

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
Closed Captioning and Video Description )  
of Video Programming )

MM Docket No. 95-176

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COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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## **SUMMARY**

The cable industry is committed to serving the important goal of providing programming enhancements for people with disabilities. To that end, well before the passage of the Telecommunications Act of 1996, the cable programming community has undertaken significant efforts to serve this audience. A wide array of programming is regularly made available to cable subscribers in a closed captioned format.

In considering any new requirements, however, we urge the Commission to balance the legitimate goal of improving the accessibility of video programming to people with disabilities with the real-life challenges and costs such requirements will have on the industries affected. The costs of captioning the hundreds of thousands of hours of basic cable programming alone could range from \$500 to \$900 million per year on top the significant amount already expended by the cable industry. The Commission must recognize, as the statute does, the differences between captioning new materials and previously published materials. The Commission must also take into account the unique challenges faced by the diverse cable programming industry. This industry's success is based, in large part, on providing a wide variety of programming aimed not just at the broad television audience, but also at smaller niche markets. In addition, the cable industry provides a wide variety of types of programming including continual live coverage of events, classic movies and series, and an array of short-form programming, some of which are more difficult and more costly to caption. We urge the Commission to develop rules and timetables that adequately consider all of these factors.

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**COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Comments in the above-captioned Notice of Inquiry.<sup>1</sup> NCTA is the principal trade association of the cable television industry in the United States. Its members include over 60 cable television networks, cable operators serving over 80 percent of cable subscribers nationwide, as well as others associated with the cable television industry.

**INTRODUCTION**

The Commission initiated this Inquiry "to assess the current availability, cost, and uses of closed captioning and video description, and to assess what further Commission actions may be appropriate to promote these services."<sup>2</sup> The Commission also seeks

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<sup>1</sup> Notice of Inquiry, MM Docket No. 95-176 (released Dec. 4, 1995). The Commission published a further Order on February 27, 1996, extending the comment date in order to provide commenters with an opportunity to address the provisions of the recently-passed Telecommunications Act of 1996 concerning closed captioning and video description.

<sup>2</sup> Id. at ¶ 2.

comment on the “appropriate means of promoting their wider use in programming delivered by television broadcasters, cable operators, and other video programming providers.”<sup>3</sup>

Since the Commission issued its Notice in December, 1995, Congress enacted the Telecommunications Act of 1996<sup>4</sup>, which also addresses the issue of closed captioning and video description. The Act provides that the Commission is to “complete an inquiry to ascertain the level at which video programming is closed captioned. Such inquiry shall examine the extent to which existing or previously published programming is closed captioned, the size of the video provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors.”<sup>5</sup> The Act also requires the Commission to commence an inquiry on the use of “video description” -- the “insertion of audio narrated description of a television program’s key visual elements into natural pauses between the program’s dialogue.”<sup>6</sup> While the Act gives the Commission power to adopt closed captioning requirements for some video programming, it gives no corresponding authority in the area of video description.

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<sup>3</sup> Id.

<sup>4</sup> P.L. 104-104.

<sup>5</sup> Telecommunications Act of 1996, Section 713(a).

<sup>6</sup> Id.

The cable television industry is committed to serving the important goal of providing programming enhancements for hearing and visually impaired audiences. There is no dispute that these are important audiences, and that technologies as they develop should be harnessed to benefit these viewers and to ensure that they too can enjoy the diversity offered by today's video programming. To that end, well before the passage of the Telecommunications Act of 1996, the cable programming community has undertaken significant efforts to serve these audiences, which are described below.

**I. AVAILABILITY OF CLOSED CAPTIONING AND VIDEO DESCRIPTION**

**A. Cable Programmers Provide A Significant Amount of Closed Captioning**

A wide array of programming, including news, sports, entertainment, documentaries, and children's programming, is regularly made available to subscribers by the cable industry in a closed captioned format. This programming includes new programs created by or for cable programmers, as well as previously-produced programming which, if not already captioned, is captioned by the cable programmer. Cable systems also retransmit closed captioned broadcast programming.

Thus, while the Notice cites to statistics indicating that "only about 4 percent of basic cable programming and 35 percent of premium cable programming is captioned",<sup>7</sup> this significantly understates the amount of closed captioned material available on cable, especially on the most widely-viewed networks. Based on data provided to NCTA by TV

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<sup>7</sup> NOI at ¶13.

Guide, the overall percentage of captioned programming (for the top 20 basic cable and the most widely distributed 6 premium networks) is nearly 24 percent.<sup>8</sup> Looking just at premium services, that number is over 54 percent -- and for individual services ranges as high as 80 percent. For individual basic cable networks, that number ranges as high as 60 percent of the entire weekly schedule. This represents over 30,000 hours per year of closed captioning provided by the top 20 basic networks and top six premium networks.

Not surprisingly, closed captioning is highest during the most heavily viewed time periods, prime time access and prime time, when the audience is the largest for cable programming. Nearly 30 percent of cable programming for the top twenty basic networks and top six premium networks is closed captioned during prime time -- and over 60 percent of the programming aired by premium networks is closed captioned during this time. Weighted by available ratings, the amount of closed captioned programming presented during prime time approaches 40 percent.<sup>9</sup> Closed captioned programming, therefore, is most prevalent on the most heavily viewed cable program networks.

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<sup>8</sup> See Attachment A. Measured over a 3 month period. Excludes 1:00 a.m. to 6:00 a.m. The TV Guide numbers may well understate the extent of captioning, as it is based only on information reported to TV Guide.

In addition, among the top 20 basic networks are program services, such as home shopping networks, that, while not captioned, are primarily textual in nature.

<sup>9</sup> Based on available Nielsen ratings for Fourth Quarter 1995, average audience as a percent of total cable households. Certain of the top basic and premium networks -- including AMC, C-SPAN, HSN and QVC -- are not rated by Nielsen. In addition, ratings for Disney and Encore are not rated separately.

The non-profit Caption Center (“CC”) and National Captioning Institute (“NCI”) have arrangements for closed captioning programming with nearly 30 cable networks. In addition, some cable programmers -- such as HBO -- have in-house captioning facilities. A number of others are exploring enhancing their in-house capabilities. Furthermore, the cable programming community includes a service, Kaleidoscope, primarily devoted to serving hearing and sight impaired individuals. Kaleidoscope provides open captioning of 100% of its programming to 15 million subscribers nationwide. Kaleidoscope also produces and transmits movies with video descriptions several times per day in the course of its 24 hour per day schedule.

In short, cable programmers offer a significant -- and growing -- amount of closed captioned programming. This voluntary effort is expected to continue as more programmers develop in-house captioning capabilities, as technology improves and becomes more affordable, and as more captioned programming is available for license in the programming marketplace. In addition, cable operators carry local broadcast signals that themselves are captioned, and transmit to their subscribers all material that the local stations transmit in a captioned format.<sup>10</sup> Cable subscribers as a result have access to a wide and ever-increasing array of captioned programming.

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<sup>10</sup> See 47 C.F.R. §76.606.

**B. Program Source**

As the Commission notes, there are differences “[b]etween the amount of closed captioning of cable programming as opposed to broadcast programming. . .”<sup>11</sup> measured solely on a percentage basis. But several differences between broadcast and cable make a comparison of their commitment to closed captioning based purely on percentages inappropriate.

First, there are over 100 national cable television programming networks, most all of which operate 24 hours a day, 7 days a week, and more than 40 regional and local cable programming networks.<sup>12</sup> In combination, this represents thousands of hours of television programming daily. In contrast, there are only 4 major over-the-air broadcast networks, which combined present only 40 hours of network television programming daily. In addition, the vast majority of government funding that has enabled programmers to provide closed captioning has historically been directed to the broadcast, rather than the cable, networks.

Second, cable program networks differ in their audience reach. Unlike the four major broadcast networks, which reach nearly 100 percent of the television households in the United States, even the most widely available cable network reaches only 65 percent of those households by cable. Other cable networks are limited in their operations to certain regions (such as regional sports). The reach is especially constricted in local communities

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<sup>11</sup> NOI at ¶14.

<sup>12</sup> NCTA, Cable Television Developments (Fall 1995).

(such as local origination (“LO”) programming or certain local news operations.) In addition, all basic and pay cable networks combined do not capture the majority of viewing in cable households.<sup>13</sup>

Finally, the programming aired by many cable networks is unlike most broadcast networks, which typically air newly produced shows each season, and whose schedules consist mainly of 30 minute series or 2 hour movies. For example, many cable networks offer a mix of old and new programming. While much of the new prerecorded material shown on cable networks is captioned, the older material may not be. Other cable networks primarily present short-form programming with a relatively short shelf life, such as music videos. Yet others present live programming on a continuous basis, 24 hours a day. Some cable networks primarily offer programming that, while not captioned, is highly textual in nature. For example, home shopping channels provide a continuous screen of textual materials explaining the articles being offered for sale. Other channels, such as those devoted to weather, provide a scroll of textual local weather information, as well as visual depictions of the information being described. Other networks offer primarily foreign language programming. And cable systems also show a variety of locally-produced programming that reaches a narrow audience, such as public, governmental, and educational access and leased access programming provided by others

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<sup>13</sup> 1996 Cable TV Facts, Cable Television Advertising Bureau, p. 15. Reflects A.C. Nielsen NHI Monthly CSR, Broadcast Year 1994-95 (total day shares). In fact, in primetime broadcast viewership is even greater in cable households.

to cable systems, and local origination channels that may include a large amount of character-generated text.

In sum, the cable programming industry presents enormous differences from network to network in the type of programming presented, and its suitability for -- or the feasibility of -- closed captioning. It is, therefore, not surprising that the percentage of closed captioned programming on cable differs from that of the over-the-air broadcast networks. Moreover, it would be wrong to conclude on the basis of the relative percentages of broadcast and cable closed captioning that cable has a lesser commitment to serving the public. In fact, in terms of the total number of hours of closed captioned programming, cable programmers' efforts exceed that of the broadcast networks. And this is the case even though the lion's share of funding for closed captioning has historically been directed to the broadcast industry.

### **C. Program Type**

The NOI asks for comment on the extent to which a variety of types of programming is closed captioned.<sup>14</sup> As described below, cable program networks provide closed captioning across a wide spectrum of program categories.

**Entertainment.** Cable provides a wide variety of captioned entertainment programming. For example, Turner Broadcasting captions many of its major movies and all of its original programming. In 1995, it captioned 157 hours of features and 100 hours

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<sup>14</sup> NOI at ¶14.

of cartoons. HBO, as another example, captions nearly all of its series and comedy programming. USA Network captions virtually all of its original entertainment series, original movies, original specials, and original animation. Four seasons of MTV's series Real World is being captioned, and its Video Music Awards and MTV Movie Awards have also been captioned. In addition, the Caption Center and the National Captioning Institute closed caption numerous entertainment programming for nearly 30 different cable networks.

**Local and National News.** A significant amount of national news is also presented in a closed captioned format. For example, CNN captions approximately half of its day and Headline News approximately 25 percent. (Headline News also provides on-screen financial and sports information in textual form 24 hours a day.) However, cable local news channels generally do not present their live programming in a captioned format.

**Documentaries.** A variety of cable original documentaries are captioned. For example, the Discovery Channel provides closed captioning for its documentaries such as In Care of Nature, Alaskan Bears, Wild India and Paleo World. As another example, TBS's documentaries such as National Geographic, Cousteau, and World of Audubon contain closed captioning. And nearly 100 percent of all documentaries on HBO are captioned as well.

**Children's Educational and Other Types of Children's Programming.**

Children also have access to closed captioning material on cable. Numerous cartoons, children's specials, and children's educational programming contain closed captions, such

as Rugrats, Ren and Stimpy, Aaaahh!! Real Monsters, and The Secret World of Alex Mack on Nickelodeon and TBS original cartoons and its children's educational program Feed Your Mind.

**Sports.** Major League baseball, National Football League games, some college football and basketball, NASCAR Winston cup auto races, NHL playoffs and the Stanley Cup, and WWF Prime Time Wrestling are captioned. Turner Entertainment provided nearly 700 hours of captioned sports programming in 1995; ESPN offered approximately 900 hours of captioned sports events that year.

**Movies.** Newly-produced movies are almost always closed captioned by the studios. This practice has been the case since the mid-1980's. But, with rare exceptions, movies produced before then were not closed captioned. Nonetheless, cable networks have taken significant strides to caption popular classic movies in their libraries that will obtain repeated airings. Cable original movies also are often closed captioned.

**Cable Public Access Programming.** Cable public access programming is not under the control of the cable operators. It is unlikely that this access programming is closed captioned.

**Live versus Pre-recorded Programming.** Closed captioning in real time generally requires the special services of a stenographic captioner, who uses a special shorthand keyboard and computer to type the captioning as the action occurs. Certain types of captioning equipment can also be used in connection with live newscasts from a

studio, in which scripts that are read by the news anchors can be aired as captions. But live reports from outside the studio cannot be captioned under this method.

In addition to the extra expense attributable to the need for additional outside assistance and equipment and the logistical difficulties attendant to live captioning outside a studio setting, it may be uneconomic to caption live programming that will only be shown once. In other words, the cost of captioning cannot be recouped through subsequent airings of certain live programs (such as sports and on-the-spot coverage of courtroom action or news events).

**D. Previously Published Programming**

The Notice seeks comment on the extent of closed captioning of previously published or exhibited programs, such as reruns or movies, that will be shown to television audiences again.<sup>15</sup> A large percentage of television programs previously aired on broadcast stations, and now aired on cable, do not have closed captioning.

Several reasons account for this lack of captioning. First, television programs and movies produced before the mid-1980's generally did not contain closed captioning. Second, even in cases where programs were closed captioned during their broadcast airing, subsequent editing of those shows to air on basic cable typically results in the existing captioning being lost. Therefore, most basic cable networks need to recaption an off-network program in order to be able to air these programs closed captioned.

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<sup>15</sup> Id. at 9.

Third, many cable networks hold large libraries of previously-aired series and previously-released theatrical movies. While efforts are made to caption (or re-caption) popular programming that will surely be aired again, it would be an impossible undertaking to caption all of these libraries accounting for thousands of hours of material on the chance that they will be aired at some point in the future. In fact, if all such programs had to be captioned, the multimillion dollar expense of doing so would likely tip the balance against airing certain library material and would have the effect of relegating valuable works to the shelves.

**E. Market Size And Other Factors**

The Notice also asks for comment on the degree to which closed captioning varies by the size (measured in terms of revenue and any other relevant factors) of the video programming provider or producer.<sup>16</sup> Clearly, the size of the audience<sup>17</sup> served and the level of viewer interest in particular programming plays a significant role in determining those programs that are closed captioned. As described previously, the extent of closed captioning is typically greatest during the hours when the level of viewership of a cable programming is the highest. It is also true, as a general matter, that a program network will choose specific programs to be captioned based on the programs' popularity with the viewing audience.

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<sup>16</sup> Id.

<sup>17</sup> The Commission also seeks comment on the effect of market size on the level of closed captioning. However, unlike broadcast television, for national cable programming networks, market size -- measured by the geographic area reached by a particular programmer -- is not particularly applicable.

For example, cable program networks may be technically available nationwide, but only obtain carriage on a limited number of systems or, even when carriage is obtained, gain only a limited number of viewers. Nielsen measurements -- the critical means by which advertising time is sold -- are not even taken of cable networks that fail to achieve viewership in 5 million homes. Therefore, in the cable context, rather than market size, one of the economic considerations that should be taken into account in implementating regulations is the size of audience viewership. Rating by Nielsen is one of the critical factors in a network's economic strength.

Moreover, new networks may not have the resources to caption otherwise uncaptioned material. Requiring these start-up operations to do so will only serve to divert needed resources from new programming -- and may well make the difference between providing programming at all. It is not surprising, therefore, that start-up cable networks generally present less closed captioning than more established networks. As audience size grows, cable networks generally have increased the amounts of captioned material.

## **II. VIDEO DESCRIPTION**

The Notice also seeks comment on the current availability of video description.<sup>18</sup> Video description enables those with visual impairments to hear a description of the events occurring on screen. Video description, as the Commission's Notice notes, is available on several PBS programs. And as described previously, the Kaleidoscope Network provides descriptions on a daily basis. Other cable networks are currently

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<sup>18</sup> Id. at ¶¶15-16.

exploring the use of video descriptions for future programs, and have devoted resources to video description of some programs. However, video description generally is not used commercially today by most cable networks. The technology that will enable a programmer to provide video description, moreover, is only in the beginning stages.

Video description also conflicts with other existing uses of the Second Audio Program (SAP) on cable programming services. The SAP is currently used by several networks to meet the significant demand for Spanish language programming. Moreover, video description would appear to be redundant for certain programming, like sports, which already has play-by-play announcing. Video description also would require creation of an entirely new product, raising serious copyright questions regarding the permissibility of creating a derivative work.

In short, unlike closed captioning, for which cable networks have taken strides to serve a market for the hearing impaired, a similar market for descriptive video services is more complicated to develop at the present time.

### **III. COSTS OF CLOSED CAPTIONING AND VIDEO DESCRIPTION**

The Notice poses several questions regarding the costs of closed captioning and video description,<sup>19</sup> and the means of providing funding. These issues are discussed below.

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<sup>19</sup> NOI at ¶18.

**A. Costs of Closed Captioning**

As a general matter, captioning a 24 hour a day service is a very expensive proposition. These costs include both captioning and encoding. Requiring captioning of all basic cable programming alone could cost anywhere from \$500 to \$900 million per year on top of the significant amount already expended by the cable industry.<sup>20</sup> This amount represents nearly one-third of the basic cable programmers' current total annual programming expenditures. The cost of captioning prime time programming alone on all national basic cable networks<sup>21</sup> is estimated to be in the range of \$58 million to \$116 million annually.

The specific costs of captioning vary, based on the type of program. For example, captioning a typical hour of original programming is more costly than reformatting an hour of previously captioned programming. Captioning live programming is ordinarily more expensive than reformatting previously captioned works. It generally requires use of trained stenographic captioning personnel, as well as special captioning equipment. It costs approximately \$500-\$750 per hour to reformat programming that has already been captioned, while the standard rate to caption never-before-captioned programming is as much as \$1,500 per program hour. Captioning live programming typically costs between

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<sup>20</sup> This is based on 621,231 hours of cable programming that currently is not captioned, multiplied by \$750-\$1,500 (the cost of closed captioning an hour of new programming).

<sup>21</sup> Includes 85 national cable networks that have prime time programming and that are not foreign language networks.

\$600-\$750 per hour.<sup>22</sup> In some instances, these costs do not include the internal costs a network incurs, but only the prices charged by the company actually doing the captioning.

**B. Costs for Video Description**

Costs for video description vary widely, but are quite expensive. For example, providing descriptive video service for full length feature films can range up to \$10,000. The precise costs differ on a case-by-case basis. Factors affecting the cost include the program's running length, format and volume of material to be described.

**C. Funding**

The Notice also seeks comment on the sources of funding for closed captioning and video description. Voluntary funding efforts on the part of programmers, coupled with government resources made available through the National Captioning Institute and the Caption Center, and grants from the United States Department of Education, are critical to ensuring that captioning reaches the viewing audience. In addition, cable programmers have had some success in obtaining corporate sponsorship to support captioning for particular popular programs. But the lion's share of funding for captioning has historically been captured by the broadcast networks. This includes not only government funding and grants but also corporate sponsorships.

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<sup>22</sup> Prices based on information provided by NCI.

#### **IV. MARKET INCENTIVES FOR CLOSED CAPTIONING AND VIDEO DESCRIPTION**

As described above, cable program networks have significantly increased their closed captioning efforts in the absence of a government mandate. This is particularly the case for programming originated by cable program networks that is intended to reach a broad audience, such as popular sporting events, original television series, and live news. It is also true for off-network programming that cable programmers intend to exhibit on widely-available cable program networks. It is therefore clear that the market provides incentives for programmers to serve the hearing impaired audience.

Market demand also plays a large role in sources of funding for closed captioning. For example, NCI and CC will approach a cable programmer and ask whether a particular program would be made available for captioning, based on the popularity that the particular program could be expected to achieve among the hearing impaired population. In addition, the Department of Education will establish funding priorities based among other things, on the preferences of consumers for particular programs.<sup>23</sup>

#### **V. MANDATORY CLOSED CAPTIONING**

The Notice in this proceeding requests comment “[o]n the general form any mandatory closed captioning or video description requirements should take if they are deemed necessary.”<sup>24</sup> Since the Notice was issued, Congress adopted Section 713 of the

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<sup>23</sup> See, e.g., Department of Education, Office of Special Education and Rehabilitative Services; Proposed Priorities, 60 Fed. Reg. 56192 (Nov. 7, 1995) (describing priority for closed captioned television programs).

<sup>24</sup> Notice at ¶26.

Communications Act, which directs the Commission to conduct an Inquiry regarding the availability of closed captioning and video descriptions in the video marketplace, and to report to Congress on the results of such inquiry within 180 days after the Act's passage. With respect to closed captioning (but not video descriptions), the Act also directs the Commission to adopt regulations, within 18 months after the date of enactment, to ensure that programming produced in the future is "fully accessible" through captioning and that video programming providers and owners "maximize" the accessibility of pre-existing programming. These regulations are to include "an appropriate schedule" for the provision of captioning; the Commission also is authorized to establish and grant waivers of its rules where closed captioning would result in an economic burden to the owners or providers of video programming. The Commission, however, does not have authority to adopt any rules regarding video description. The provision granting the FCC power to impose such regulations, if necessary, while included in the House bill, was deleted in Conference.<sup>25</sup>

Thus, while it is clear that the Commission is obligated to adopt regulations to ensure the "full accessibility" of newly produced programming and to "maximize" the accessibility of pre-existing programming, the specific content of these regulations has not been defined by Congress, other than the requirement for an "appropriate" schedule and for some recognition of the burdens of captioning. In reporting to Congress and in

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<sup>25</sup> See Joint Explanatory Statement of the Committee of Conference at 184.

deciding whether the best means of achieving the statutory goals is through mandatory captioning requirements, the Commission can and should take into account the voluntary efforts that have led to the availability of a large and growing amount of cable closed captioned materials and the reasons why certain programs cannot be economically captioned. Furthermore, should the FCC conclude from this Inquiry that mandatory requirements are necessary, it should consider whether the obligation is better imposed on the producer of the program -- rather than the entities that subsequently distribute the program (i.e., the program network and the cable operator).

Finally, should the FCC adopt mandatory requirements, it is clear that in accordance with the Act, any mandatory requirements proposed as a result of the Inquiry should include reasonable exemptions aimed at addressing the unique situations faced by the diverse cable programming industry and should also establish reasonable and realistic time-frames to ensure that the transition to closed captioning does not impose an undue financial burden on programmers.

**A. Exemptions**

The closed captioning provisions of the Telecommunications Act of 1996 expressly distinguish between newly produced programming and previously-produced programming. With respect to the former, the Act mandates that closed captioning be “fully accessible”; with respect to the latter, the Commission is directed merely to “maximize the accessibility of video programming first published or exhibited” prior to the effective date of the regulations. In both cases, however, Congress was clearly

concerned that any rules the FCC may adopt should not impose economic hardship on programmers. Therefore, Congress specifically directed that the FCC may exempt “programs, classes of programs, or services” for which it has determined the provision of closed captioning would be “economically burdensome” to the provider or owner of that programming.<sup>26</sup>

The Notice sets forth four factors that it believes guides the determination of whether captioning would be “economically burdensome”.<sup>27</sup> However, the legislative history accompanying the House closed captioning provision (which was adopted by the Conference) delineates several more factors, including “the cost of the captioning, considering the relative size of the market served or the audience share”; “the cost of captioning, considering whether the program is locally or regionally produced”; “the non-profit status of the provider”; and “the existence of alternative means of providing access to the hearing impaired, such as signing”.<sup>28</sup> The Act also directs the Commission, in determining whether a captioning requirement would be “economically burdensome” to the provider, to focus on the individual outlet affected, and not on the financial impact on that outlet’s parent or the other resources in other related business units.<sup>29</sup>

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<sup>26</sup> Telecommunications Act of 1996, Section 713.

<sup>27</sup> Notice at ¶29. These include (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.

<sup>28</sup> House Report at 115.

<sup>29</sup> House Report at 114-115. The Notice mistakenly suggests that the Act establishes a higher, ADA-type, threshold. See NOI at ¶28 n. 65.

Taking all these factors into account, there are several exemptions that the Commission should consider in its Report to Congress.<sup>30</sup> As the 1996 Telecommunications Act recognizes, the important objective of serving the hearing impaired audience must be balanced against the financial hardship and potential loss to programming diversity that mandatory captioning could cause.

First, the Commission should not propose mandatory closed captioning for programming libraries. As described above, a number of cable programmers already voluntarily undertake to caption or recaption certain programming. But captioning (or recaptioning) preexisting programming will cause an enormous financial burden on cable programmers, large and small. This is because many cable networks have large libraries of movies and television programs -- accounting for tens of thousands of hours of programming -- that either were not captioned when originally produced or aired, or have lost their captioning due to the need to reformat programs for basic cable viewing. Therefore, all the costs for closed captioning would be borne by the programmer. In many cases, these costs could not be recouped through further syndication, since the programmer would not be the owner of the programming involved.

Over time, cable programmers will "maximize the accessibility" of their libraries as the previously aired programming in use will contain more and more captioned material.

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<sup>30</sup> The Act also provides that upon petition, the Commission may find the requirement to result in an "undue burden", and therefore may exempt a program or program service from the requirements. The Commission must entertain such case-by-case petitions. But by rule, it should seek to establish categories for exemptions in order to minimize the burdens on programmers and to conserve scarce Commission resources.

Older programs may not be rerun and will be replaced by newer programs that are already captioned. And programmers voluntarily will caption popular, previously produced programs that they intend to show on a regular basis. But requiring all library programming to be captioned will only serve to relegate older movies and series permanently to the archives. Congress did not intend such a result. As the House Report makes clear, “[i]n general, the Committee does not intend that the requirement for captioning should result in a previously produced programming not being aired due to the costs of the captions.”<sup>31</sup>

Second, niche programmers or newly-launched programmers cannot reasonably be expected to be able to shoulder the financial burdens imposed by closed captioning. The costs of captioning are fixed, and do not hinge on the number of subscribers reached or the production budget for a program. Therefore, a programmer may find that the costs of captioning exceed their programming budget for the entire year. The Commission should encourage the development of new networks and networks that serve more narrow segments of the viewing public. Therefore, the Commission should consider exempting any program network that fails to reach a minimum level of viewership in cable homes. The Commission also should consider whether local and regional cable networks should be exempt.<sup>32</sup>

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<sup>31</sup> House Report at 114.

<sup>32</sup> This would be consistent with the House Report’s suggestion that “the Commission may determine that it is economically burdensome to require captioning for certain types of programming, such as locally produced or regionally distributed programs.” House Report at 114.