours; interstitials, promotional announcements and public service announcements that are ten minutes or less in duration; Instructional Television Fixed Services ("ITFS") programming; locally produced and distributed non-news programming with no repeat value; programming on new networks for their first four years of operation; and primarily non-vocal musical programming. We also adopted a general exemption rule based on gross programming revenues for situations where the addition of captioning obligations would either make the service nonviable or adversely impact the content of the service provided. We exempt from closed captioning requirements any video programming provider that has annual gross revenues of less than \$3 million.<sup>136</sup> In addition, we do not require any video programming provider to spend more than 2% of its annual gross revenues on closed captioning.<sup>137</sup>

##### ***1. Requests for Modification of Exemptions***

44. New Networks. The Commission recognized the significant start-up costs faced by new networks and determined that the additional costs of captioning could pose an economic burden that might deter entry by some networks.<sup>138</sup> The Commission adopted an exemption from the closed captioning requirements for any new network, broadcast or nonbroadcast, national or regional, for its first four years of operation

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<sup>133</sup>NAB Opposition at 10.

<sup>134</sup>47 U.S.C. § 613(d)(1).

<sup>135</sup>*Report and Order* 13 FCC Rcd 3350 ¶ 164.

<sup>136</sup>47 C.F.R. § 79.1(d)(12). *Report and Order* 13 FCC Rcd 3350 ¶ 164.

<sup>137</sup>47 C.F.R. § 79.1(d)(11). *Report and Order* 13 FCC Rcd 3550 ¶ 164.

<sup>138</sup>*Report and Order* 13 FCC Rcd 3346 ¶ 154.

calculated from the new network's launch date.<sup>139</sup> A network must comply with the closed captioning rules in effect at the time its exemption expires.<sup>140</sup>

45. Several parties representing the programming industries state that the new network exemption does not adequately relieve the undue burden captioning imposes on new networks.<sup>141</sup> GSN supports exempting new networks until they reach 20 million subscribers.<sup>142</sup> GSN argues that it is generally impossible for a new, niche cable network to break even until its distribution reaches 20 million subscribers and the four year rule bears no relation to a network's financial health or long-term viability.<sup>143</sup> Outdoor Life and A&E advocate a five year exemption period.<sup>144</sup> They argue that this is necessary because the captioning requirements are especially burdensome for new networks, many of which do not become profitable for the first five years of operation.<sup>145</sup> Outdoor Life notes that NCTA proposed a five year exemption in its comments because at least five years is generally necessary for a new network to gain acceptance in the marketplace and achieve a positive cash-flow.<sup>146</sup>

46. Parties representing new networks oppose the requirement that new networks "drop in" to the generally applicable captioning requirements at the end of their exemption. Instead, they propose that the rules be amended to permit new networks to implement closed captioning using the same eight year transition schedule afforded other video programming providers.<sup>147</sup> GSN asserts that, even after a four year exemption period, new networks will be unable to meet the benchmarks for new programming without the same "ramp up" schedule contemplated for the industry as a whole.<sup>148</sup>

47. GSN argues that because such networks frequently rely on substantial amounts of pre-rule programming,<sup>149</sup> the current requirement to caption 75% of pre-rule programming is unrealistic even after ten

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<sup>139</sup>47 C.F.R. § 79.1(d)(11). *See also Report and Order* 13 FCC Rcd 3346 ¶ 154.

<sup>140</sup>*Report and Order* 13 FCC Rcd 3346 ¶ 154.

<sup>141</sup>GSN Petition at 9-10; Outdoor Life Petition at 6-10; A&E Opposition at 10.

<sup>142</sup>GSN Petition at 5-9; GSN Opposition at 2.

<sup>143</sup>GSN Petition at 5-6.

<sup>144</sup>Outdoor Life Petition at 6-10; A&E Opposition at 10. A&E further asserts that this transition period should be available to all networks which qualify as new networks on the effective date of the captioning rules. A&E Opposition at 10.

<sup>145</sup>Outdoor Life Petition at 6-10; A&E Opposition at 12-13.

<sup>146</sup>Outdoor Life Petition at 13.

<sup>147</sup>GSN Petition at 10-13; Outdoor Life Petition at 12-14; Lifetime Opposition at 7-8.

<sup>148</sup>GSN Petition at 11; GSN Opposition at 3.

<sup>149</sup>GSN estimates that it relies on its library of 50,000 vintage game shows for more than 90% of its programming.  
(continued...)

years. Instead, GSN proposes that when a network becomes subject to the Commission's rules it should not be required to caption more than 2% of its pre-rule programming, plus any "significantly viewed" programming. In each year thereafter, an additional 2% would be required to be captioned.<sup>150</sup> GSN argues that this proposal will allow new networks to become established through the use of older pre-rule programming without being burdened by the captioning requirements.<sup>151</sup>

48. GSN and Outdoor Life also recommend that the Commission revise the current new network exemption to begin counting the four year exemption period from the effective date of the rules rather than the launch date of the network.<sup>152</sup> They assert that many start-up networks made substantial investments in acquiring programming before there was any indication that Section 713 would be enacted and this change is necessary if any new networks launched on or before January 1, 1998, are to enjoy the benefit of the new network exemption.<sup>153</sup>

49. SHHH proposes to limit the four year new network exemption to networks that have less than \$3 million in annual revenues.<sup>154</sup> SHHH further proposes that after reaching the \$3 million threshold, the new network would commence the same implementation schedule SHHH has proposed for existing networks.<sup>155</sup> SHHH argues that a blanket exemption is not warranted for new networks and that the Commission only considered the cost of providing captioning and not the revenues of the new network.<sup>156</sup>

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<sup>149</sup>(...continued)  
GSN Petition at 15.

<sup>150</sup>*Id.* at 16.

<sup>151</sup>*Id.*

<sup>152</sup>*Id.* at 9-10, GSN Opposition at 2; Outdoor Life Petition at 6-9; A&E Opposition at 10. In its petition, GSN proposed this as an alternative to exempting new networks until they reach 20 million subscribers. Subsequently, in its opposition, GSN agreed with Outdoor Life that this proposal should supplement any change to the threshold for exempting new networks. GSN Opposition at 2.

<sup>153</sup>GSN Petition at 9-10; GSN Opposition at 3; Outdoor Life at 6-9.

<sup>154</sup>SHHH Petition at 6. In its original petition, SHHH proposed that the exemption be limited to networks with less than \$75 million in revenue. On December 17, 1997, after the close of the filing period, SHHH filed an erratum indicating that it intended to apply this revenue criterion to new networks with more than \$3 million in revenue.

<sup>155</sup>See Section III.A, Transition for New Programming, *supra*.

<sup>156</sup>SHHH Petition at 7. See also COR Opposition 4; NAD/CAN Opposition at 6-8 (arguing that these networks will remain eligible for an exemption if they (1) fall into the general revenue exemption, or (2) the provision of captions would otherwise create an undue burden, and any broader exemption would violate Congressional intent to limit exemptions from the captioning mandates). In the alternative, NAD/CAN opposes any expansion of the existing new network exemption. NAD/CAN Opposition at 6-8



50. NAD/CAN joins SHHH in opposing any blanket exemption for new networks.<sup>157</sup> NAD/CAN also opposes any expansion of the existing new network exemption.<sup>158</sup> NAD/CAN notes these networks will remain eligible for an exemption from the captioning mandates if (a) they fall into the general revenue exemption, or (b) the provision of captions would otherwise create an undue burden.<sup>159</sup> According to NAD/CAN, any broader exemption would violate Congressional intent to limit exemptions from the captioning mandates.<sup>160</sup> NAD/CAN opposes allowing new networks to be exempt from the effective date of the Commission's rules rather than their launch date.<sup>161</sup> NAD/CAN argues that the rules were not unanticipated, that captioning must be considered an integral part of programming production and new networks should make arrangements to begin captioning during the grace period.<sup>162</sup> NAD/CAN dismisses GSN's proposal that new networks be allowed to implement the captioning of pre-rule programming at 2% per year as "absurd."<sup>163</sup> NAD/CAN observes that ". . . nearly half one's lifetime would have to pass before being able to enjoy captioning on 75% of pre-rule programming were this proposal adopted."<sup>164</sup>

51. ALTV opposes SHHH's request that new networks be required to provide a minimum number of hours of captioned programming after their exemption expires.<sup>165</sup> According to ALTV, this proposal appears to be premised upon the faulty assumption that new broadcast networks will provide a full day's program schedule. ALTV asserts that no existing broadcast network, much less an emerging network, does this.<sup>166</sup> Under the SHHH proposal, emerging broadcast networks would be required to caption virtually all of their programming immediately.<sup>167</sup> Moreover, because local stations and not broadcast networks are the focal point of responsibility, application of separate benchmarks to these new networks serves no purpose, according to ALTV.<sup>168</sup> ALTV asserts that, to the extent the broadcast network provides programming to a station as part

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<sup>157</sup>NAD/CAN Opposition at 6-8.

<sup>158</sup>*Id.*

<sup>159</sup>*Id.* at 7-8.

<sup>160</sup>*Id.* at 8.

<sup>161</sup>NAD/CAN Reply at 9-10.

<sup>162</sup>*Id.*

<sup>163</sup>NAD/CAN Opposition at 13.

<sup>164</sup>*Id.*

<sup>165</sup>ALTV Opposition at 6.

<sup>166</sup>*Id.*

<sup>167</sup>*Id.*

<sup>168</sup>*Id.*

of that station's schedule, such programming will be subject to the station's overall compliance with the captioning benchmarks.<sup>169</sup>

52. A definition based on the ability of a network to reach fewer than 20 million subscribers or homes, as suggested by GSN, would unnecessarily exempt many regional networks permanently and provide no exemption for new national broadcast networks. While we recognize that new networks encounter challenges after the initial four year exemption period, this exemption was not intended as permanent relief for video programming providers.

53. We decline to eliminate the so-called "drop in" provision. Parties requesting that we eliminate this provision of the rules seem to believe that this exemption is designed to completely relieve new networks of their captioning obligation. This exemption allows new networks an opportunity to develop the infrastructure to provide captioning during the early phases of their development. We recognize that new networks, in contrast to well established services, experience significant financial burdens unique to the initiation of service that warrant special treatment. Through this exemption, we provide networks additional discretion for phasing in captioning. We expect such networks to begin efforts to caption programming during the exemption period and, therefore, will require captioning at the level in effect at the expiration of their exemption.<sup>170</sup>

54. We will allow new networks launched prior to the effective date of the rules that have not yet reached their fourth anniversary by that date to be exempt for a four year period beginning on January 1, 1998. We recognize that these networks were in the planning or early stages of development as the statute was enacted and rules were implemented and were at a disadvantage of not knowing the requirements. A reasonable case has been made that the costs of captioning were not envisioned and incorporated into initial investment plans. We recognize that new networks, especially in the early stages, frequently must pay for carriage, and struggle to become an accepted venue for national advertising. These economic circumstances create significant accumulated debt and deferred earnings which must be recovered from revenues if the network is to remain viable. These conditions distinguish start-up networks from existing networks. This change will afford a limited expansion of the new network exemption to include numerous nascent networks that are continuing to experience growing difficulties.

55. We agree with NAD/CAN that the proposed transition period for pre-rule programming once the new network exemption expires is unrealistic as it would take more than 37 years, at 2% a year, to reach the required 75% captioning. This would unfairly extend the relief given to new networks 27 years beyond the phase-in schedule afforded similar existing networks. GSN also does not define "significantly viewed" programming nor explain what it envisions the requirements to be in this regard.

56. SHHH's proposal effectively eliminates the new network exemption because the only new networks that qualify would be those with less than \$3 million in revenues. Such networks would already be exempt pursuant to the general revenue exemption. This proposal fails to distinguish between the expense and

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<sup>169</sup>*Id.*

<sup>170</sup>We note, for example, that a video programming provider will need to caption video programming that it expects will have repeat value since such programming likely will need to be captioned to meet the benchmark requirements after the expiration of its new network exemption.

burdens associated with an established video programming provider and those experienced by a start-up network. We recognize the significant expense associated with starting a new network and that an initial captioning requirement could be economically burdensome. SHHH's proposal fails to account for the substantial initial investment, accumulated debt and delayed earnings related to starting a new network and the resulting need for revenues to recoup that investment. We reject SHHH's proposal to add a revenue criteria to the existing four year network exemption.

57. Locally Produced and Distributed Programming. The Commission adopted an exemption for locally produced and distributed non-news programming with no repeat value.<sup>171</sup> The Commission noted that it intended to review this exemption during the transition period to determine if, in practice, its scope is appropriately targeted.<sup>172</sup>

58. ALTV requests that the Commission clarify the exemption for locally produced programming to ensure that local programming with little repeat value will be preserved and traditional public service programming is not stifled.<sup>173</sup> ALTV specifically requests that the Commission clarify that this exemption includes programs that are repeated on the producing station, a co-owned or operated station, or a station operated under a local marketing agreement ("LMA"), and local programming, such as candidate debates and telethons that produce no revenue.<sup>174</sup> ALTV notes that many local stations routinely double run local talk shows and that locally produced programming is frequently shared with co-owned or operated stations.<sup>175</sup> ALTV also argues that candidate debates should be exempt, asserting that while such programming could be construed as "news," it produces little revenue and is provided as a public service.<sup>176</sup> ALTV further asserts that telethons are charitable events and funds devoted to captioning decrease the potential revenue for those charities.<sup>177</sup>

59. NAD/CAN opposes ALTV's proposed expansion of the exemption for local programming.<sup>178</sup> NAD/CAN argues that this proposal would deny persons with hearing disabilities access to community affairs

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<sup>171</sup>47 C.F.R. § 79.1(d)(8). *See also Report and Order* 13 FCC Rcd 3347-48 ¶ 158. The title of this exemption inaccurately refers to limited repeat value while the text addresses programming with no repeat value. Accordingly, we will amend the title to conform with the text of the rule.

<sup>172</sup>*Report and Order* 13 FCC Rcd 3347-48 ¶ 158.

<sup>173</sup>ALTV Petition at 6-9.

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* at 7.

<sup>176</sup>*Id.* at 8.

<sup>177</sup>*Id.* at 8-9.

<sup>178</sup>NAD/CAN Opposition at 11.

programming that is of considerable interest to all local viewers.<sup>179</sup> Similarly, NAD/CAN opposes ALTV's request to exempt candidates' debates from the captioning requirement, arguing that the Commission should not deny persons with hearing disabilities access to this kind of information given the Commission's efforts to ensure the availability of candidates' debates.<sup>180</sup> Moreover, NAD/CAN argues that the Commission should clarify that public funds may not be used for such debates unless they are captioned.<sup>181</sup>

60. In reply to NAD/CAN, ALTV claims that the clarification it seeks is far more limited than NAD/CAN envisions.<sup>182</sup> According to ALTV, it only sought to clarify that the exemption would continue to apply if an otherwise exempt program were double-run or occasionally re-run on the producing station (or a station subject to an LMA in the same market) or broadcast on a co-owned station in another market.<sup>183</sup> ALTV states that its intent was to ensure sufficient flexibility to accommodate the efforts by some local television stations to expand the reach of their local public affairs programming, which normally attracts only minimal audiences.<sup>184</sup> ALTV also argues that NAD/CAN fails to address its basic argument in seeking a clarification of the exemption regarding political debates. ALTV argues that political debates are precisely the type of programming which this exemption is intended to cover "locally-produced programming with limited repeat value."<sup>185</sup> ALTV argues that the Commission should avoid encouraging carriage of political debates on one hand and burdening them with considerable new costs on the other.

61. We reject ALTV's request to expand the exemption for locally produced and distributed non-news programming without repeat value to include programming that is repeated on the producing station, a co-owned station or an LMA'd station. In the *Report and Order*, we recognized that certain types of locally produced and distributed programs that are of primarily local public interest, that have no repeat value and that have a fragile economic support system might be impeded if they were subject to captioning requirements.<sup>186</sup> We intended that this exemption be limited to programming that is locally produced by the video programming distributor, has no repeat value, yet serves the community where the video programming distributor is located. We wanted to ensure that our captioning requirements did not prevent the distribution of the most local public interest programming (e.g., a parade, a county hearing). Programming that has value to an additional station, even a co-owned or LMA'd station, should have sufficient value to support captioning. Therefore, we conclude that it is appropriate to retain this exemption as adopted.

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<sup>179</sup>*Id.*

<sup>180</sup>*Id.* at 11-12.

<sup>181</sup>*Id.* at 12.

<sup>182</sup>ALTV Reply at 2-3.

<sup>183</sup>*Id.*

<sup>184</sup>*Id.* at 3.

<sup>185</sup>*Id.*

<sup>186</sup>*Report and Order* 13 FCC Rcd 3347-48 ¶ 158.

62. ITFS Programming. The Commission established an exemption for video programming produced for ITFS. We concluded that it would be economically burdensome to require ITFS licensees to caption this programming which is not intended for general distribution to home viewers, and is covered by other laws that require accommodations be made for those persons with hearing disabilities.<sup>187</sup> WCA claims that the language used to define the exemption in Section 79.1(d)(7) of the rules limits the exemption to programming produced specifically for ITFS.<sup>188</sup> WCA asserts that ITFS licensees often transmit educational and instructional films that were not necessarily produced solely for ITFS distribution, and that it would be as burdensome for ITFS licensees to caption this material as it would be for them to caption programs produced specifically for ITFS distribution.<sup>189</sup> WCA submits a proposed clarification to the rule, which refers to programming transmitted by ITFS licensees rather than programming produced for ITFS licensees.<sup>190</sup>

63. We concur with WCA that the rule has the unintended effect of limiting the scope of the ITFS exemption. We also agree that the same reasoning for the ITFS exemption applies to programming produced by others for ITFS licensees as to programming produced by the ITFS licensees themselves. Therefore, we amend Section 79.1(d)(7) to exempt video programming transmitted by an Instructional Television Fixed Service licensee pursuant to Sections 74.931(a), (b) or (c) of the rules.

64. General Revenue Exemption. The captioning rules include a general revenue exemption. Under this exemption, no video programming provider is required to spend any money to caption any channel of video programming producing annual gross revenues of less than \$3 million during the previous calendar year.<sup>191</sup> In addition, no video programming provider is required to spend more than 2% of its gross revenues received from any channel during the previous calendar year on closed captioning.<sup>192</sup> The general exemption is intended to address a variety of situations where captioning requirements would pose an economic burden, without the need for adopting individual exemptions for each such situation.<sup>193</sup> GSN seeks expansion of this exemption, contending that it does not treat new national networks fairly because such networks may generate over \$3 million in annual revenues without being profitable.<sup>194</sup> GSN recommends that we raise the annual revenue threshold to at least \$20 million, and that we lower the revenue spending cap to an unspecified, "significantly lower" amount in order to address the financial realities of national start-up networks.<sup>195</sup> In

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<sup>187</sup>*Id.*

<sup>188</sup>WCA Petition at 3.

<sup>189</sup>*Id.*

<sup>190</sup>*Id.* at 4.

<sup>191</sup>47 C.F.R. § 79.1(d)(12); *see also Report and Order* 13 FCC Rcd 3350 ¶ 164.

<sup>192</sup>47 C.F.R. §§ 79.1(d)(11), (e)(6) and (e)(7); *see also Report and Order* 13 FCC Rcd 3350 ¶ 164.

<sup>193</sup>*See Report and Order* 13 FCC Rcd 3348-49 ¶¶ 161-162.

<sup>194</sup>GSN Petition at 14.

<sup>195</sup>*Id.*

contrast, NAD states that the Commission struck the appropriate balance in crafting the general revenue exemption, and urges us not to revisit the issue at this time.<sup>196</sup>

65. ALTV requests that the general revenue exemption be amended to exclude explicitly network compensation and barter transactions from the calculation of provider revenue.<sup>197</sup> Network compensation is the money local stations are paid to carry network programming, while barter transactions are arrangements where stations receive a license to broadcast syndicated programs in exchange for allowing the syndicator to sell some of the commercial time during the program.<sup>198</sup> In support of its proposal, ALTV contends that the captioning rules contemplate separate treatment of network programming, and that network compensation logically would be excluded from any calculation of station revenues from non-network programming.<sup>199</sup> ALTV further contends that it would be difficult to quantify barter transactions as a portion of a local station's revenues because the station does not sell the advertising time itself.<sup>200</sup> In response, NAD/CAN claims that exclusion of these items from revenue calculations would provide stations with incentives to increase the number and scope of such arrangements, in turn reducing the stations' overall revenues and captioning obligations.<sup>201</sup>

66. We decline to modify the criteria incorporated in the general revenue exemption. GSN offers no evidence to support an expansion of the revenue threshold to \$20 million or lowering the required spending cap. We provide an exemption for new networks for their first four years of operation when they are no longer considered new for purposes of the captioning rules. Once a network is no longer new, its captioning obligations are subject to the limits of our general revenue exemption. In addition, GSN does not propose a specific spending cap for captioning that would be more appropriate than the 2% of gross annual revenues cap established in the rules. We continue to believe it reasonable to expect a video programming provider to spend 2% of its previous year's revenue on captioning. As we stated in the *Report and Order*, we believe it reasonable to exempt video programming providers with annual revenues of less than \$3 million and note that this criteria was based on a determination that 2% of such revenues would provide only two hours of captioning per week.<sup>202</sup>

67. With regard to ALTV's requested exclusions from the calculations of revenues, we believe that network compensation should be included in those calculations because it is money the station receives in lieu of selling the advertising itself, and can be allocated at the station's discretion for captioning or other obligations. We also reject ALTV's argument that we exclude barter transactions from our definition of gross revenues for calculating the general revenue exemptions. The value barter transactions has historically been

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<sup>196</sup>NAD/CAN Reply at 14.

<sup>197</sup>ALTV Petition at 13-14.

<sup>198</sup>*Id.* at 13.

<sup>199</sup>*Id.* at 13 citing *Report & Order* 13 FCC Rcd 3350 ¶ 165.

<sup>200</sup>*Id.*

<sup>201</sup>NAD/CAN Reply at 13.

<sup>202</sup>*Report and Order* 13 FCC Rcd 3350 ¶ 164.

considered as part of revenue and is included as such in the annual NAB Television Financial Report, and in accounting and IRS calculations of an entity's revenue.<sup>203</sup>

## 2. *Requests for Additional Exemptions*

68. Instructional Programming on Public Television Stations. The Commission did not provide a general exemption for instructional programming (i.e., programming generally for use in the classroom) except to exempt ITFS programming from the closed captioning requirements.<sup>204</sup> With respect to other local instructional programming, the Commission determined that the general exemption for local programming or the general revenue exemption would provide sufficient relief in specific cases where closed captioning is an economic burden.<sup>205</sup>

69. APTS requests that instructional programming distributed by public television stations be exempt from the closed captioning requirements.<sup>206</sup> APTS compares the instructional programming distributed by public television stations to ITFS instructional programming, arguing that like ITFS instructional programming, this programming is not intended for widespread distribution<sup>207</sup> and to the extent that persons with hearing disabilities are the intended recipients other existing laws provide sufficient protection.<sup>208</sup> APTS asserts that the generalized exemption based on revenues does not ameliorate the substantial effect of the captioning requirements on the instructional programming because the revenue of many public stations exceeds the \$3 million revenue exemption and much of this programming will not qualify for the local production exemption because it has repeat value.<sup>209</sup> NAD/CAN initially opposed any proposal to exempt instructional programming.<sup>210</sup> After the close of the pleading cycle, APTS amended its petition in response to discussions

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<sup>203</sup>NAB Television Financial Report. *See also* 26 C.F.R. § 1.461(d)(4)(ii).

<sup>204</sup>47 C.F.R. § 79.1(d)(7). *See also Report and Order* 13 FCC Rcd 3348 ¶ 159.

<sup>205</sup>*Report and Order* 13 FCC Rcd 3350 ¶ 159.

<sup>206</sup>APTS Petition at 3-5.

<sup>207</sup>*Id.* at 4. APTS asserts that some public broadcasting licensees distribute instructional programming intended for students enrolled in a specific institution

<sup>208</sup>According to APTS, public television instructional programming broadcast in connection with educational institutions, like ITFS instructional programming, is covered by other federal laws that require accommodation of disabilities on an individualized basis. APTS Petition at 5; APTS Reply at 4. Citing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Rehabilitation Act"); Title II, Sections 201-205 of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12134 ("ADA"); and Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA").

<sup>209</sup>APTS Petition at 5; APTS Reply at 3-4.

<sup>210</sup>NAD/CAN Opposition at 2-5. *See also* COR Opposition at 3 (COR notes that the Commission has already established a general revenue based exemption which COR argues will adequately address the interests of public broadcasters that may not be able to afford to caption instructional programming).

with NAD.<sup>211</sup> Rather than seeking an exemption for all instructional television programming, APTS now proposes that the Commission exempt only instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools.<sup>212</sup> APTS reasserts its previous recognition that this programming will continue to be subject to other Federal requirements designed to ensure accessibility. NAD subsequently withdrew its opposition to APTS' proposal as amended.<sup>213</sup>

70. APTS' amended proposal conforms more closely with our original intent in exempting ITFS programming.<sup>214</sup> We will adopt this proposal as it is specifically limited to a narrow, readily identifiable class of programming that might otherwise become substantially less available absent an exemption. Therefore, we will amend the rules to exempt instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools. In adopting this exemption we remain confident that other Federal requirements will ensure that adequate efforts will be taken to make this programming accessible on a case by case basis.

71. Children's Educational Programming. Encore seeks an exemption for new children's educational programming.<sup>215</sup> Encore asserts that much of the children's educational programming it carries is produced on minimal budgets by institutions, governmentally supported organizations, and nonprofit producers. Encore maintains that to recover the cost of captioning this programming, licensing fees would need to increase by more than 100%.<sup>216</sup> Encore asserts that because neither the producers nor the distributors of this programming are in a position to caption this material, application of the rules to this programming would severely reduce the amount of such programming being distributed.<sup>217</sup> Encore also states that much of the children's educational programming it distributes is produced in other countries, such as Canada and Australia, where there are no captioning requirements.<sup>218</sup> According to Encore, networks unable to take advantage of the revenue exemption will be faced with a significant incentive to substantially reduce the diversity of programming they carry.<sup>219</sup>

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<sup>211</sup>APTS *Ex Parte Notice* (April 24, 1998).

<sup>212</sup>*Id.* at 1.

<sup>213</sup>NAD/CAN *Ex Parte Notice* (May 29, 1998).

<sup>214</sup>We also note that it shares some characteristics with locally produced non-news programming without repeat value. Thus, this programming appears to straddle two previously identified exemptions while clearly not fitting in either category.

<sup>215</sup>Encore Petition at 2.

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>*Id.* at 4.



72. NAD/CAN asserts that failure to caption children's educational programming will deny children with hearing disabilities the same learning opportunities as their nondisabled peers.<sup>220</sup> NAD/CAN refutes Encore's assertion that requiring children's educational programming to be captioned will result in less such programming being available.<sup>221</sup> NAD/CAN further contends that captioning will increase the value of educational programming and cites studies that indicate that closed captioning can increase the benefit of educational programming for hearing persons.<sup>222</sup> NAD/CAN also disputes Encore's assertion that children's educational programming from Canada and Australia is not captioned.<sup>223</sup>

73. Encore argues that NAD/CAN mischaracterizes its request for an exemption for children's educational programming as an effort "to exclude deaf and hard of hearing children from enjoying the benefits of its programming."<sup>224</sup> Encore asserts that this proposal is simply to preserve the availability of diverse programming generally. Absent the requested exemption, Encore states that requiring captioning for low revenue children's educational programming will only result in less quality children's educational programming being available to the public as a whole.<sup>225</sup> Encore argues that the focus for increasing the amount of captioning of children's educational programming should not rest with the channels which distribute them (almost always as a public service without financial gain), but rather should be in seeking continued or increased governmental or charitable funding of captioning efforts for these programs.<sup>226</sup>

74. We decline to adopt a categorical exemption for children's educational programming as requested by Encore. No other provider of children's educational programming sought an exemption and no new evidence is provided that persuades us that captioning is economically burdensome for children's educational programming as a class. Based on the evidence, we believe that such an exemption might well apply to programming that is currently being captioned as well as programming for which captioning is economically viable under our transition schedule. Moreover, we are unpersuaded that the captioning of programming produced for networks outside the United States is, in itself, economically burdensome.<sup>227</sup> Nothing in the rules limits where programmers and producers get the funding to caption programming and we recognize much captioning to this point has been underwritten by charitable and governmental foundations and

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<sup>220</sup>NAD/CAN Opposition at 4.

<sup>221</sup>*Id.* at 4-5.

<sup>222</sup>*Id.* at n. 4 citing Jensma, "The Benefits of Closed Caption Television as Reading Material for Children," Institute for Disabilities Research and Training, Inc., MD; Kosinen *et al.*, "Using Closed Captioned Television to Enhance the Vocabulary and Reading Comprehension of Adult Beginning Readers," American Educational Research Association, LA (1994).

<sup>223</sup>NAD/CAN Opposition at 5.

<sup>224</sup>Encore Reply at 2 citing NAD/CAN Opposition at 4.

<sup>225</sup>Encore Reply at 4.

<sup>226</sup>*Id.* at 3-4.

<sup>227</sup>We note that in another context NAD/CAN cites "Masterpiece Theatre" as an example of an English language program produced in another country that has been captioned.

business. The exemption proposed is overly broad and inconsistent with the law's overall objective of making video programming fully accessible.

75. Long-form Advertising. The Commission decided not to exempt long-form advertising of more than five minutes duration (i.e., program length commercials or infomercials) from the closed captioning requirements as they are generally prerecorded, generally distributed nationwide, and are formatted to resemble traditional television programming.<sup>228</sup> The Commission also declined to adopt an exemption for home shopping programming.<sup>229</sup>

76. ALTV asserts that home shopping and infomercial programming, which are intended to sell products or services, should be exempt or subject to more flexible treatment.<sup>230</sup> According to ALTV, while some stations only use such programming as schedule filler or late night programming, other stations devote the bulk of the programming day to such programming and will be unfairly disadvantaged by the closed captioning requirements.<sup>231</sup> ALTV asserts that such stations will be faced with the prospect of changing their programming schedules to comply with the Commission's captioning requirements.<sup>232</sup> NIMA asserts that the failure to exempt long-form advertising from the captioning requirement unfairly disadvantages producers and providers of such material.<sup>233</sup> NIMA argues that long-form advertising differs from traditional programming in its reliance on graphics and its intended purpose is to invite sales based on those graphics.<sup>234</sup> NIMA asserts that closed captioning will block those graphics and hinder persons with hearing disabilities from taking advantage of the benefits available to the hearing audience.<sup>235</sup> NIMA also argues that long-form advertising is more frequently edited than traditional forms of programming thus increasing the cost of providing captions for the various versions of the long-form commercial.<sup>236</sup> NIMA further asserts that in contrast to traditional programming long-form advertising derives its revenue from sales directly to the consumer and cannot simply pass the cost of closed captioning on to other advertisers.<sup>237</sup> Similarly, HSN argues that the cost of captioning all-live retail programming may impair the ability of electronic retailers to bring products to their viewers at

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<sup>228</sup>Report and Order 13 FCC Rcd 3345-46 ¶¶ 152-153.

<sup>229</sup>Id. at 3344-45 ¶¶ 150.

<sup>230</sup>ALTV Petition at 9.

<sup>231</sup>Id.

<sup>232</sup>Id. at 9; ALTV Reply at 5.

<sup>233</sup>NIMA Petition at 3.

<sup>234</sup>Id. See also HSN Opposition at 2-3.

<sup>235</sup>NIMA Petition at 3-4. See also HSN Opposition at 3. To illustrate the effectiveness of these graphics in making this programming accessible to persons with hearing disabilities, HSN notes that it already receives numerous responses from viewers on its TTY service (which it asserts averages several calls per day). HSN Opposition at 3.

<sup>236</sup>NIMA Petition at 5.

<sup>237</sup>Id. at 6.

competitive prices, thus harming viewers, product manufacturers, and the home shopping networks.<sup>238</sup> HSN also argues that the frequency of errors in captioning these primarily live programs may result in confusion among viewers faced with discrepancies between erroneous captions and the information already displayed on the screen.<sup>239</sup>

77. NIMA states that long-form advertisers derive their revenues from sales to consumers, and since advertisers cannot determine which channels produced their revenues in excess of the \$3 million revenue threshold they will not be able to take advantage of the revenue based exemptions.<sup>240</sup> NIMA also claims that it would have to caption its commercials if they appeared on any channel with more than \$3 million in revenue.<sup>241</sup> NIMA proposes that, absent a categorical exemption for long-form advertising, the Commission broaden the revenue exemption to clarify that long-form advertisers need not spend more than 2% of gross revenues from sales of the advertised product or service in a particular long-form advertisement in the prior year and need not caption any program if the product or service in a particular long-form advertisement produced gross revenues of less than \$3 million in the prior year.<sup>242</sup> HSN suggests that, even if the Commission does not provide a general exemption to home shopping programs that display price, product number and other critical information on screen throughout their programming, specific guidelines should be adopted that would permit these programmers to use alternative means to make their programming effectively accessible.<sup>243</sup>

78. NAD/CAN opposes exempting home shopping programming and infomercials.<sup>244</sup> NAD/CAN cites examples to illustrate that the graphics used in such programming do not provide adequate information.<sup>245</sup> NAD/CAN further questions why infomercials and home shopping programming providers include dialogue if it is not useful for the consumer.<sup>246</sup> Furthermore, NAD/CAN disputes NIMA's assertion that captioning may block on-screen textual information.<sup>247</sup> NAD/CAN argues that either graphics can be redesigned to minimize their interference with captions or captions can be placed so as to not interfere with textual or graphic

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<sup>238</sup>HSN Opposition at 3.

<sup>239</sup>*Id.*

<sup>240</sup>NIMA Petition at 7-8.

<sup>241</sup>*Id.*

<sup>242</sup>*Id.* at 9.

<sup>243</sup>HSN Opposition at 4.

<sup>244</sup>NAD/CAN Opposition at 8-9.

<sup>245</sup>*Id.* at 8.

<sup>246</sup>*Id.* at 9.

<sup>247</sup>*Id.*

displays.<sup>248</sup> NAD/CAN also asserts that digital technology will allow the viewer to control the size, placement and color of captioning. Finally, NAD/CAN maintains that because the textual and graphic displays are static, information can be obtained within a few seconds during the program.<sup>249</sup>

79. We reaffirm our previous decision and will require long-form advertising to be subject to the same captioning requirements as other programming. We previously considered and rejected requests for exemption of programming that uses graphics and text to sell products or services. We concluded that the dialogue in such programs adds information that would be lost to consumers with hearing disabilities without captions and that the captioning rules should apply to such programming. In response to arguments that the captions block the text and graphics, we note that they can be designed so that they do not interfere with each other. Moreover, as we indicated in the *Report and Order*, long-form advertising closely resembles conventional programming in that it is prerecorded and has repeat value.<sup>250</sup> The general revenue exemption rules provide relief in that no video programming provider with less than \$3 million in annual revenues will be required to provide captioning nor will any video programming provider be required to spend more than 2% of its revenue on captioning. In calculating the per channel revenues, we will allow providers of such programming to use any reasonable attribution methodology. For example, a provider could simply divide its total sales attributable to long-form advertising by the number of channels on which that programming is distributed in order to determine the per channel revenue.

80. Edited Programming. Captioned programming that is edited must be reformatted in order to ensure that the captions are properly synchronized with the edited programming. This reformatting adds to the cost of otherwise routine editing. The Commission elected not to require the captioning of edited programming where the captions must be reformatted.<sup>251</sup> The Commission did not, however, specifically exempt edited programming.<sup>252</sup> A video programming provider is not required to reformat the captions of a specific program unless such captioning is necessary to reach the applicable benchmark.<sup>253</sup>

81. ALTV argues that edited programming that cannot be shown in captioned form should be exempt to allow the local station to edit programming, especially movies, to make it suitable for local tastes.<sup>254</sup> According to ALTV, without an exemption, stations almost in compliance with the benchmarks would be faced with three undesirable options: (a) edit the program and undertake the cumbersome and expensive task of reformatting the captions; (b) edit the program and broadcast it without reformatting the captions possibly

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<sup>248</sup>*Id.*

<sup>249</sup>*Id.*

<sup>250</sup>*Report and Order* 13 FCC Rcd 3346 ¶ 153.

<sup>251</sup> 47 C.F.R. § 79.1(c). *Report and Order* 13 FCC Rcd 3312-13 ¶ 86.

<sup>252</sup>*Report and Order* 13 FCC Rcd 3312-13 ¶ 86.

<sup>253</sup>*Id.*

<sup>254</sup>ALTV Petition at 12.

risking noncompliance with the Commission's rules; or (c) broadcast the program without editing.<sup>255</sup> ALTV asserts that while the Commission has sought to eliminate the risk of noncompliance by not requiring that stations reformat captions in edited programming, this solution will be largely illusory for stations near compliance with the captioning requirements.<sup>256</sup> NAD/CAN opposes ALTV's proposal to exempt edited programming arguing it allows stations to avoid captioning obligations by merely editing out allegedly objectionable scenes.<sup>257</sup> ALTV demurs to NAD/CAN's argument that its requested exemption of locally edited programming is only an effort to evade the captioning requirements under the guise of editing for taste.<sup>258</sup> ALTV argues that reformatting edited programming represents a significant burden and notes that the Commission has declined to require reformatting captions by video programming distributors.<sup>259</sup>

82. We reaffirm our previous decision. A program that is received with captions that is edited need not have its captions reformatted (i.e., it need not be captioned under § 79.1(c), the Obligation to Pass Through Captions of Already Captioned Programming). Eventually, as the benchmarks increase, distributors will have to reformat the captions to comply with the rules. We expect that new technologies will be developed to standardize reformatting procedures among captioning agencies making the process easier and less expensive. We will not exempt locally edited programming as requested by ALTV. We expect formatting to become standardized among captioning agencies which will in turn allow for easier, less expensive reformatting of edited programming. Because captioning is being gradually phased in over an eight year period for new programming and over a ten year period for pre-rule programming, we do not believe the requested relief is necessary.

83. We note that persons with hearing disabilities are concerned that programming often includes the "cc" closed captioning logo even when the version of the program being shown is not captioned.<sup>260</sup> We expect video programming providers to take any steps necessary to ensure that the captioning logo is used only when the version of the programming being shown is captioned. We also expect that video programming providers in conjunction with those publicizing programming and publishing programming schedules will make every effort to correctly label programming as to whether it is captioned.

84. Pre-1970 Programming. Encore seeks an exemption for video programming first exhibited prior to January 1, 1970. Encore contends that older movies theatrically released prior to 1970 experience a substantial decline in licensing fees, and that these fees are so small that owners of such movies are unlikely

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<sup>255</sup>*Id.*

<sup>256</sup>*Id.*

<sup>257</sup>NAD/CAN Opposition at 12-13.

<sup>258</sup>ALTV Reply at 4-5.

<sup>259</sup>*Id.*

<sup>260</sup> See, e.g., *ex parte* letter from John Donnarumma, Director of Public Relations, Television Rights for the Hearing Impaired, Inc., May 5, 1998; *ex parte* letter from Michael N. Ubowski, Arizona Association of the Deaf, Inc., February 10, 1998; e-mail from strostle@uh.edu, May 2, 1998; e-mail from Steve and Jamie Berke, berke@erols.com, February 27, 1997.

to caption them due to the minimal returns possible on their investment.<sup>261</sup> According to Encore, when the 75% pre-rule captioning requirement becomes effective, the captioning burden will disproportionately handicap networks that rely on older movies to fill their program schedules.<sup>262</sup> Encore claims that this will make such services substantially more expensive to operate and will discourage diversity in the marketplace.<sup>263</sup> Encore observes that the owners of older movies frequently have declined to reissue such movies on video cassette, leaving cable networks as the only remaining distributor for these less prominent movies.<sup>264</sup> Encore asserts that exempting programming first exhibited, theatrically or otherwise, prior to January 1, 1970, will not substantially affect the availability of closed captioning as the bulk of programming includes newer programming and the exemption would only apply to older programs with limited licensing fee potential.<sup>265</sup>

85. NAD/CAN opposes Encore's request to exempt pre-1970 programming, contending that nothing in the statute or legislative history would permit such an exemption.<sup>266</sup> Further, NAD/CAN argues that captioning of this older programming is needed to offer access to such programming that has historical or cultural significance for persons with hearing disabilities, an opportunity denied previously during the early years of television, or when these older programs were released through theaters and home video without captioning.<sup>267</sup>

86. We decline to adopt Encore's proposed exemption for video programming first published or exhibited prior to 1970. There is no support for such a broad exemption in the statute. Section 713 indicates that Congress intended to maximize the captioning of older programming.<sup>268</sup> We have concluded that it was Congress' intent to place pre-rule programs under a lesser captioning requirement than that for new programs and, at the same time, to require that these programs be captioned to the maximum extent possible.<sup>269</sup> If Congress had intended to create a blanket exemption for the oldest programming (e.g., pre-1970) as a class, it could have expressly done so or it could have specified a lesser standard for such programming. Neither Encore nor GSN, which supports the proposal, have demonstrated that captioning would be economically burdensome as envisioned by the law in all or even most cases involving this class of programming. Indeed,

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<sup>261</sup>Encore Petition at 5-6. *See also* GSN Opposition at 5-6.

<sup>262</sup>Encore Petition at 6.

<sup>263</sup>*Id.*; *see also* GSN Opposition at 5-6.

<sup>264</sup>Encore Petition at 6.

<sup>265</sup>*Id.* at 8-9.

<sup>266</sup>NAD/CAN Opposition at 9.

<sup>267</sup>*Id.* at 9-10.

<sup>268</sup>47 U.S.C. § 613(b)(2).

<sup>269</sup>*Report and Order* 13 FCC Rcd 3301-02 ¶¶ 62-63.

the Commission found that much pre-1970 programming has voluntarily been captioned and, therefore, there is no basis for exempting all such programming.<sup>270</sup>

87. In adopting the captioning rules, we recognized that there might be more problems with the captioning of older programming and that it would not be economically or logistically feasible to caption all such programming. It is for this reason that the Commission set the captioning requirements for pre-rule programming at 75%, and adopted a longer transition period for captioning pre-rule programs.<sup>271</sup> In particular, the Commission concluded that the 25% allowance for programming without captions would be sufficient to permit the distribution of those older programs and movies that would be difficult or relatively expensive to caption.<sup>272</sup> The undue burden petition process allows the Commission to grant waivers or partial waivers tailored to address specific difficulties of a particular video programming provider as may be appropriate for certain older programs or movies.<sup>273</sup>

88. Interactive Programming. The Commission declined to adopt a specific exemption for "interactive" programming.<sup>274</sup> GSN maintains that the Commission did not address its proposal to exempt interactive programming but simply decided not to exempt such programming along with other programming that uses significant graphics such as weather, home shopping, and sports.<sup>275</sup> GSN initially sought an exemption for interactive programming because the captions would block portions of the programming.<sup>276</sup> In denying this and similar requests, the Commission observed that consumers always have the option of turning off the captions.<sup>277</sup> GSN contends that it is illogical for the Commission to require programmers to pay for captioning for programming that viewers may want to turn off because the captions may interfere with other aspects of the program.<sup>278</sup> GSN also asserts that the Commission fails to address its specific difficulties with incorporating closed captioning into its live interactive programming whereby the three second delay inherent in real-time captioning will prevent participation by viewers with hearing disabilities.<sup>279</sup>

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<sup>270</sup>*Id.* at 3303 ¶ 67.

<sup>271</sup>*See* 47 C.F.R. § 79.1(b)(2); *Report and Order* 13 FCC Rcd 3301-02 ¶¶ 61, 64-65.

<sup>272</sup>*See Report and Order* 13 FCC Rcd 3302 ¶ 63.

<sup>273</sup>*See* 47 C.F.R. § 79.1(f).

<sup>274</sup>*Report and Order* 13 FCC Rcd 3344-45 ¶ 150.

<sup>275</sup>GSN Petition at 17.

<sup>276</sup>*Report and Order* 13 FCC Rcd 3338 ¶ 135.

<sup>277</sup>*Id.* at 3344-45 ¶ 150.

<sup>278</sup>GSN Petition at 17 citing *Report and Order* 13 FCC Rcd 3344-45 ¶ 150.

<sup>279</sup>GSN Petition at 18.

89. NAD/CAN opposes GSN's request for a categorical exemption for interactive programming.<sup>280</sup> NAD/CAN argues that both graphics and captions can be rearranged to the satisfaction of producers and consumers.<sup>281</sup> NAD/CAN assert that, even if a viewer were occasionally required to turn off captions to view a program's graphics, this does not negate the need to caption the audio portion of the interactive game to instruct viewers about critical information such as the rules of the game.<sup>282</sup>

90. In response, GSN notes that the Commission had previously found that the "economically burdensome" standard may include "situations where captioning would be difficult or technically infeasible, would not add significantly to the information that is already available visually, [or] would create severe logistical problems."<sup>283</sup> GSN states that NAD/CAN fails to recognize the difficulty in structuring captioning in a way that would not affect the viewability of GSN's interactive programming or the additional costs associated with such measures.<sup>284</sup> GSN also disputes NAD/CAN's argument that, even if captioning must be turned off to watch an interactive program, captioning should still be required because it will allow such viewers to read the program's rules and questions and answers since these components make up only a small part of its interactive programming.<sup>285</sup>

91. We reject GSN's request for exemption of its interactive programming. The obstacles to captioning described by GSN are shared with other graphic intensive programming. If captions block the text or graphics of this programming, they can be redesigned not to interfere or consumers can choose to turn them off momentarily. GSN would have us exempt an entire class of programming based on a single example. Furthermore, their example is limited to game playing and does not contemplate other potential forms of interactive programming. Such an exemption would provide no incentive for others developing interactive programming to consider innovative means to caption their product or otherwise make it more accessible to persons with hearing disabilities. Even if there is no such solution in a specific case, the undue burden exemption remains available for video programming providers contemplating interactive programming.

### 3. *Requests for Elimination of Exemptions*

92. Spanish Language Programming. The Commission exempted non-English language programming from the captioning requirements except for scripted programming that can be captioned using ENR.<sup>286</sup> NAD/CAN requests that the Commission modify this exemption to require the captioning of Spanish

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<sup>280</sup>NAD/CAN Opposition at 13-14.

<sup>281</sup>*Id.* at 14.

<sup>282</sup>*Id.* at 14.

<sup>283</sup>GSN Reply at 2-4 citing *Report and Order* 13 FCC Rcd 3343 ¶ 145.

<sup>284</sup>GSN Reply at 2-4 citing NAD Opposition at 9.

<sup>285</sup>GSN Reply at 4.

<sup>286</sup>47 C.F.R. § 79.1(d)(3). *See also Report and Order* 13 FCC Rcd 3343-44 ¶¶ 146-148.



language programming using a more lenient implementation schedule.<sup>287</sup> NAD/CAN notes that while the Commission estimated that there are 17,339,172 Spanish speaking persons in the United States, others predict that by the year 2000, there will be 32 million Spanish speaking Americans living in the United States.<sup>288</sup> NAD/CAN points out that in the record of this proceeding Univision, a provider of Spanish language programming, only sought a longer phase-in period for Spanish language programming and a national captioning agency indicated that it could begin off-line captioning in a matter of months.<sup>289</sup> NAD/CAN asserts that captioning resources are available to begin captioning Spanish language programming. It also argues that Spanish language captioning is no more expensive than captioning English language programming when no translation is involved because both captions use the same character set, computers and captioning skills.<sup>290</sup> NAD/CAN further contends that concerns about captioning programming obtained from sources outside the United States are unfounded. For example, NAD/CAN cites "Masterpiece Theater," a program imported from England, which is captioned by the Public Broadcasting Service ("PBS").<sup>291</sup> University supports NAD and adds that any Spanish language programming that is too economically burdensome to caption would be exempt under an existing exemption and, therefore, there is no need for a separate exemption for Spanish language programming.<sup>292</sup>

93. Parties representing Spanish language programmers oppose NAD/CAN's proposal to apply the closed captioning requirement to Spanish language programming even using a more lenient phase-in schedule.<sup>293</sup> They argue that the benefits of such a requirement are outweighed by the burdens both financial and logistical.<sup>294</sup> According to Televisa, the Spanish speaking population that would benefit from closed captioned Spanish language programming is not sufficient to justify both the expense of providing captioned programming, and the related risk that mandatory captioning will reduce the diversity of available Spanish language programming.<sup>295</sup> Televisa states that it is estimated Spanish speaking persons with hearing disabilities represent only 0.75% of the United States population and 0.08% is believed to be persons with hearing disabilities who only speak Spanish.<sup>296</sup> The Spanish language programmers concur with the Commission's earlier conclusion that the personnel and facilities necessary to caption Spanish language programming are

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<sup>287</sup>NAD/CAN Petition at 11-13. *See also* COR Opposition 5-6.

<sup>288</sup>NAD/CAN Petition at 12.

<sup>289</sup>*Id.*

<sup>290</sup>*Id.* at 12-14.

<sup>291</sup>*Id.* at 13.

<sup>292</sup>University Opposition at 6.

<sup>293</sup>Televisa Opposition at 1-2; Telemundo Opposition at 1-2; Univision Opposition at 1.

<sup>294</sup>Televisa Opposition at 2; Telemundo Opposition at 2-3.

<sup>295</sup>Televisa Opposition at 8.

<sup>296</sup>*Id.*

limited as are captioning capabilities outside the United States.<sup>297</sup> Televisa maintains that the current lack of qualified non-English language captioners will necessarily translate to higher captioning costs for non-English language programming (including Spanish language programming) than for English language programming.<sup>298</sup> According to Telemundo, NAD/CAN has based its argument on the comments of a single captioning company and these arguments fail to distinguish between a largely voluntary captioning regime and a requirement that all programming be captioned.<sup>299</sup> Telemundo notes that it does caption its own national news coverage but is currently not in a financial position to expand its captioning efforts.<sup>300</sup> Telemundo further dismisses NAD/CAN's claim that Telemundo did not request an exemption but only a longer phase-in period noting that it had requested a permanent exemption for all foreign produced programming which constitutes a significant portion of the programming of any Spanish language network.<sup>301</sup> Televisa disputes NAD/CAN's assertion that distributors of Spanish language programming in the United States could "arrange contracts for captioning all shows brought to their stations from foreign countries" in order to comply with a captioning requirement.<sup>302</sup> Univision argues that the ability of PBS to caption a single imported English language program, "Masterpiece Theatre," is not demonstrative of the difficulties that would be associated with captioning hundreds of hours of imported Spanish language programs per week.<sup>303</sup> Televisa states that because no other country currently requires video programming to be captioned, and Univision represents such a small percentage of Televisa's total sales, no economic incentive exists for Televisa to caption its programming. Televisa states that the expense of captioning would necessarily be passed exclusively onto its American distributors.<sup>304</sup> Televisa asserts that this increase in programming costs is particularly relevant to program providers like Univision, which distributes nearly twice as much video programming as the broadcast networks.<sup>305</sup> Televisa asserts that these increased costs will force Univision and other United States distributors of Spanish language programming to eliminate from their programming schedules those Spanish language programs for which the

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<sup>297</sup>*Id.* at 3 citing *Report and Order* 13 FCC Rcd 3343 ¶ 147; Telemundo Opposition at 3; Univision Opposition at 4-5.

<sup>298</sup>Televisa Opposition at 7; Univision Opposition at 6.

<sup>299</sup>Telemundo Opposition at 4. *See also* Univision Opposition at n. 5.

<sup>300</sup>Telemundo Opposition at 4.

<sup>301</sup>*Id.*

<sup>302</sup>*Id.* at 6 citing NAD/CAN Petition at 13-14.

<sup>303</sup>Univision Opposition at 5; Telemundo Opposition at 4-5. Univision notes that the inability of Spanish language broadcasters to even obtain scripts for the foreign programs they would be required to caption makes the process far more complex and expensive. Univision Opposition at 6.

<sup>304</sup>Televisa Opposition at 5. Televisa notes that in 1996 program royalties paid to Televisa by its primary U.S. distribution outlet, the Univision Network, amounted to less than 2% of its total sales. Televisa Opposition at 5. Univision maintains that its research to date indicates that captioning its programming with the currently available technical and personnel resources would be impossible. Univision notes that, even if there were a Spanish language closed captioning industry, the cost of captioning Univision's programming would exceed the individual gross revenues for over half of Univision's owned and operated stations. Univision Opposition at 2-3.

<sup>305</sup>Televisa Opposition at 7 citing Univision Comments at 13.

cost of captioning would represent an uneconomical expenditure in light of expected revenues, thereby reducing the diversity of Spanish language programming in the United States.<sup>306</sup>

94. In response, NAD/CAN argues that objections to a Spanish language captioning requirements are based on the current availability of personnel and facilities and that is why additional time may be needed for the implementation of Spanish language captioning.<sup>307</sup> NAD/CAN also dismisses the complaint of Televisa that there is little incentive for producers outside the United States to supply captions for the American market since these producers need not provide captions for markets elsewhere.<sup>308</sup> NAD/CAN disputes Televisa's assertion that "no other country in the world currently requires video programming to be captioned," citing Canada, England, New Zealand, Australia, and Japan as other countries that caption some of their programming.<sup>309</sup> NAD/CAN also asserts that this would not be the first example where the United States has created a requirement for disability access which affects production in other countries.<sup>310</sup>

95. We generally reaffirm our previous decision to exempt non-English language programming that cannot be captioned using ENR programming.<sup>311</sup> Upon further consideration, however, we find it appropriate to further narrow this exemption and distinguish Spanish language programming from other non-English language programming. As NAD/CAN observes, the number of Spanish speaking persons is significantly larger than any other non-English speaking population and is rapidly growing.<sup>312</sup> Unlike most other non-English language programming, there already exists a substantial market for Spanish language programming in the United States.<sup>313</sup> Captioning of Spanish language programming is technically feasible, although it may be logistically more difficult than English language captioning.<sup>314</sup> While the number of Spanish language captioners appears to be small currently, we believe that their availability will grow to meet the

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<sup>306</sup>Televisa Opposition at 7-8.

<sup>307</sup>NAD/CAN Reply at 5-6.

<sup>308</sup>*Id.* at 6-7 citing Televisa Opposition at 5.

<sup>309</sup>NAD/CAN Reply at 6.

<sup>310</sup>*Id.* at 7. NAD cites requirements for all landline telephones to be hearing aid compatible and the requirement that all televisions over thirteen inches have built-in closed captioning decoders

<sup>311</sup>This use of ENR is distinct from the more limited use of ENR for English language that has been previously addressed.

<sup>312</sup>NAD/CAN Petition at 12. *See also* U.S. Department of Commerce, Bureau of the Census, Current Population Reports: Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050 (February 1996). Spanish is the most widely spoken non-English language with 17,339,172 speakers. *Id.* at Table 4. The second most widely spoken language is French with 1,702,176 speakers. We also note that our rules apply to video programming distributed in Puerto Rico. 47 U.S.C. § 153(22).

<sup>313</sup>NAD/CAN Petition at 12.

<sup>314</sup>*See, e.g.,* WGBH Comments to *Notice* at 9C stating that "Destinos" a PBS Spanish instructional program is captioned. *See also 60 Minutes Finds New Audience*, Captioning Center News, Issue 50, at 1 (announcing that the CBS program *60 Minutes* will be captioned in both Spanish and English).

demand created by a captioning requirement that will serve to make Spanish language programming accessible. Given the rapid growth of this sector of the market, captioning Spanish language programming should not prove economically burdensome under the generous phase-in period we are adopting. Accordingly, we will require that Spanish language programming be captioned using a longer transition period to allow Spanish language programmers to develop the means to accommodate the logistical difficulties associated with captioning such programming and for the market for Spanish language captioning to develop.

96. We will adopt a 12 year transition for new nonexempt Spanish language programming similar to our general implementation schedule for new nonexempt English language programming and a 14 year transition period for pre-rule nonexempt Spanish language programming.<sup>315</sup> We will establish three benchmarks for new programming and one benchmark for pre-rule programming similar to those adopted for nonexempt English programming. We believe that by lengthening the transition periods for Spanish language programming by four years we will be providing sufficient time for the necessary captioning resources to develop.

97. Under the transition we adopt for new Spanish language programming, the benchmarks will become effective at three year intervals. Between January 1, 2001, and December 31, 2003, a video programming distributor must provide at least 450 hours of captioned video programming on each channel during each calendar quarter; between January 1, 2004, and December 31, 2006, a video programming distributor must provide at least 900 hours of captioned video programming on each channel during each calendar quarter; and between January 1, 2007, and December 31, 2009, a video programming distributor shall provide at least an average of 1350 hours of captioned video programming on each channel during each calendar quarter. Effective January 1, 2010, 100% of the programming distributor's new nonexempt video programming must be provided with captions. To the extent that the number of hours of new nonexempt programming on a channel during a calendar quarter is less than the benchmarks specified during the transition period, then 100% of all new nonexempt programming on that channel must be captioned.

98. For pre-rule Spanish language programming, we will require that 75% of all pre-rule nonexempt programming on each channel and during each calendar quarter include captions as of January 1, 2012, the end of the transition period. We also establish one benchmark for such pre-rule programming halfway through the transition period. Thus, video programming distributors will be required to provide captioning for 30% of their pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter beginning on January 1, 2005. Section 79.1(b) is amended accordingly.

99. Late Night Programming. The Commission concluded that the costs of captioning late night programming outweigh the benefits to be derived from captioning such programming at this time.<sup>316</sup> We stated, however, that as we implement our closed captioning rules we will consider whether there is a continued need

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<sup>315</sup>In developing this schedule, we note Univision sought a phase-in in its original comments.

<sup>316</sup>47 C.F.R. § 79.1(d)(5). See also *Report and Order* 13 FCC Rcd 3346-47 ¶ 155.

to exempt this daypart and whether captioning of programming distributed during the late night time period should be counted towards compliance with the rules.<sup>317</sup>

100. NAD/CAN requests the Commission reduce the exemption for late night programming.<sup>318</sup> NAD/CAN notes that this exemption when combined with the 5% de minimis allowance, results in 21% of all programming being exempt from captioning. Even then, NAD/CAN observes that still more exemptions may be available to individual programming providers.<sup>319</sup> Similarly, COR argues this exemption is overly broad and can be handled more equitably within the Commission's general revenue exemption.<sup>320</sup> NAD/CAN also objects to the provision that allows programming providers to exempt programming service for any continuous four hour period between 12 a.m. and 7 a.m. local time.<sup>321</sup> NAD/CAN argues that expanding the hours of this exemption in this fashion is inconsistent with any reasoning that could support a late night programming exemption. NAD/CAN argues that, while this exemption is premised on the low viewership between the hours of 12 a.m. and 6 a.m., many popular late night programs continue past 12 a.m. and many viewers begin their day by watching the 6 a.m. news.<sup>322</sup>

101. NCTA opposes NAD/CAN's petition to reduce the exemption for late night programming.<sup>323</sup> According to NCTA, NAD/CAN fails to demonstrate that the Commission was incorrect in concluding that captioning late night programming would constitute an economic burden.<sup>324</sup> GSN agrees with the Commission that the cost of captioning late night programming outweighs the possible benefits and observes that throughout much of the history of broadcasting programming was not aired during these hours given the costs of producing and distributing programming for such a limited audience.<sup>325</sup> NCTA also maintains that NAD/CAN has incorrectly interpreted the late night programming exemption to be broader than it is.<sup>326</sup> NCTA notes that, while the rule allows some networks to choose a four hour period between 12 a.m. and 7 a.m. local time, this provision applies only to networks that serve the United States with a single satellite feed crossing several time

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<sup>317</sup>*Report and Order* 13 FCC Rcd 3347 ¶ 156.

<sup>318</sup>NAD/CAN Petition at 10-11. *See also* COR Opposition 6.

<sup>319</sup>NAD/CAN Petition at 11.

<sup>320</sup>COR Opposition 6. *See also* University Opposition at 5.

<sup>321</sup>NAD/CAN Petition at 11. *See also* University Opposition at 5.

<sup>322</sup>NAD/CAN Petition at 10-11.

<sup>323</sup>*Id.* *See also* GSN Opposition at 10-11.

<sup>324</sup>NCTA Opposition at 10.

<sup>325</sup>GSN Opposition at 10-11.

<sup>326</sup>NCTA Opposition at 10-11.

zones.<sup>327</sup> The rule allows these networks to choose any continuous four hour block of time beginning no earlier than 12 a.m. local time and ending no later than 7 a.m. local time in any area where that service is intended for viewing.<sup>328</sup> NCTA maintains that this approach ensures that relatively larger audiences will still receive captioned programming while preserving the ability of single feed networks to take advantage of the exemption for hours when appropriate.<sup>329</sup>

102. We will retain this exemption. We agree with GSN and NCTA that, at this time, the costs of a captioning requirement for late night programming would outweigh the benefits given the low audiences during this time period and the fact that many providers use filler or repeat programming during this time period.<sup>330</sup> We expect that even without a closed captioning requirement there will be captioned programming available to consumers during this daypart. To the extent that video programming providers repeat programming offered in other dayparts, and that programming has been captioned to meet the benchmark requirements, there will be captioned programming during the late night hours. In particular, the pass through requirement ensures that such material distributed during these hours will be captioned. We reaffirm our decision to allow single feed video programming providers some flexibility in using this rule in order to account for the difficulties imposed by serving multiple time zones. To do otherwise effectively deprives such programmers of the benefit of this exemption because they would be unable to have a single block of four hours exempt in all time zones.<sup>331</sup> We expect the costs of captioning to decrease as captioning resources increase. On this basis, it is likely that a requirement to caption programming distributed during the late night period near or at the end of the transition period generally will not impose an economic burden. Thus, we expect to consider whether to eliminate this exemption as we approach the end of this period.<sup>332</sup>

103. Short-form Advertising. The Commission concluded that commercials of five minutes duration or less ("short-form advertising") are not included in the definition of programming here.<sup>333</sup> As a result, under the rules adopted in the *Report and Order*, short-form advertising is not required to be closed captioned.<sup>334</sup>

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<sup>327</sup>*Id.* at 10.

<sup>328</sup>*Id.* at 10-11.

<sup>329</sup>*Id.* at 11. *See also* GSN Opposition at 10-11.

<sup>330</sup>GSN Opposition at 10-11; NCTA Opposition at 10-11.

<sup>331</sup>For example, absent a special provision for single feed programmers, such a video programming distributor would be in violation of the rule in the Pacific Standard Time Zone if it chooses to distribute programming without captioning at 2 a.m. Eastern Standard Time (i.e., it would be distributed at 11 p.m. Pacific Standard Time). We expect that single feed video programming providers will have an inherent incentive to choose their block of time so as to provide captioning to the largest number of consumers.

<sup>332</sup>*Report and Order* 13 FCC Rcd 3347 ¶ 156 where we stated that we that we will reexamine the continued need for the late night exemption as we implement our closed captioning rule.

<sup>333</sup>47 C.F.R. § 79.1(a)(1). *See also Report and Order* 13 FCC Rcd 3345-46 ¶ 152.

<sup>334</sup>*Report and Order* 13 FCC Rcd 3345-46 ¶¶ 152-153.

104. NAD/CAN requests that the Commission apply the requirements and implementation schedules to short-form advertising.<sup>335</sup> NAD/CAN asserts that the Commission's conclusion that commercials are ancillary to the programming is unsupported by the statute and conflicts with the important emphasis historically placed on advertising.<sup>336</sup> NAD/CAN notes, for example, that the Communications Act requires the Commission's to direct cable operators to carry the entirety of a television station's program schedule on their cable system.<sup>337</sup> NAD/CAN states that the Supreme Court has addressed the issue of the rights of consumers to access to commercial information.<sup>338</sup> NAD/CAN argues that because a nationally distributed commercial can cost thousands, or in some rare cases millions, of dollars, the \$200 required to caption commercials cannot realistically qualify such material for an exemption under the economically burdensome standard.<sup>339</sup> NAD/CAN states that, in most cases, video programming providers can pass the cost of monitoring commercials for captions on to advertisers.<sup>340</sup> NAD/CAN also argues that need for readily accessible political information is even more acute.<sup>341</sup> NAD/CAN notes that Congress has recognized the significance of political advertising and requires broadcasters to offer reduced rates for such advertising during the 45 days prior to a primary or primary runoff election and 60 days prior to the date of a general or special election.<sup>342</sup> NAD/CAN suggests that, at a minimum, the Commission should require captioning of advertising in national elections, as well as in any election for which candidates receive local or federal funding.

105. NAB supports the Commission's determination that short-form advertisements are outside the definition of "programming" and therefore not subject to the closed captioning requirements.<sup>343</sup> NAB argues that neither the 1996 Act nor the associated legislative history defines "video programming" or implicitly or explicitly includes short-form commercials as "video programming."<sup>344</sup> NAB asserts that, in other contexts, Congress has used the term "programming" in ways that have clearly distinguished program material from

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<sup>335</sup>NAD/CAN Petition at 7-10. *See also* COR Opposition 5-6; University Opposition at 4-5.

<sup>336</sup>NAD/CAN Petition at 8-9. *See also* University Opposition at 4 (arguing that the language of the 1996 Act does not support the Commission's contention that commercials are ancillary to the main programming content).

<sup>337</sup>NAD/CAN Petition citing 47 U.S.C. § 534(b)(3)(B) (must-carry rules).

<sup>338</sup>NAD/CAN Petition at 8-9 citing *VA Pharmacy Board v. VA Consumer Council*, 425 U.S. 748 (prohibition against advertising the price of prescription drugs struck down); *44 Liquormart, Inc. v. Rhode Island*, 134 L. Ed. 2d. 711, 723-24 (1996) (advertising ban on the price of alcoholic beverages held invalid); *Edenfeld v. Fane*, 123 L. Ed. 2d 543, 552; *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (rejecting ban on promotional advertising by electric utilities).

<sup>339</sup>NAD/CAN Petition at 7.

<sup>340</sup>*Id.* at 10.

<sup>341</sup>*Id.* at 9-10.

<sup>342</sup>*Id.* at 9 citing 47 U.S.C. § 315(b)(1).

<sup>343</sup>NAB Opposition at 6-8.

<sup>344</sup>*Id.* at 6-7.

advertising.<sup>345</sup> NAB asserts that NAD/CAN's proposal to mandate captioning of political campaign advertising would be inconsistent with the Communications Act's prohibition on censorship of station uses by candidates.<sup>346</sup> As a practical matter, NAB cautions that captioning added to political advertising at the last minute may block viewing of the visual sponsorship identification information required by the Commission's rules.<sup>347</sup> According to NCTA, the precedents cited by NAD/CAN fail to support its position that advertising should be captioned.<sup>348</sup> NCTA argues that these cases reflect a court striking down government restrictions on commercial speech.<sup>349</sup> In the instant case, NCTA argues that the Commission is not restricting commercial speech or affecting the content of advertising.<sup>350</sup> NCTA asserts that the Commission's approach is consistent with these precedents and a captioning mandate would result in the Commission dictating the content of advertising.<sup>351</sup>

106. NAD/CAN disputes arguments supporting the current rules' exclusion of advertising from closed captioning requirements.<sup>352</sup> NAD/CAN argues that NAB's assertion that Congress' silence justifies the exemption holds little weight given the "strong legislative intent to provide *full* captioning access to all new video programming."<sup>353</sup> NAD/CAN also disputes NAB's and NCTA's interpretation of the precedent previously cited by NAD/CAN.<sup>354</sup> NAD/CAN argues that those cases reflect an overriding governmental interest in providing consumers with complete access to commercial information for informed decision making in purchases.<sup>355</sup> Rather than dictating content as suggested by NCTA, NAD/CAN argues that a captioning mandate for short-form advertising would dictate access to advertising by persons with hearing disabilities, regardless of the advertising content.<sup>356</sup>

107. We reassert our previous conclusion that short-form advertising is not covered by Section 713. As we stated in the *Report and Order*, while we recognize that in some contexts programming and advertising

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<sup>345</sup>NAB Opposition at 7 citing Cable Television Consumer Protection And Competition Act of 1992, Public L. No. 102-385, § 2(a)(12) and Children's Television Act, Pub. L. No. 101-437, § 101.

<sup>346</sup>NAB Opposition at 8 citing 47 U.S.C. § 315(a) and 47 U.S.C. § 312(a)(7).

<sup>347</sup>NAB Opposition at 8 citing 47 C.F.R. § 73.1212(a)(2)(ii).

<sup>348</sup>NCTA Opposition at 9. *See also* NAB Opposition at 6.

<sup>349</sup>NCTA Opposition at 9. *See also* NAB Opposition at 6.

<sup>350</sup>NCTA Opposition at 9. *See also* NAB Opposition at 6.

<sup>351</sup>NCTA Opposition at 9. *See also* NAB Opposition at 6.

<sup>352</sup>NAD/CAN Reply at 9.

<sup>353</sup>*Id.*

<sup>354</sup>*Id.*

<sup>355</sup>*Id.*

<sup>356</sup>*Id.*



may be treated the same for definitional purposes, here we conclude that it is reasonable to define short-form advertising as separate from programming and thus not subject it to the captioning obligations.<sup>357</sup>

## E. EXEMPTIONS BASED ON THE UNDUE BURDEN STANDARD

108. Section 713(d)(3) permits a video programming provider or program owner to petition the Commission for an exemption from the closed captioning requirements where it can be shown that such requirements would impose an "undue burden" which is defined as a significant burden or expense.<sup>358</sup> The Commission established procedures that permit any party in the video programming distribution chain to file for an exemption under the undue burden standard.<sup>359</sup> Petitions must include information that demonstrates how one or more of the statutory factors specified in Section 713(e) that the Commission is required to consider are met.<sup>360</sup> Petitioners are also permitted to submit any other information they deem appropriate.<sup>361</sup> During the pendency of an undue burden petition, the programming subject to the request for exemption will be considered exempt from the closed captioning requirements.<sup>362</sup>

### 1. *Requirements During the Pendency of Petitions*

109. NAD/CAN requests that the rules be amended to require captioning during the pendency of the petition before the Commission.<sup>363</sup> NAD/CAN compares this situation to the Commission's rule requiring cable systems to continue to carry a broadcast station during a "must-carry" dispute.<sup>364</sup> GSN, NAB and NCTA oppose this proposal and argue that forcing programmers to provide captioning during the pendency of their petitions would defeat the purpose of the exemption and impose captioning on those who could least afford it.<sup>365</sup> Absent some evidence of abuse, NAB recommends that the Commission not require stations to caption programming during the pendency of an undue burden petition.<sup>366</sup>

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<sup>357</sup>Report and Order 13 FCC Rcd 3345-6 ¶ 152.

<sup>358</sup>47 U.S.C. § 613(d)(3).

<sup>359</sup>47 C.F.R. § 79.1(f). See also Report and Order 13 FCC Rcd 3363-64 ¶ 199.

<sup>360</sup>47 C.F.R. § 79.1(f)(2). See also Report and Order 13 FCC Rcd 3363-65 ¶¶ 198-202. The factors the Commission is required to consider include: (a) the nature and cost of the closed captions for the programming; (b) the impact on the operation of the provider or program owner; (c) the financial resources of the provider or program owner; and (d) the type of operations of the provider or program owner. 47 U.S.C. § 613(e).

<sup>361</sup>47 C.F.R. § 79.1(f)(3). See also Report and Order 13 FCC Rcd 3363 ¶ 198.

<sup>362</sup>47 C.F.R. § 79.1(f)(3). See also Report and Order 13 FCC Rcd 3364 ¶ 200.

<sup>363</sup>NAD/CAN Petition at 17.

<sup>364</sup>*Id.*

<sup>365</sup>GSN Opposition at 12, NAB Opposition at 11, NCTA Opposition at 13-14.

<sup>366</sup>NAB Opposition at 11.

110. We continue to believe that requiring parties to provide captioning during the pendency of the petition will result in some parties being unduly burdened. NAD/CAN is mistaken in its reliance on the rules addressing must-carry, as those rules preserve the status quo during the pendency of the petition. In the instant case, we believe that a petitioner that is seeking an exemption from complying with our rules should be allowed to maintain its status at the time of the petition. The parties most likely to petition for an undue burden exemption are those least able to pay for captioning. The approach advocated by NAD/CAN risks requiring legitimate petitioners to sustain tangible undue economic burden during the pendency period, a result contrary to the intent of Congress.

## 2. *Time Limits on Undue Burden Exemptions*

111. NAD/CAN proposes that the Commission establish a time limit on undue burden exemptions, such as one to two years.<sup>367</sup> According to NAD/CAN, the reason for virtually all undue burden exemptions is likely to disappear over time as the costs of captioning decline or petitioners' financial situations changes.<sup>368</sup> NAB opposes NAD/CAN's request that undue burden exemption be limited in time.<sup>369</sup> NAB states that doing so would only create greater burdens for both programmers and the Commission as repeated requests are likely to be filed for subsequent airing of programs after their exemptions have expired.

112. We previously determined the undue burden exemption was intended to allow the Commission to evaluate individual circumstances when considering whether specific programming should be exempt from our captioning requirements. In establishing procedures for filing and assessing undue burden exemption petitions, we sought to provide sufficient flexibility to accommodate the wide range of situations that might arise. We believe that the procedures we adopted satisfy this objective because petitioners may determine the best information, consistent with the statute, to demonstrate why an exemption is needed. We did not limit the range of remedies available, preserving our discretion to determine the exemption appropriate for a particular circumstance. We stated that we will consider time limits or alternative means of making programming accessible when evaluating requests for undue burden exemptions on the basis of the information regarding individual circumstances. We also determined that prescribing specific durations for such petitions partially defeats the purpose for the exemption. While a specific time limit may be appropriate for some cases, a longer or shorter period may be appropriate in others. NAD/CAN fails to recognize the burden that frequent petitioning could pose for some small entities. We decline to reverse this decision.

## F. ENFORCEMENT AND COMPLIANCE REVIEW MECHANISM

113. In the *Report and Order*, the Commission decided to enforce the closed captioning rules through a complaint procedure. The rules require that complaints first be directed to video programming

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<sup>367</sup>NAD/CAN Petition at 17. NAD/CAN later argues that no parties to this proceeding opposed this proposal and further asserts that NCTA supports its proposal to establish a deadline for the resolution of such petitions. NAD/CAN Reply at 10 citing NCTA Opposition at 14. We note, however, that NCTA does not support a specific schedule or deadline for resolution of undue burden petitions but simply advocates expeditious resolution of such petitions.

<sup>368</sup>NAD/CAN Petition at 18.

<sup>369</sup>NAB Opposition at 11. *See also* GSN Opposition at 12; NCTA Opposition at 15.

distributors.<sup>370</sup> A complaint must be filed with the video programming provider no later than the end of the calendar quarter following the calendar quarter in which the alleged violation occurred.<sup>371</sup> A complaint must, at a minimum, state with specificity the Commission rule violated and should provide some information which supports the alleged rule violation.<sup>372</sup> We require the video programming provider to provide a written response to a complaint within 45 days after the end of the calendar quarter in which the violation occurred or 45 days after receipt of the complaint, whichever is later.<sup>373</sup> If a video programming provider fails to respond to a complaint or a dispute remains following this initial procedure, a complaint may be filed with the Commission.<sup>374</sup> A video programming provider will have 15 days to respond to the complaint filed with the Commission.<sup>375</sup> In order to further minimize the administrative burden on individual video programming distributors, we elected not to prescribe specific recordkeeping requirements but instead to require video programming distributors to maintain records sufficient to demonstrate compliance in response to any complaint.<sup>376</sup> We will permit video programming providers to rely on certifications from program suppliers to demonstrate compliance with the rule.<sup>377</sup>

### ***1. Filing Procedures***

114. NAD/CAN seeks elimination of the requirement that consumers contact the provider first.<sup>378</sup> It argues that the Commission has previously rejected this approach in its proceeding on children's educational programming. NAD/CAN also states that prior experiences with a particular programmer may lead consumers to conclude that the programmer is likely to be unresponsive to consumer complaints.<sup>379</sup> COR joins NAD/CAN in seeking to eliminate this requirement and suggests that where consumers can prove that going to a provider first would prove futile, the consumer be permitted to proceed directly with a complaint to the Commission.<sup>380</sup> ALTV and NCTA oppose NAD/CAN's demand that the Commission eliminate the requirement that complaints

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<sup>370</sup>47 C.F.R. § 79.1(g)(1). *See also Report and Order* 13 FCC Rcd 3381 ¶ 240.

<sup>371</sup>47 C.F.R. § 79.1(g)(2). *See also Report and Order* 13 FCC Rcd 3382 ¶ 242.

<sup>372</sup>47 C.F.R. § 79.1(g)(1). *See also Report and Order* 13 FCC Rcd 3381 ¶ 241.

<sup>373</sup>47 C.F.R. § 79.1(g)(3). *See also Report and Order* 13 FCC Rcd 3382-83 ¶ 243.

<sup>374</sup>47 C.F.R. § 79.1(g)(4). *See also Report and Order* 13 FCC Rcd 3382-83 ¶ 243.

<sup>375</sup>47 C.F.R. § 79.1(g)(5). *See also Report and Order* 13 FCC Rcd 3382-83 ¶ 243.

<sup>376</sup>47 C.F.R. § 79.1(g)(5). *See also Report and Order* 13 FCC Rcd 3383 ¶ 244.

<sup>377</sup>47 C.F.R. § 79.1(g)(5). *See also Report and Order* 13 FCC Rcd 3383 ¶ 244.

<sup>378</sup>NAD/CAN Petition at 20-21. *See also COR Opposition* at 4-5.

<sup>379</sup>NAD/CAN Petition at 21. NAD/CAN compares this situation to the rules regarding pole attachments where parties are permitted to file directly with the Commission without first contacting the respondent, so long as the complaint contains an explanation for taking steps to resolve the problem prior to filing are believed to be "fruitless." NAD/CAN Petition at 21 citing 47 C.F.R. § 1.1404(i).

<sup>380</sup>COR Opposition 5.

first be directed to the video programming distributor.<sup>381</sup> ALTV asserts that the Commission's rules eliminate the potential confusion, frustration and wasted time about which NAD/CAN complains.<sup>382</sup> In the case of a local broadcast station, ALTV states that even consumers unfamiliar with the Commission's procedures are likely to send their complaint to the station.<sup>383</sup> If a consumer mistakenly sends the complaint to a cable company which carries the local station, ALTV notes that the cable company is required to not only return the complaint to the complainant, but to also provide the name and address of the station to whom the complaint should be sent.<sup>384</sup> ALTV and NCTA also assert that by requiring that complaints be addressed first at the local level, the Commission leaves the matter in the hands of the parties with the first hand knowledge and information to respond and, if necessary, correct a problem.<sup>385</sup> NCTA also supports the current rule requiring the video programming distributor to receive copies of the complaint filed with the Commission.<sup>386</sup> NCTA notes that the Commission has successfully relied on similar procedures for program access complaints, must-carry procedures, and complaints regarding cable signal quality.<sup>387</sup> NAD/CAN argues that the precedents cited by NCTA in support of the current rule involve situations where both parties are similarly situated.<sup>388</sup> NAD/CAN states that in the case of closed captioning the parties do not have comparable resource and the circumstances more nearly approximate the circumstances involved in the children's programming regulations.<sup>389</sup>

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<sup>381</sup>ALTV Opposition at 5-6.

<sup>382</sup>*Id.* at 5.

<sup>383</sup>*Id.*

<sup>384</sup>*Id.* at 5-6.

<sup>385</sup>*Id.* at 6; NCTA Opposition at 17-18.

<sup>386</sup>NCTA Opposition at 17-18. *See also* GSN Opposition at 12.

<sup>387</sup>NCTA Opposition at 17-18. For instance, NCTA notes that disputes regarding program access require an aggrieved competitor to notify the potential defendant prior to filing with the Commission. NCTA Opposition at 17 citing 47 C.F.R. § 76.1003(a). *See also* 47 C.F.R. § 76.1302(a) (notice required prior to filing a complaint alleging violation of carriage agreement rules). NCTA also cites the must-carry complaint resolution process noting that such complaints must be sent by a broadcaster to a cable operator prior to filing with the Commission. NCTA Opposition at 17 citing 47 C.F.R. §§ 76.7(4)(i) and 76.61(a).

<sup>388</sup>NAD/CAN Reply at 8 citing NCTA Opposition at 17.

<sup>389</sup>NAD/CAN Reply at 8. *See also* COR Opposition at 3-5. COR asserts that the Commission has already deemed monitoring and reporting requirements necessary to ensure accountability and compliance with the children's programming rules and argues that networks should be required to maintain information on captioned programs, exemptions claimed and other pertinent facts concerning their compliance with the captioning mandates. COR further maintains that such information should be kept in public files to facilitate monitoring of their compliance.

115. NAD/CAN argues that assuming that the Commission eliminates the 5% de minimis exemption all complaints should be answered within 20 days.<sup>390</sup> At the least, NAD/CAN asserts that complaints regarding pass through be answered within 20 days of receipt by the video programming provider.<sup>391</sup> NCTA opposes NAD/CAN's proposal to expedite the timetable for responding to complaints, arguing that adopting a 20 day requirement is unrealistic as cable operators will not always have the records necessary to demonstrate compliance by certain programmers.<sup>392</sup>

116. We generally retain the enforcement procedures adopted in the *Report & Order*. We continue to believe that in many cases requiring the complainant to go to the video programming distributor first will allow the parties to more quickly and satisfactorily resolve the dispute. Indeed, the direct relationship between the video programming distributor and the consumer was, in part, our justification for holding the video programming distributor responsible for compliance with the captioning rules.<sup>393</sup> Moreover, we expect video programming distributors to be responsive to consumer complaints. If a video programming distributor does not resolve these complaints, the Commission will become involved, and where violations have occurred, video programming distributors will face penalties.<sup>394</sup> Additionally, we will retain the process that requires the distributor to respond to a complaint 45 days after the end of the calendar quarter in which the alleged violation occurred or 45 days after receipt of the complaint, whichever is later. As we do not know the magnitude or the extent of complaints, we believe this time period may be needed to permit video programming providers to prepare a response demonstrating compliance. Depending on the facts alleged, the video programming distributor may be required to seek additional information from various video programming providers and thus require additional time to adequately respond to consumer complaints. This is appropriate for complaints regarding the measurement of compliance with the required amounts of captioning since they are calculated on a quarterly basis. We recognize that our decision to allow video programming providers to respond to a complaint within 45 days of the end of the quarter or after the complaint is filed is premised on the complaint being related to the compliance with the quarterly benchmarks. In order to avoid confusion for both video programming providers and consumers, however, we will apply the same time table even to those alleged violations that are not tied to quarterly compliance benchmarks.

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<sup>390</sup>NAD/CAN Petition at 22-23.

<sup>391</sup>*Id.* at 22.

<sup>392</sup>NCTA Opposition at 18. *See also* GSN Opposition at 13.

<sup>393</sup>*Report and Order* 13 FCC Rcd 3286 ¶ 27.

<sup>394</sup>While all complaints must be filed in writing, we believe that it is important that video programming distributors make their organizations accessible to persons with hearing disabilities seeking information about the entity's closed captioning or other matters. We strongly encourage all video programming distributors to have TTY telephones or to take measures to readily accommodate incoming calls placed through a Telecommunications Relay Service ("TRS") operator.

## 2. *Recordkeeping Requirements*

117. NAD/CAN further seeks to amend the rules to require recordkeeping.<sup>395</sup> NAD/CAN argues that the providers will have information pertaining to their captioning efforts readily available, it will not be burdensome to provide it to consumers and it will assist consumers in monitoring compliance.<sup>396</sup> NAD/CAN also states that consumers do not have the resources to monitor compliance themselves.<sup>397</sup> NCTA contends that the Commission does not typically prescribe recordkeeping requirements where compliance is complaint driven.<sup>398</sup> According to NCTA, proponents of recordkeeping requirements have failed to demonstrate a compelling need for increasing the administrative burden on video programming providers.<sup>399</sup> NAD/CAN dismisses the precedents cited by NCTA in support of the current "no recordkeeping" rule, arguing that most involve situations where complaints are made by other members of industry where both parties have comparable resources.<sup>400</sup> NAD/CAN argues that in the case of closed captioning the parties do not have comparable resources and the circumstances are more comparable to those of the children's programming regulations.<sup>401</sup> COR asserts that the Commission has already deemed monitoring and reporting requirements necessary to ensure accountability and compliance with the children's programming rules and argues that networks should be required to maintain information on captioned programs, exemptions claimed and other pertinent facts concerning their compliance with the captioning mandates. COR further maintains that such information should be kept in public files to facilitate monitoring of their compliance.<sup>402</sup>

118. We will continue to rely primarily on the complaint process to enforce our captioning requirements. We will not adopt recordkeeping or reporting requirements as they would impose unnecessary administrative burdens on video programming distributors and the Commission. Upon reconsideration, however, we believe it important to establish a means to further ensure compliance with our rules. Therefore we have decided to plan to conduct random audits of captioning similar to the audits we use to monitor

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<sup>395</sup>NAD/CAN Petition at 19-20. *See also* COR Opposition at 4-5.

<sup>396</sup>NAD/CAN Petition at 19-20. NAD/CAN also proposes a recordkeeping requirement could be used to eliminate the need for the de minimis 5% "exemption" and eliminate the need for video programming providers to file emergency undue burden exemptions. NAD/CAN Petition at 6.

<sup>397</sup>NAD/CAN Reply at 8.

<sup>398</sup>NCTA Opposition at 16. NCTA cites the process for rate justification as an example where the Commission has refrained from requiring publicly accessible file as part of a complaint driven procedure. NCTA Opposition at 16, citing 47 C.F.R. § 76.956. In addition, NCTA notes that the Commission does not require records be maintained for public inspection regarding compliance with program access rules. Rather, an operator or programmer must submit an answer to the complaint that demonstrates compliance. NCTA Opposition at 16 citing 47 C.F.R. § 76.1003. *See also* GSN Opposition at 12.

<sup>399</sup>NCTA Opposition at 16-17.

<sup>400</sup>NAD/CAN Reply at 8 citing NCTA Opposition at 17.

<sup>401</sup>NAD/CAN Reply at 8.

<sup>402</sup>COR Opposition at 3-5.

compliance with other rules, such as the children's programming requirements. Such audits may examine the captioning efforts of broadcasters or MVPDs. In conducting such audits, we may request the records of broadcasters or MVPDs or monitor the captioning provided by individual networks. We believe that the information gathered through these audits will be an important factor in monitoring the implementation of the captioning requirements, assist consumers should they find it necessary to file a complaint, and assist video programming providers to comply with our rules. We disagree with NAD/CAN that the precedents cited by NCTA in support of the current "no recordkeeping" rule involve situations where both parties have comparable resources and the circumstances here are more comparable to those of the children's programming regulations. The children's programming regulations only require the records be maintained for those channels which carry children's programming which effectively limits the recordkeeping requirements to a significantly smaller number of channels.<sup>403</sup> The captioning rules apply to every channel carried by an MVPD and virtually every program distributed by any broadcaster. Accordingly, a recordkeeping requirement would be significantly more extensive and costly. Furthermore, we note that our rules only require consumers to provide the best available evidence to support the complaint and the onus is on the video programming distributor to provide adequate information to demonstrate that the requirements have been met. Thus, we believe that our rules will provide sufficient incentive for video programming distributors to furnish clear, concise and accurate responses to consumers and ameliorates the initial burden on consumers.

#### IV. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

##### A. Background

119. As required by the Regulatory Flexibility Act (RFA),<sup>404</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the *Notice of Proposed Rulemaking* in this proceeding.<sup>405</sup> The Commission sought written public comment on the expected impact of the proposed policies and rules on small entities in the *Notice*, including comments on the IRFA.<sup>406</sup> Based on the comments in response to the *Notice*, the Commission included a Final Regulatory Flexibility Analysis ("FRFA") into the *Report and Order*.<sup>407</sup> While no petitioners seeking reconsideration of the *Report and Order* raised issues directly related to the FRFA, the Commission is amending the rules in a manner that may affect small entities. Accordingly, this Supplemental Regulatory Flexibility Analysis ("Supplemental FRFA") addresses those amendments and conforms to the RFA.

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<sup>403</sup>47 C.F.R. §§ 76.225, 76.305

<sup>404</sup>See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>405</sup>*Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Notice of Proposed Rulemaking, 12 FCC Rcd 1044, 1095 (1997) ("*Notice*").

<sup>406</sup>*Notice* 12 FCC Rcd 1095 ¶ 125.

<sup>407</sup>*Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272, 3388 (1997) ("*Report and Order*").

120. *Need for Action and Objectives of the Rule:* The 1996 Act added a new Section 713 to the Communications Act of 1934 that *inter alia* requires the Commission to develop rules to increase the availability of video programming with closed captioning.<sup>408</sup> The statutory objective of the closed captioning provisions is to promote the increased accessibility of video programming for persons with hearing disabilities. The Commission adopted the *Report and Order* in this proceeding on August 7, 1997, promulgating rules to implement this mandate. The current *Order on Reconsideration* clarifies and refines these rules in conformance with Section 713.

**B. Summary of Significant Issues Regarding FRFA Raised in Petitions for Reconsideration**

121. No parties address the FRFA in their petitions for reconsideration, or any subsequent filings. We have, however, addressed, on our own motion, steps taken to further minimize the effect of these requirements on small entities.<sup>409</sup>

**C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

122. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.<sup>410</sup> Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>411</sup>

123. As noted, an FRFA was incorporated into the *Report and Order*. In that analysis, the Commission described in detail the various kinds of small business entities that may be affected by these rules.<sup>412</sup> Those entities consist of program producers and distributors,<sup>413</sup> broadcast stations<sup>414</sup> and small

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<sup>408</sup>47 U.S.C § 613.

<sup>409</sup>See ¶¶ 127-130 *infra*.

<sup>410</sup>5 U.S.C. § 601(3) (1980) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes definitions in the Federal Register."

<sup>411</sup>Small Business Act 15 U.S.C. § 632.

<sup>412</sup>*Report and Order* 13 FCC Rcd 3391 ¶¶ 268-297.

<sup>413</sup>*Id.* at 3397-98 ¶¶ 288-289.

<sup>414</sup>*Id.* at 3396-97 ¶¶ 283-287



multichannel video programming distributors including cable system operators,<sup>415</sup> multipoint distribution systems,<sup>416</sup> direct broadcast satellite services and home satellite dishes,<sup>417</sup> open video systems<sup>418</sup> and satellite master antenna systems.<sup>419</sup> In this present *Order on Reconsideration*, we address petitions for reconsideration filed in response to the *Report and Order*. In this Supplemental FRFA, we incorporate by reference the description and estimate of the number of small entities from the previous FRFA in this proceeding,<sup>420</sup> subject to the following amendments.

124. *Open Video Systems ("OVS")*: As noted in the *Report and Order* the definition of a small entity in the context of cable or other pay television service includes all such companies generating \$ 11 million or less in annual receipts.<sup>421</sup> As of this date, the Commission has approved five additional applications for OVS operators, bringing the total number of certified operators to 14. Two more applications are pending. Of the entities authorized to provide OVS service, several are only recently approved and are not actually providing service and generating revenue. Little financial information is available for the many of entities authorized to provide OVS that are not yet operational. Given that some of these entities have not yet begun to generate revenues, we believe that our original conclusion that at least some OVS operators qualify as small entities remains sound.<sup>422</sup>

125. *Local Multipoint Distribution Service ("LMDS")*: As noted in the *Report and Order*, the SBA has developed a definition of small entity for cable and other pay television services which includes all such companies generating \$ 11 million or less in annual receipts.<sup>423</sup> The Commission concluded its LMDS spectrum auction on March 25, 1998. Of the 139 successful bidders, 93 qualified as small businesses. We are unable to determine how many of these small businesses will use the available spectrum to provide video programming services. We believe, however, that our original determination that at least some of these

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<sup>415</sup>*Id.* at 3392 ¶¶ 270-271.

<sup>416</sup>*Id.* at 3393 ¶¶ 272-274. This category includes both multipoint multichannel distribution systems (also known as "MMDS" or "wireless cable") as well as instructional television fixed service ("ITFS") licensees.

<sup>417</sup>*Id.* at 3393-94 ¶¶ 275-277.

<sup>418</sup>*Id.* at 3394-95 ¶ 278.

<sup>419</sup>*Id.* at 3395 ¶ 279.

<sup>420</sup>See Section C of the FRFA, "Description and Estimate of the Number of Small Entities to Which the Rules Will Apply," 13 FCC Rcd at 3391-3398 ¶¶ 268-289.

<sup>421</sup>*Report and Order* 13 FCC Rcd 3391 ¶ 268-269 citing 13 C.F.R. § 121.201 (SIC 4841).

<sup>422</sup>*Report and Order* 13 FCC Rcd at 3394-3395 ¶ 278.

<sup>423</sup>*Report and Order* 13 FCC Rcd at 3391 ¶ 268-269 citing 13 C.F.R. § 121.201 (SIC 4841).

licensees will provide video programming services and will thus qualify as small entities affected by our closed captioning requirements is correct.<sup>424</sup>

**D. Description of Reporting, Recordkeeping and Other Compliance Requirements:**

126. We did not prescribe reporting requirements in the *Report and Order*<sup>425</sup> and have declined to do so in the current *Order on Reconsideration*.<sup>426</sup> While parties representing persons with hearing disabilities petitioned for the adoption of such requirements on reconsideration,<sup>427</sup> we believe that our enforcement process alleviates the need for reporting and its associated burdens.<sup>428</sup> Thus, we will not impose recordkeeping requirements for video programming distributors. Rather, we shall allow video programming distributors to exercise their own discretion and only require that they retain records sufficient to demonstrate compliance with our rules.<sup>429</sup> In order to further relieve small video programming distributors of any unnecessary recordkeeping burden, we also permit video programming distributors to rely on certifications from the producers or owners of the programming to demonstrate compliance with our closed captioning rules.<sup>430</sup> At the same time we recognize the concerns that the hearing disabled community has raised regarding the need to monitor and ensure compliance with our closed captioning requirements. Accordingly, on reconsideration we stated that the Commission intends to conduct random audits of video programming as needed to ensure compliance with the captioning requirements.<sup>431</sup>

**E. Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered:**

127. In formulating our closed captioning rules in the *Report and Order*, we sought to minimize the effect on small entities while making video programming more accessible to persons with hearing disabilities. These efforts are consistent with the Congressional goal of increasing the availability of closed captioned programming while preserving the diversity of available programming. The actions we are taking on reconsideration further refine the closed captioning rules so as to advance the Congressional goal and further minimize unnecessary burdens on small entities.

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<sup>424</sup>*Id.* at 3395-97 ¶¶ 280-282.

<sup>425</sup>*Id.* at 3391 ¶¶ 268-297.

<sup>426</sup>*See* ¶ 118 *supra*.

<sup>427</sup>NAD/CAN Petition at 19-20; NAD/CAN Reply at 16; COR Opposition at 4-5.

<sup>428</sup>*See* ¶ 118 *supra*.

<sup>429</sup>47 C.F.R. § 79.1(g)(5)

<sup>430</sup>*Id.*

<sup>431</sup>*See* ¶ 118 *supra*.

128. For example, in the *Report and Order*, we exempted programming produced by ITFS licensees.<sup>432</sup> In the current *Order on Reconsideration*, we clarify the rules to ensure this exemption applies to any programming distributed by ITFS licensees pursuant to Sections 74.931(a), (b) or (c) of the rules. Thus, the amended rule applies to programming distributed by the ITFS licensees as part of its permitted educational operations regardless of whether the programming is produced by the ITFS licensee or a third party.<sup>433</sup>

129. We also amend the rules to establish an exemption for instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools.<sup>434</sup> On reconsideration, we conclude that this class of programming is already subject to sufficient safeguards to ensure its availability to persons with hearing disabilities. We further conclude that this exemption protects the continued availability of such programming.<sup>435</sup>

130. We also previously recognized that many newly launched services may qualify as small entities. We further acknowledged the need to allow new and innovative services designed to serve emerging or niche markets greater flexibility than more established services serving well defined markets.<sup>436</sup> Accordingly, we adopted an exemption from our captioning rules for new programming networks.<sup>437</sup> Upon reconsideration, however, we recognize that new networks launched only shortly before the enactment of the 1996 Act would not benefit from this exemption as originally drafted. Accordingly, on reconsideration we amend this exemption to provide the full four year exemption to networks that commenced operations within four years of the effective date of the closed captioning rules.<sup>438</sup> This expansion of the new network exemption will provide relief to a significant number of recently launched emerging networks without profoundly affecting the overall availability of captioned programming.

## F. Report to Congress

131. The Commission will send a copy of the *Order on Reconsideration*, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order on Reconsideration*, including Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

## V. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

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<sup>432</sup>*Report and Order* 13 FCC Rcd 3391 ¶¶ 268-297.

<sup>433</sup>47 C.F.R. § 79.1(d)(7). *See also* ¶ 63 *supra*.

<sup>434</sup>47 C.F.R. § 79.1(d)(14). *See also* ¶ 70 *supra*.

<sup>435</sup>*See* ¶ 70 *supra*.

<sup>436</sup>*Report and Order* 13 FCC Rcd 3391 ¶¶ 268-297.

<sup>437</sup>*Id.*

<sup>438</sup>47 U.S.C. § 79.1(d)(9). *See also* ¶ 54 *supra*.

132. This *Order on Reconsideration* has been analyzed with respect to the Paperwork Reduction Act of 1995 and has been found to contain no new or modified information collection requirements on the public.

## VI. ORDERING CLAUSES

133. Accordingly, IT IS ORDERED that the Petitions for Reconsideration in MM Docket No. 95-176 which pertain to the closed captioning of video programming are GRANTED IN PART and DENIED IN PART, as provided herein.

134. IT IS FURTHER ORDERED that, pursuant to authority found in 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, Part 79 of the Commission's rules IS HEREBY AMENDED as shown in Appendix B. The amendments to 47 C.F.R. §§ 79.1 shall be effective 30 days following publication of this *Order on Reconsideration* in the Federal Register.

135. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Order on Reconsideration*, including the Supplemental Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub.L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A****List of Submissions****Petitions for Reconsideration**

Association of America's Public Television Stations ("APTS")  
Association of Local Television Stations, Inc. ("ALTV")  
Encore Media Group LLC ("Encore")  
Game Show Network, L.P. ("GSN")  
National Association of the Deaf and the Consumer Action Network ("NAD/CAN")  
NIMA International ("NIMA")  
Outdoor Life Network, L.L.C., Speedvision Network, L.L.C. and the Golf Channel  
("Outdoor Life")  
Self Help for Hard of Hearing People, Inc. ("SHHH")  
Wireless Cable Association International, Inc. ("WCA")

**Oppositions to Petitions for Reconsideration**

A&E Television Networks ("A&E")  
Association of Local Television Stations ("ALTV")  
Council of Organizational Representatives on National Issues Concerning People who are Deaf or Hard of  
Hearing ("COR")  
Game Show Network, L.P. ("GSN")  
Grupo Televisa, S.A. ("Televisa")  
HSN, Inc. ("HSN")  
Lifetime Television ("Lifetime")  
National Association of Broadcasters ("NAB")  
National Association of the Deaf and the Consumer Action Network ("NAD/CAN")  
National Cable Television Association ("NCTA")  
Outdoor Life Network, L.L.C., Speedvision Network, L.L.C. and the Golf Channel  
("Outdoor Life")  
Radio-Television News Directors Association ("RTNDA")  
Self Help for Hard of Hearing People, Inc. ("SHHH")  
Telemundo Group, Inc. ("Telemundo")  
University Legal Services-Protection and Advocacy ("University")  
Univision Communications Inc. ("Univision")

**Replies to Oppositions to Petitions for Reconsideration**

American Association of Advertising Agencies ("AAAA")  
Association of America's Public Television Stations ("APTS")  
Association of Local Television Stations, Inc. ("ALTV")  
Encore Media Group LLC ("Encore")  
Game Show Network, L.P. ("GSN")

National Association of the Deaf and the Consumer Action Network ("NAD/CAN")

## APPENDIX B

### Revised Rules

Part 79 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 79--CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for Part 79 continues to read as follows:

Authority: 47 U.S.C. 613.

2. Section 79.1(b) is amended by revising paragraphs (1) and (2) and adding paragraphs (3) and (4) to read as follows:

(b) Requirements for Closed Captioning of Video Programming.

(1) Requirements for new English language programming. Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2000, and December 31, 2001, a video programming distributor shall provide at least 450 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2002, and December 31, 2003, a video programming distributor shall provide at least 900 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2004, and December 31, 2005, a video programming distributor shall provide at least an average of 1350 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2006, and thereafter, 100% of the programming distributor's new nonexempt video programming must be provided with captions.

(2) Requirements for pre-rule English language programming.

(i) After January 1, 2003, 30% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(i) As of January 1, 2008, and thereafter, 75% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(3) Requirements for new Spanish language programming. Video programming distributors must provide closed captioning for nonexempt Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2001, and December 31, 2003, a video programming distributor shall provide at least 450 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2004, and December 31, 2006, a video programming distributor shall provide at least 900 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2007, and December 31, 2009, a video programming distributor shall provide at least an average of 1350 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2010, and thereafter, 100% of the programming distributor's new nonexempt Spanish language video programming must be provided with captions.

(4) Requirements for Spanish language pre-rule programming.

(i) After January 1, 2005, 30% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(i) As of January 1, 2012, and thereafter, 75% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(5) Video programming distributors shall continue to provide captioned video programming at substantially the same level as the average level of captioning that they provided during the first six (6) months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.

3. Section 79.1(d) is amended by revising paragraphs (3), (7), (8), (9) and adding a new paragraph (14) to read as follows:

(3) Programming Other Than English or Spanish Language. All programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the "electronic news room" technique is not exempt.

(7) ITFS Programming. Video programming transmitted by an Instructional Television Fixed Service licensee pursuant to Sections 74.931(a), (b) or (c) of the rules.

(8) Locally Produced and Distributed Non-News Programming With No Repeat Value. Programming that is locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the "electronic news room" technique of captioning is unavailable.

(9) Programming on New Networks. Programming on a video programming network for the first four years after it begins operation, except that programming on a video programming network that was in operation less than four (4) years on January 1, 1998 is exempt until January 1, 2002.

(14) Locally Produced Educational Programming. Instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools.

4. Section 79.1(e) is amended by revising paragraph (3) and adding paragraph (10) to read as follows:

(3) Live programming or repeats of programming originally transmitted live that are captioned using the so-called "electronic news room" or ENR technique will be considered captioned, except that effective January 1, 2000, and thereafter, the major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services shall not count ENR captioned programming towards compliance with these rules. The live portions of noncommercial broadcasters' fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

(10) In evaluating whether a video programming provider has complied with the requirement that all new nonexempt video programming must include closed captioning, the Commission will consider showings that any lack of captioning was de minimis and reasonable under the circumstances.



**SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD**

*Re: MM Docket No. 95-176 In the Matter of Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996, Order on Reconsideration*

I believe that it is vital for persons with hearing disabilities to have full access to video programming. It simply is inexcusable in this day and age for video programming not to be available to our nation's 27 million Americans with hearing disabilities. As the role of video programming becomes even more important in our society, it becomes increasingly incumbent on this Commission to ensure that we fully implement Congress's mandate to make programming accessible to all Americans. I am very pleased that the order my colleagues and I adopt today makes a number of changes to the closed captioning rules that will further this statutory mandate.

Today's order makes significant changes in our closed captioning rules, including increasing the definition of full accessibility from 95% to 100% of all new nonexempt video programming, establishing a benchmark for the closed captioning of pre-rule programming of 30% beginning on January 1, 2003, and requiring that Spanish language programming be closed captioned. These changes bring us closer to satisfying our statutory obligation under Section 713 that video programming be fully accessible.

I also am pleased that the Commission's decision today requires the largest video programming providers to use real time captioning to meet our benchmark requirements. However, because many of these providers may be able to meet these requirements without counting their news programming, I want to stress that I believe that news can and should be captioned regardless of whether the benchmark requirements have been met. Because important information often is lost when electronic newsroom (ENR) software is used to create captions, I strongly believe that ENR should not be the method of choice for captioning news and other live programming and should only be used when no other alternative is available. After all, television news programming is vital for the dissemination of information to all Americans. Through this information, we participate in our communities and make decisions that affect our lives. We learn what is going on in the world, our country, our home towns. News is essential to the democratic process and to being part of an informed electorate. Alternative sources of information do not provide the immediacy of television. Therefore, I urge video programming providers to give news programming the highest priority when allocating resources for captioning.

Beyond general and routine news programming, I am particularly concerned about the lack of information for persons with hearing disabilities in emergency situations where life and safety issues are involved and immediate action may be necessary. This is an issue that was recognized in the Report and Order and is being considered in a separate proceeding. I expect that the Commission will consider appropriate action in the next few months.

I also want to stress the importance that I will place on enforcement of our closed captioning rules. Our enforcement process requires that complaints first be directed to the video programming distributors in an effort to achieve a resolution that serves the needs of persons with hearing disabilities. To the extent that compliance can be achieved through informal discussions between the parties, I believe that we will accomplish our goal of serving the needs of persons with hearing disabilities and ensuring full accessibility to video programming. However, to make this process a success, video programming distributors will need to make their operations

accessible to persons with hearing disabilities. Specifically, distributors and programmers should have TTY capability or staff trained and available to respond to inquiries received through the telecommunications relay service (TRS). They also should have customer service representatives knowledgeable regarding the closed captioning rules and the operator's efforts to comply. Each distributor and programming network should name a specific contact on these issues so that any complaints are resolved quickly and fairly. Distributors and programmers can also post information about closed captioning on their web sites, including the name of a staff contact. I also encourage distributors to address consumer complaints in a timely and effective manner. I do not think, for example, that it is necessary for a distributor to wait until after the close of a calendar quarter to respond to a complaint that involves captioning that does not go to the hourly requirements.

I do express one point of departure from today's order. I believe that it would have been appropriate for the Commission to require that nationally distributed advertisements be captioned at some point during the transition period. It is my view that the better reading of Section 713 results in advertising not being excluded from the definition of video programming. While I have concluded that legal arguments may be made to support either the inclusion or exclusion of advertising from this definition, I think the better argument includes advertising within the scope of video programming. In addition, while Congress provided an exception to its mandate that video programming be fully accessible for cases where a captioning requirement would impose an economic burden, I do not believe that captioning nationally distributed advertisements can be seen as an economic burden given the amount of money generally spent to develop these national advertisements. As a policy matter, I am concerned about the intense frustration of persons with hearing disabilities who are watching captioned programs where the advertisements are not captioned. Advertisements disseminate information to the public, and may have an even greater relevance for persons who are otherwise cut off from the rest of society in many ways. I note that some advertisers have chosen to caption their commercials without a regulatory requirement and I sincerely hope that others will see the benefits of attracting the business of the millions of consumers with hearing disabilities.

I also wish to note that I look forward to bringing an order before the Commission in the next few months that will bring our Section 255 proceeding to a close. This proceeding is vitally important for all Americans because allowing persons with disabilities to more fully participate in our society enriches the lives of all Americans.