

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

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COMMISSION
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In the Matter of)
) MM Docket No. 95-176
Closed Captioning and Video Description)
of Video Programming)

REPLY COMMENTS
OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

INTRODUCTION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding. The cable industry agrees with the many commenters in this proceeding that making video programming more accessible to persons with hearing and visual impairments serves the public interest. For that reason, as described in our initial comments, cable program networks have undertaken significant efforts to provide programming with captions.¹ Cable operators, also, have made significant strides

¹ NCTA submitted a study showing that the overall percentage of captioned material for the top 20 basic cable networks and the most widely distributed 6 premium networks is nearly 24 percent, and is even higher in day parts where viewership is highest.

It is inaccurate to claim, as the National Association of the Deaf ("NAD") does, that there has "scarcely been an increase in the captioning of basic cable programming" since the Television Decoder Circuitry Act was adopted in 1990. NAD Comments at 30. The amount of captioned programming on basic cable, even by NAD's own data, has grown from the 4 percent figure cited in the Commission's Notice to over three times as much in 1995 (nearly 13 percent of basic cable programs were captioned in the NAD study, if USA Network and CNN are included in their survey results). USA Networks and Turner Entertainment Group, for example, have expanded their captioning efforts exponentially during the 1990's. Media Captioning Services ("MCS") reports that beginning in January 1996, it is captioning 25 percent of CNBC's programming. MCS Comments at Section VI. The Comments of the A&E Television Networks show that since 1990, the rate at which captioned programming has aired on A&E has increased significantly. Comments of The A&E Television Networks at 13-14. And MCS, which has arrangements to provide hundreds of hours of captioning for basic cable networks, states that "cable ... has shown, in our opinion, the fastest growth in providing accessibility through closed captioning." MCS Comments at Section VI.

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toward ensuring the accurate delivery of programming that contains captioning to customers' television sets.

The laudable goal of providing captioned material, however, cannot be achieved overnight -- and, for certain types of program services and certain types of programs, attaining this goal simply may be impossible in the near future. NCTA's initial comments described the types of program networks -- such as those with a limited audience, those with programming that makes captioning impractical (such as short form², or interstitial programs, and text- and graphics -based program services³), and those that provide coverage of live events -- for which captioning would be inappropriate, economically burdensome and technically complex. In addition, we urged that the Commission consider exemptions for program libraries, recognizing, as the statute does, the difference between captioning new and old material, and for certain day parts when viewing is lowest. Our initial comments also described how the cable programming industry provides hundreds of thousands of hours of programming annually -- and how captioning basic cable programming alone would cost hundreds of millions of dollars each year if all programs were required to be captioned.

² The Recording Industry Association of America's ("RIAA") Comments explain that, while many music videos are captioned, "[c]losed captioning is not necessarily appropriate, or even possible on some videos." According to RIAA, "music videos are a very complex medium, often times their imagery is just as important as their music. And often the lyrics are subordinate to the actual music. In some cases lyrics may be unintelligible, or non-literal." It therefore urged the Commission to exempt music videos from any mandatory captioning requirements. RIAA Comments at 3.

³ The Weather Channel's Comments demonstrate that vital weather information and emergency messages are scrolled in text form followed by an on-going crawl containing the severe weather information. Because of the highly visual presentation of information, "consumers can easily view our service without the audio and still clearly understand the content." Comments of The Weather Channel at 2. Under these circumstances, "[c]arriage of such captioning information would likely reduce the value of [TWC's] programming to consumers by blocking graphical elements that are an integral part of [the] service." *Id.* at 3-4.

ARGUMENT

I. EXEMPTIONS FROM THE CLOSED CAPTIONING REQUIREMENT ARE WARRANTED

Congress in adopting the Telecommunications Act of 1996 clearly understood that the worthy goals of providing programming enhancements for people with disabilities must be balanced against the costs of achieving accessibility in crafting rules to implement Section 713 of the Act. Certain commenters, however, would have the Commission displace this balancing process except in individualized cases, and in their comments urge that the Commission require 100 percent captioning of all video programming, subject only to the undue burden exemptions.⁴ The 1996 Act, however, provides a different framework. The Commission has the authority to exempt classes of programs or services where the provision of closed captioning would be “economically burdensome to the provider or owner of such programming.”⁵ This authority is in addition to the right of any program provider or owner to individually petition the Commission for an exemption based on a particularized showing that the requirements would constitute an “undue burden.”⁶

⁴ See, e.g., Comments of the NAD at 35. NAD acknowledges that the Act allows for exemptions, but argues that “the Commission should very narrowly construe this exemption provision.” Id. at 39. They also argue that any distinctions drawn in the Act between programs published before the effective date of any FCC rules and those published after the rules should be reflected “[o]nly with respect to the timetables by which captioning will be implemented.” Id. at 34.

⁵ 47 U.S.C. §713(d)(1).

⁶ Id., §713(d)(3). NAD argues that the “undue burden” language should be construed “in a manner that is analogous to the statutory definition of ‘undue hardship’” under the Americans with Disabilities Act. NAD Comments at 40. NAD claims that, as under the ADA, an “undue burden” determination must take into account the overall financial resources of the video program provider or owner, and the relationship between the provider and program owner. Id. at 40-1. But the 1996 Telecommunications Act does not use the same terminology as the ADA, and deliberately so. As the House Report makes clear, when considering exemptions “[t]he Commission should focus on the individual outlet and not on the financial conditions of that outlet’s corporate parent, nor on the resources of other business units within the parent’s corporate structure.” House Report at 114-115. Further, in other areas,

Failure to adhere to this statutory framework and to adopt exemptions for certain types of program networks and specific types of programs will cause several ill effects. First, it will undoubtedly result in a diminution of diverse programming for all viewers, as a universal captioning requirement would impose significant costs on video providers that otherwise may have been used for the production of new programming.⁷ Second, requiring captioning of all programming -- both old and new -- may cause program networks not to air previously-produced programs that are not captioned. The expense of captioning a particular program -- particularly in light of expectations of viewership for that program -- may well tip the balance against airing that program at all.⁸ Third, narrowly interpreting the exemption authority will increase burdens on program networks and producers, who will be forced to expend resources on filing and prosecuting petitions for exemptions on an individual basis, and on the Commission, which will be required to adjudicate a greater number of these petitions. Congress did not intend such as result.

Congress explicitly incorporated the ADA into the standard setting process. See 1996 Telecommunications Act, §255(a).

⁷ The Comments of The Faith & Values Channel demonstrate that the cost of captioning an entire year's programming would exceed its programming budget for the entire year. "Even selective closed captioning of programs would have a major financial impact on F&V's ability to produce original programming to its entire audience." Comments of F&V Channel L.L.C. at 5.

⁸ Contrary to NAD's suggestion, NAD Comments at 40, Congress directed the FCC in determining whether the cost of captioning constitutes an "undue burden" to look at the cost of captioning a particular program relative to the cost of creating that production.

II. THE COMMISSION SHOULD ADOPT REALISTIC TIME FRAMES FOR CAPTIONING REQUIREMENTS

The significant costs associated with captioning also warrant adoption of reasonable and realistic timeframes for implementing any new captioning requirements. However, the schedules proposed by certain commenters ignore these real world constraints.

For example, several commenters argue that premium services should be subject to an expedited schedule and should be required to fully caption their services (both for programming first published before and after the effective date of the Commission's rules) within 90 days of the effective date of those rules.⁹ This would be a wholly unrealistic -- and unwarranted -- requirement. As described in our initial comments, there are a variety of reasons why certain programming cannot practically or economically be captioned -- regardless of whether it is on pay or basic cable service. This includes library material -- which may make up a large part of the program day of certain premium services¹⁰ -- as well as certain live, and short form and interstitial, programs. In addition, budgets for programs are created well in advance of their airing -- often many years beforehand. It is unreasonable to expect that the significant new expenditures that a 100 percent captioning requirement would impose could be absorbed in such an expedited fashion. The Commission must take these factors into account in devising a reasonable timetable for compliance.¹¹

⁹ E.g., NAD Comments at 36.

¹⁰ Home Box Office's Comments, for example, note that Cinemax shows older, previously released movies that are not captioned. HBO Comments at 3. HBO explains that "these titles generally are shown in non-prime time hours, when viewership is very low." Id.

¹¹ NAD argues in favor of this expedited schedule based on the fact that subscribers pay extra for premium services. But, as HBO's comments point out, premium services are discretionary purchases. If premium services do not serve their customers, they will decide against making this monthly discretionary expenditure. HBO Comments at 15-16.

Some commenters also suggest that the Commission require reformatting of previously captioned material immediately upon the effective date of the rules.¹² But, even limiting an initial requirement to recaptioning previously captioned materials entails significant expenditures. NCTA's initial comments explained that reformatting previously captioned material costs approximately \$500 to \$750 per hour.¹³ Given the wide diversity of cable program networks offerings, the differing financial conditions and in-house captioning capabilities of the networks, failing to provide adequate lead time would in many cases be economically burdensome.

Furthermore, several commenters complain about the quality of captioning available today, and urge that the Commission adopt standards governing accuracy of closed captioning. Imposing expedited and unreasonable time frames on cable compliance with any new mandates would only exacerbate these alleged quality problems, as the imposition of new captioning requirements on cable networks will increase demand at a time that supply is already stretched to its limit.¹⁴ If reasonable time frames are imposed, the marketplace will have an opportunity to respond to this increased demand, and will be better able to ensure the quality of captioning efforts.

But in any event, the Commission should not adopt quality standards for captioning. Real time captioning, as the comments make clear, is a difficult endeavor requiring skilled

¹² NAD Comments at 35-36.

¹³ NCTA Comments at 15.

¹⁴ The Comments of the National Captioning Institute explain that it takes approximately six months to train a person who is already expert in court reporting to be able to perform on-line captioning services. NCI Comments at 6 n.10.

personnel. Micromanaging the quality of the captioning to the extent suggested by some commenters -- such as dictating an acceptable number of spelling and grammatical errors¹⁵ -- is neither required by the statute nor appropriate. Mandating a particular level of quality will only serve to put the costs of captioning out of reach for even more programs and program networks.

III. CABLE OPERATORS ALREADY COMPLY WITH REQUIREMENTS TO DELIVER CLOSED CAPTIONED MATERIALS INTACT

Cable system operators also have taken great strides to ensure that captioned material is presented in an accurate fashion to their subscribers. For example, the cable industry agreed to transmit intact closed captioning information presented in Line 21 of the vertical blanking interval.¹⁶ Cable operators do not strip out the Line 21 material, and virtually all converters that may have done so have been retired from the market. Therefore, cable operators allow closed captioning data to be received and displayed on television sets. Contrary to the suggestion of some commenters¹⁷, no further action by the Commission is warranted or necessary in this area.

IV. VIDEO DESCRIPTION

In our initial comments, NCTA described how several cable networks were exploring use of Descriptive Video Services, but that few, if any titles were available at this time.¹⁸ There are

¹⁵ See, e.g., NAD Comments at 19-20.

¹⁶ This aspect of the voluntary agreement between the cable industry and representatives of the cities was incorporated into the FCC's cable technical standard rules at 47 C.F.R. §76.606.

¹⁷ See, e.g., Comments of WGBH Educational Foundation at 28.

¹⁸ The Comments of WGBH Educational Foundation explain that "a new partnership with the Turner Classic Movies cable channel will be providing video description of 12 movies starting in April 1996." WGBH Comments at 1. Descriptive Video Services are also available on the Nostalgia Television Channel, See *id.* at 10, and Kaleidoscope, both of which are available to cable households nationwide. In the Washington area, movies with video descriptions are available on cable every day of the week. "Loss of Sight Leads to Life in Movies", *The Washington Times* (Mar. 19, 1996) (available on Media General in Fairfax County and Montgomery County Cable).

many challenges that must be overcome before DVS is widely available. These include competing uses of the Second Audio Program (“SAP”) channel that is necessary for DVS.

WGBH urges that the Commission adopt technical standards that will ensure that any distributor transmits video description intact. WGBH further argues that the technical feasibility of doing so should no longer be an issue and therefore proposes that the Commission adopt a blanket requirement for retransmitting DVS.¹⁹ However, WGBH’s Comments ignore that it still may not be technically feasible for cable operators to retransmit DVS programming, given the lack of equipment at their headend, and the inability of their customers’ television sets to receive the DVS signal simultaneously with the regular audio accompanying the program. Any Commission action in this area, accordingly, is premature at best.

¹⁹ Comments of WGBH at 11.

CONCLUSION

The cable industry is committed to providing programming enhancements for persons with disabilities. However, the costs of doing so cannot be ignored. Any rules that the Commission ultimately develops must include reasonable timetables and exceptions, and should ensure that implementation schedules are crafted to avoid being "economically burdensome."

Respectfully submitted,



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