

a captioning requirement for library programming that is distributed by only a few stations or has a very small audience.¹¹⁹

53. HBO asserts that the amount of captioning of previously published programming has been steadily increasing and that the success of voluntary captioning efforts proves it unnecessary to require completion of captioning video libraries by a date certain.¹²⁰ Similarly, MPAA claims that a requirement of wholesale captioning of video libraries is unnecessary and impractical, claiming that voluntary efforts of the motion picture industry have been successful to date and that the industry will continue to meet demands for captioning where they exist.¹²¹ NCTA asks that the Commission not impose mandatory captioning requirements on programming libraries due to the enormous financial burden such a requirement would place on cable providers. NCTA claims that providers will voluntarily caption popular library programs that are aired on a regular basis, but a requirement that all library programming be captioned will "relegate older movies and series permanently to the archives."¹²²

54. With regard to library programming, commenters representing individuals with hearing disabilities interpret the requirement that our rules "maximize the accessibility" of such programming to mean that all library programming should eventually be captioned.¹²³ NAD notes that little or no cost should be involved in ensuring that previously published captioned programming is transmitted with captions intact, and that therefore such programming should be required to include captions immediately upon the effective date of the rules.¹²⁴ Many commenters request that movies and programs that were captioned when first broadcast should be required to be captioned on rebroadcast as well as on videotape. Some commenters also complain about the lack of captions on rental videos and videos of theatrical and broadcast programs which are sold retail.¹²⁵

¹¹⁹ NAB Comments at 9.

¹²⁰ HBO Comments at 11-12.

¹²¹ MPAA Comments at 11-13.

¹²² NCTA Comments at 21-22.

¹²³ See, e.g., CAN Comments at 18; NAD Comments at 37; Pickell Comments at 5.

¹²⁴ NAD Comments at 16-17, 35.

¹²⁵ See, e.g., Burkhalter Comments at 3-4; Cassidy Comments at 9; Chertok Comments at 2; Gallaudet University's Technology Assessment Program Comments at 4; Neuhauser Comments at 2. *But see* PBS Comments at 4 (PBS uses best efforts to include captioning for programs licensed to PBS for home video distribution; where PBS's program rights do not include tape distribution, however, it cannot prevent a producer who captioned a program for PBS broadcast from furnishing an uncaptioned version of that same program to the tape distributor).

55. NCI notes that very little captioning has been done of programming produced prior to early the 1980s; that which does exist is primarily home videos and off-network programming. NCI further claims that, to the extent older programming is in the public domain, there is usually no one with sufficient economic interest in the program to fund captioning.¹²⁶ Similarly, Colorado Assistive Technology Project et al. ("CATP") claim that relatively few previously published or exhibited programs are captioned when shown as reruns. CATP recommends that we draft regulations guaranteeing that once a program has been captioned, all copies of the program must be equally captioned, with significant fiscal penalties levied on entities who remove or do not copy captioning from previously-captioned material.¹²⁷

56. Individuals with hearing disabilities also acknowledge that captioning of library programming should be accomplished over a longer period of time than that allowed for captioning of new programming.¹²⁸ NAD argues that previously published captioned programming should be required to be transmitted with captions immediately upon the effective date of the rules.¹²⁹ Captioning of other library programs should be mandated based on a timetable beginning within six months of the effective date, and staggered to reflect differences in the size and resources of the provider, nature of the program, and time of day.¹³⁰ NAD further argues that the schedule for library programming should allow a three to five year period for completion of captioning of all library programming which is not subject to the undue burden exemption.¹³¹

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57. An enormous amount of older programming exists, including classic movies and television series, as well as current-run, uncaptioned programming. In considering closed captioning requirements for library programming, we do not believe that the statute requires that all such programming be captioned, given the distinction between new programming ("fully accessible") and library programming ("maximize accessibility") evident in the statutory language of Sections 713(b)(1) and (b)(2). The legislative history supports our conclusion that Section 713 was not intended to require the captioning of all library programming:

¹²⁶ NCI Comments at 4.

¹²⁷ CATP Comments at 3-4.

¹²⁸ See, e.g., CAN Comments at 18; NAD Comments at 37; Pickell Comments at 5.

¹²⁹ NAD Comments at 16-17, and 35.

¹³⁰ NAD Comments at 37.

¹³¹ NAD Comments at 37.

[T]he Committee expects that . . . preexisting programming will be captioned to the maximum extent possible, with the recognition that economic or logistical difficulties make it unrealistic to caption all previously produced programming.¹³²

The legislative history of Section 713 also states that, "[i]n general, the Committee does not intend that the requirement for captioning should result in previously produced programming not being aired due to the costs of captions."¹³³

58. We believe it inappropriate to mandate captioning of nearly all library programming. First, based on the volume of existing uncaptioned programming, such a requirement could place a significant burden on the owners and providers of library programs created prior to closed captioning requirements.¹³⁴ Further, rather than captioning their library programming, providers might elect to remove older, uncaptioned programming from their scheduled offerings rather than captioning such programs, thus reducing the amount and variety of programming options available to all viewers. We seek comment on whether the rules should require that a percentage of library programming (e.g., 75%) ultimately be captioned.¹³⁵ We seek comment on what deadline should apply to captioning of library programming and what the relevant time frames for the transition period should be. We seek comment on any criteria that could be considered for establishing phase in schedules, noting that we do not believe immediate or near term captioning of library programming is appropriate.¹³⁶

59. Some commenters assert that captioning of previously published programming is increasing and thus it may be unnecessary to require completion of closed captioned video libraries by a date certain.¹³⁷ Commenters who support this approach should indicate how the Commission would ensure that video programming providers or owners "maximize the accessibility" of previously published programming, as required by Section 713(b)(2).

60. For some of the older programs included in these libraries, there may not be a single entity that holds title to or controls the program (e.g., programming for which the copyright has lapsed or which has otherwise been placed in the public domain). Each entity that

¹³² House Report at 114.

¹³³ *Id.*

¹³⁴ We note, however, that we believe that the cost of captioning any individual existing program would not differ significantly from the cost of captioning comparable new programming.

¹³⁵ See ¶¶ 46-47 *supra* for a discussion of a possible requirement to transmit with captions any programming that is received with captions.

¹³⁶ See ¶¶ 43-45 *supra* for a discussion of how the percentages of programming that must be captioned would be applied.

¹³⁷ See, e.g., HBO Comments at 9-10.

owns a copy of the program might be responsible for having its copy captioned, which would be economically inefficient. We expect that the market will address any such inefficient outcomes; for example, video providers or owners may elect to wait until another provider or owner has captioned a copy of the program, which could then be duplicated for others, rather than requiring each owner or provider to secure captioning of its own copy. Alternatively, several parties owning copies of the programming could arrange to caption the programming for their use and that of others. We seek comment as to whether our expectations regarding market influences are sound.

61. As with the proposal for mandatory captioning of new programming, we ask that commenters explain in detail why any of the proposals for maximizing captioning of library programming are infeasible and offer specific alternatives. We also seek comment on any criteria that could be considered for establishing phase in schedules and the relevant time frames for the transition periods.

62. We note that under these requirements it is necessary to know when a program was first exhibited or published in order to determine whether it may be shown without closed captioning. We seek comment on whether sufficient information regarding when a program was first published or exhibited is readily available.

D. Exemptions of Classes of Programming and Providers Based on Economic Burden

1. Background

63. Section 713(d)(1) provides that:

the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.

64. Many providers want broad categories of programming to be exempted from any mandatory captioning requirements, and most also do not want to caption "interstitials" (i.e., promotional spots for upcoming programs) or other short-form material. For example, NAB recommends that overnight news feeds and other programming that attracts a small audience be exempted from captioning requirements, and also seeks to exempt local stations from captioning advertising, infomercials or other programming which they air but do not produce.¹³⁸ The Recording Industry of America ("RIAA") claims that captioning is not necessarily appropriate or even possible for some music videos, and asks the Commission to exempt music videos from any

¹³⁸ NAB Comments at 8-9.

mandatory requirements.¹³⁹ HBO recommends blanket exemptions for live and interstitial programming, as well as pay-per-view and pay-per-channel premium services.¹⁴⁰

65. The Wireless Cable Association International ("WCA") requests exemption of locally-originated programming, citing the limited production budgets and resources available to such program producers.¹⁴¹ Along similar lines, the Association of America's Public Television Stations ("APTS") requests that the Commission take into account the limited operating budgets of public television stations in considering standards for exemptions or waivers of mandatory captioning for locally produced programming.¹⁴² ALTS notes that the enormous costs involved with captioning at the station level could exert substantial influence over a station's programming decisions, forcing local stations to forego locally-produced programming in favor of pre-packaged, captioned programming which may not be responsive to the needs, tastes and interests of local viewers.¹⁴³

66. Broadcast and cable providers also claim that a variety of technical issues argue against captioning sports in general, and specifically regional sports. These include: technical or logistical problems with delivering different games to affiliates in various parts of the country at the same time; lack of stenocaptioning services in regions where particular games will be televised, making it impossible for the captioner to see the game and caption it in real-time; and lack of encoding equipment at the site from which the local programming is transmitted by uplink.¹⁴⁴ In addition, providers assert that sporting events are essentially visual, with statistics and progress typically indicated by graphics, thereby eliminating or reducing the need for captioning of such programming. Providers further claim that sports and other live programming is perishable, generally having no residual market, so that production costs may not be spread out over multiple showings, and contend that there is no financial incentive to caption such programs.¹⁴⁵ However, we observe that much national sports programming is captioned despite these issues, and, as reported in the comments, CBS provided real time captioning of the entire 1995 and 1996 NCAA Men's Basketball Championships, in a joint effort among several funding and captioning resources.¹⁴⁶

¹³⁹ RIAA Comments at 3.

¹⁴⁰ HBO Comments at 13-16.

¹⁴¹ WCA Comments at 6.

¹⁴² APTS Comments at 7-8.

¹⁴³ ALTS Comments at 11-12.

¹⁴⁴ See, e.g., ABC Comments at 13-14; NBC Comments at 13-14; NCTA Comments at 11.

¹⁴⁵ *Id.*

¹⁴⁶ CBS Comments at 14-15 and nn. 17, 18; VITAC Comments at 4.

67. While providers and program producers raise concerns associated with captioning certain programming, commenters representing the hearing disabled are in favor of mandatory captioning of all programming, stating that "there is no type of programming that should be exempt from captioning."¹⁴⁷ Captioners also want a requirement that all programming be captioned.¹⁴⁸ One commenter points out that cable subscribers with hearing disabilities pay for full cable service even though they can access only a small selection of cable's program offerings due to limited existing captions.¹⁴⁹ Many commenters representing the hearing disabled specifically request mandatory captioning for several types of programming which providers argue should be exempt from captioning requirements, or at least subject only to limited requirements, including weather, sports, interstitials, commercials, and locally-produced programming.¹⁵⁰

68. With respect to local, live programming, one commenter with a hearing disability points to weather and emergency broadcasts as being of great concern, noting that, without captions, she must guess at the significance of information concerning storm alerts and instructions from emergency management personnel. Several commenters request that captions be required or encouraged for all news and weather programs as well as emergency announcements.¹⁵¹ Although a high percentage of national and international news is captioned, commenters report problems with local news, weather and emergency messages, which are often poorly captioned or not captioned at all. One commenter states that it is particularly important for locally produced programming to be captioned so that persons with a hearing disability may fully participate in their community affairs.¹⁵² A related problem mentioned in the comments is that emergency messages that scroll across the screen are brief, and usually refer the viewer to an upcoming weather report, which is not captioned.¹⁵³

69. Several commenters involved in creating captions also support captioning for news programming. For example, CATP recommends a requirement that local news be captioned.¹⁵⁴

¹⁴⁷ See, e.g., CAN Comments at 13; LHH Comments at 5; ALDA Comments at 8; ASDC Comments at 3; Pickell Comments at 5.

¹⁴⁸ See, e.g., CaptionMax Comments at 3; MCS Comments at 8.

¹⁴⁹ Cassidy Comments at 1.

¹⁵⁰ See, e.g., North Carolina Department of Human Resources Comments at 1; ALDA Comments at 4-5; League for the Hard of Hearing ("LHH") Comments at 4; ALDA/Potomac Comments at 2; Burkhalter Comments at 9; Chertok Comments at 2; Clepper Comments at 2.

¹⁵¹ See, e.g., Webster Comments at 2; Shepard Comments at 1; Andrews Comments at 3-4; Clepper Comments at 2.

¹⁵² Burkhalter Comments at 3, 9.

¹⁵³ Andrews Comments at 3.

¹⁵⁴ CATP Comments at 3.

Other commenters support real-time captioning as the only acceptable form of captioning for live reports. MCS notes that local broadcast news programs typically use teleprompter captioning methods (i.e., ENR captioning) which, MCS argues, may be justified for smaller markets, but are wholly inadequate in most major markets, where live coverage of local events is provided. MCS claims that ENR captioning provides only partial accessibility of the news, because it captions only those portions of the news which are scripted.¹⁵⁵ Caption Colorado also encourages the adoption of real time captioning as the only acceptable standard for news and local live programming, claiming that real-time is the overwhelming choice of persons with hearing disabilities when given a choice between real time or ENR. This commenter claims that approximately 30% of what is said during local live news broadcasts is scripted and therefore using ENR leaves substantial portions of the news uncaptioned and inaccessible to persons with hearing disabilities.¹⁵⁶ They further assert that late-breaking and emergency news require real-time reporting, as there is usually no time to prepare scripts for such reports. In this regard, they contend that the absence of real time captioning leaves persons with hearing disabilities with only the most basic, terse warnings in emergency situations.¹⁵⁷

2. *Request For Comment*

a. *Exemption of Classes of Video Programming*

70. Section 713(d)(1) states that the Commission may only exempt classes of programmers and providers from our rules where the requirement to provide closed captioning would prove to be economically burdensome for the entire class. While Section 713 and its legislative history do not define the term "economic burden," we interpret this provision to permit us to exempt those classes of programming where the economic burden of captioning these programming types outweighs the benefits to be derived from captioning and, in some cases, the complexity of adding the captions. We believe the number and scope of our proposed class exemptions must strike a careful balance between the economic burden imposed and Congress' goal of making video programming "fully accessible."

71. We seek to establish a general classification or a number of general classifications of programming for which captioning would be economically burdensome. We note, however, that there are many variables that affect the costs and benefits relevant to closed captioning, and, thus we request detailed comments regarding the appropriate class exemptions that would be consistent with the statutory mandate to make video programming fully accessible to individuals with hearing disabilities. In particular we seek comment on whether a definition of economic burden should be based on factors such as relative market size, degree of distribution, audience

¹⁵⁵ MCS Comments at 3.

¹⁵⁶ Caption Colorado Comments at 3, 16.

¹⁵⁷ *Id.* at 5.

ratings or share, relative programming budgets or revenue base, lack of repeat value, or a combination of factors. The following discusses various classes of video programming.

72. Foreign language programming: We ask whether our general exemption should cover foreign language programming. To what extent is the captioning of such programming feasible? For example, are there captioners that are fluent in all other languages? Do foreign language programmers generally tend to have small production budgets and/or provide programming that is viewed by a limited audience? We note that, as is explained above, existing technology in television receivers is only capable of decoding Latin-based alphabets and symbols. To require non-Latin-based alphabets (e.g., Arabic, Hebrew, Japanese) to be captioned is likely to require costly technical upgrades that may be burdensome, if at all possible, to implement. Accordingly, we believe that, at a minimum, an exemption is appropriate for programming that is in languages which are not written using a Latin-based alphabet. We request comment on this proposed exemption and whether this exemption should be extended to all foreign language programming, regardless of the type of characters used to express that language in writing. In considering this proposal, we seek information on the benefits of captioning other foreign programming where Latin-based alphabets may be used and that serves significant population groups, such as the Spanish-speaking population in the U.S.

73. Programming that is primarily textual in nature. We further propose to encompass video programming that is primarily textual within the general exemptions from our requirements for closed captioning. Such programming would include channels dedicated to on-screen program schedules or guides, stock tickers and bulletin boards, and could also include selected programs offered by other programming services. We believe that a requirement for captioning this type of programming is unnecessary because information is already provided visually, with little or no relevant audio track. We seek comment on whether the textual information currently provided by such programming is sufficient to ensure accessibility to persons with hearing disabilities. We also ask commenters to consider what, if any, definition of primarily textual video programming is needed for our rules.

74. Cable access programming. PEG access channel programming typically operates on a relatively small production budget.¹⁵⁸ Therefore, imposing a captioning requirement may place an economic burden on the producers of such programming. However, we believe that some PEG programming is of a high public interest value because it may present important governmental, educational and community information. We request comment on whether PEG access programming should be encompassed by our general exemptions. We also seek comment on whether there are certain types of PEG access programming for which we should require captioning. If so, how should we distinguish between PEG access programming that should be encompassed by our general exemptions and that which should not be exempt?

¹⁵⁸ Alliance Comments at 9.

75. We do not believe, however, that leased access channels should be encompassed by our general exemptions from captioning requirements. We do not believe that captioning requirements for leased access channels would be economically burdensome, as it might be for PEG access channels, since these channels are intended to serve as commercial outlets for programming. To some extent, commercial leased access channels are expected to be used by nationally-distributed programming networks. We tentatively conclude that closed captioning would not be economically burdensome on leased access programming as a class, although there may be circumstances where exemptions under Section 713(d)(3), the undue burden standard, might apply. We request comment on this tentative conclusion. Commenters supporting the inclusion of leased access programming within the general exemptions should consider whether there should be an exemption for some but not all leased access programming.

76. Instructional Programming. Locally produced and distributed instructional programming typically operates on a relatively small production budget.¹⁵⁹ Thus, a captioning requirement may be economically burdensome to the program's providers or owners and might result in the loss of such programming. We are concerned, however, that such an exemption might deprive persons with hearing disabilities of access to important educational programming. We seek comment on whether such programming should be encompassed by our general exemptions. We also request comment on whether there are alternatives to an exemption for this class of programming that would allow it to be closed captioned without imposing significant economic burdens that would result in a loss of certain programs. With respect to nationally-distributed instructional programming, we note at least some of this programming may be prerecorded and have repeated showings. Should such programming be encompassed by our exemptions from closed captioning requirements?

77. Advertising. There are several types of advertising including national and local short form advertising (i.e., traditional commercials) and local and national long form advertising (e.g., infomercials). We seek comment on whether all advertising or certain types of advertising should be encompassed by our general exemptions. We seek comment on whether a requirement to close caption commercials would impose an economic burden relative to the typical production budgets for such commercials, and the typical revenues the commercials generate. Could captioning costs be offset by the revenues produced by the commercials? Alternatively, would a captioning requirement significantly raise the cost of certain advertising, especially local advertising that reaches small audiences which is currently inexpensive, and prevent some entities from advertising? We note that there is likely to be a marketplace incentive for advertisers to caption their commercials to attract consumers with hearing disabilities and seek comment on this assumption. We observe that many national advertisers have already recognized the benefits of captioning their commercials.¹⁶⁰ We further believe that there will be a greater incentive for advertisers to caption their commercials once a significant amount of programming is captioned,

¹⁵⁹ HBO Comments at 11.

¹⁶⁰ Report, FCC 96-318 ¶ 66.

as uncaptioned commercials will seem inconsistent with surrounding captioned programming for the individuals with hearing disabilities who are attracted to the programming because of its accessibility. We also note that in some advertising a portion of the information is provided textually or graphically and may serve as an alternative closed captioning.

78. Home shopping programming. We are aware that home shopping channels are similar in some ways to commercials in that they are intended to sell products and present a portion of the information provided to consumers in textual form. However, we do not believe that all of the descriptive material and information provided by home shopping program hosts is currently available in textual form on the television screen. Thus, we do not propose to include home shopping programming in the classes of programming exempt from our captioning requirements. We seek comment on this tentative conclusion. Commenters who contend that this requirement is not feasible or would pose an economic burden on the providers or owners of such programming are requested to provide specific support for their contentions, including relevant cost data.

79. Interstitials and promotional advertisements. From the information we have gathered, we conclude that most interstitials and promotional advertisements provide their principal information in textual form.¹⁶¹ Thus, given the number of such announcements and the short time period in which they are produced, we tentatively conclude that the burden of requiring captioning of interstitials and promotional advertisements outweighs the benefit of a mandatory requirement for captioning, and thus interstitials and promotional advertisements should be included in our general exemptions. We seek comment on this tentative conclusion. We believe, however, that the basic information provided by these types of announcements should be displayed in some textual or graphic form in order to provide accessibility to persons with hearing disabilities.

80. Political advertising. Political advertising is important programming in that it provides information about candidates for public office, which is beneficial to persons with hearing disabilities, as it is for all Americans. Requiring parties to close caption political advertising, however, could impose an economic burden and, thus, might prevent some of this type of advertising, especially political advertising for local elections. Accordingly, should this programming be included within our general exemptions? If it is not exempt, to what extent would a requirement for closed captioning of political advertisements be inconsistent with the anti-censorship provisions of Section 315 of the Communications Act?¹⁶²

81. Fundraising activities of noncommercial broadcasters. We tentatively conclude that live portions of noncommercial broadcasting stations' fundraising activities, e.g., pledge drives and on-air auctions, should be included within the classes of programming exempt from our

¹⁶¹ *Id.* NBC Comments at 4.

¹⁶² 47 U.S.C. § 315.

closed captioning requirement. Noncommercial stations use this type of programming in lieu of commercials to raise money to support their activities. We are aware that noncommercial stations generally have fewer resources than commercial providers to raise money to finance their operations and the economic burden of captioning live fundraising activities might outweigh the benefits of captioning such programming. We seek comment on whether there are less economically burdensome alternatives to closed captioning for such programming that would ensure accessibility. For example, should we require periodic textual graphics or captioning during a fundraising program that would summarize the highlights of the program as an alternative to full closed captioning? We seek comment on this proposal and solicit alternative suggestions.

82. Music programming. There are numerous types of music included in video programming and musical programming. We believe that some types of music should be captioned, while it would be reasonable to include other types of music programming in the classes of exempt programming. With respect to music videos, we note that many of these programs are already being captioned, and that the lyrics of many songs are readily available for use by off line captioners. Music videos are not highly perishable, and often have significant production budgets, sometimes along the lines of a short film. The cost of captioning music videos can be spread over the many times they are distributed and thus a requirement to caption them should not be overly burdensome. Thus, we tentatively conclude that these programs should be captioned. We seek comment on this proposal. However, we tentatively conclude that several types of music should be encompassed by the classes of programming we exempt from captioning requirements. We believe that background music, and performances where the music is primarily instrumental (e.g., symphony concerts, ballets) should be encompassed by the classes of programming we exempt. We seek comment on whether live performances should be included within our general exemptions. With respect to background music, such as theme songs from television shows and feature films, we recognize that the lyrics may be important to the enjoyment of the programming and seek comment on whether we should require them to be captioned. We propose, however, to require that any rebroadcast of a live musical performance (that is not primarily instrumental) be captioned as it would be a prerecorded program.¹⁶³ We seek comment on these tentative conclusions.

83. Weather programming. We propose not to include weather programming in our general exemption. Although there is often graphic information included in this programming, we believe that a significant amount of information is conveyed in the audio portion which is not captured by the graphics accompanying the report. Also, we note that satellite pictures, which are an integral part of most weather programs, are difficult to comprehend without the meteorologist's oral explanation. Given that weather conditions can and often do directly affect health and safety concerns, we tentatively conclude that it would be inappropriate to include

¹⁶³ We believe that this captioning requirement would be reasonable and note that HBO uses this practice for the live concerts it distributes. Interview with Robert M. Zitter, Senior Vice President, Technology Operations, HBO (November 18, 1996).

weather programming in our general exemptions from our captioning requirements.¹⁶⁴ In addition, to the extent that weather reports are part of local news programming, we do not believe that the captioning is economically burdensome. Weather reports can be scripted and included in the teleprompter text that is converted to captioning at virtually no cost using the ENR method of captioning that is common at many local stations. We seek comment on this tentative conclusion. We also seek comment as to the feasibility of captioning weather programming, and whether the cost of such captioning would outweigh its utility.

84. Sports programming. We do not believe that all sports programming should be encompassed by our general exemptions. There is no evidence that the captioning of sports programming, in general, is economically burdensome. We note that a significant amount of nationally distributed sports programming has been captioned voluntarily as has some regional sports programming. We also do not believe that all local sports programming should be exempt from captioning because, to some extent, this type of programming may involve major league sports teams, large production budgets, and may achieve large audiences comparable to that of some national services. There may be, however, types of sports programming for which a closed captioning requirement would be burdensome, such as locally produced college or high school sports. Should those types of sports programming for which closed captioning would be economically burdensome fall under our general exemptions? In addition, we seek comment on whether there are alternatives to a closed captioning requirement for this type of programming, e.g., presentation of the basic information in textual or graphical form, that would be less burdensome than a closed captioning requirement.

b. Exempt Classes of Video Providers

85. While the statute provides that we also may exempt classes of video providers, we believe that a blanket exemption even for very small providers is unnecessary, because the various providers distribute the same types of programming to consumers, and all classes of providers appear to have the technical capability to deliver closed captioning to viewers intact. We request comment on whether this conclusion is sound.¹⁶⁵

¹⁶⁴ We note that our rules requiring broadcasters to display emergency announcements visually have been extended to all other video program providers, and that the rules require that such announcements be displayed at the top of the screen, where captions typically do not appear. 47 C.F.R. §§ 11.51(c)(1), (g)(3).

¹⁶⁵ We seek comment regarding the burden on small entities in an effort to achieve the market entry objectives set forth in Section 257 of the 1996 Act. 47 U.S.C. § 257. See also *Section 257 Proceeding to Identify and Eliminate Market Barriers for Small Businesses*, Notice of Inquiry, GN Docket No. 96-113, FCC 96-216, 11 FCC Rcd 6280 (1996).

E. Exemptions Based on Existing Contracts

1. Background

86. Section 713(d)(2) exempts video programming providers or owners from our closed captioning requirements to the extent that such requirements are inconsistent with existing contracts.¹⁶⁶ Specifically, Section 713(d)(2) states:

a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such captions would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996 [February 8, 1996], except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law.¹⁶⁷

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87. The language of Section 713(d)(2) exempts programming from any closed captioning requirements we may adopt, if applying such requirements would be "inconsistent" with an existing contract. We tentatively conclude that contracts which affirmatively prohibit closed captioning would fall within this exemption and we seek comment on this conclusion. Such contracts do not appear to be typical but may have been entered into when the program creator wishes to maintain total creative control over the product involved. A provider that entered into such a contract could find itself unable to use the product at all if this exemption provision did not exist.

88. However, we recognize that it is possible that contracts may contain more general language, not explicitly mentioning closed captioning, that might nonetheless be inconsistent with captioning. We seek comment on the types of provisions that might be contained in programming contracts that would be inconsistent with a captioning requirement. We seek such comment in order to determine whether we need to identify types of contract provisions that may be eligible for exemption under Section 713(d)(2) in addition to those that specifically prohibit closed captioning. We note that a broad interpretation of this provision, which might exempt all existing contracts other than those that specifically provide for captioning, may be contrary to Congress' intent to increase the availability of captioning. Under this latter interpretation, a large volume of programming covered by long term contracts, but not yet produced, would never be captioned.

¹⁶⁶ 47 U.S.C. § 613(d)(2).

¹⁶⁷ *Id.*

F. Exemptions Based on the Undue Burden Standard**1. Background**

89. Section 713(d)(3) states that:

a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would result in an undue burden.¹⁶⁸

Section 713(e) defines undue burden:

UNDUE BURDEN.- The term "undue burden" means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered 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.¹⁶⁹

90. Section 713(d)(3) allows individual video services providers or owners of programming to seek an exemption from the closed captioning requirements based on their particular circumstances.¹⁷⁰ While Section 713(d)(1) permits the Commission to exempt an entire class of programming or video provider from its closed captioning rules, this provision allows the Commission to look at specific circumstances faced by an individual video service provider or program owner. Section 713(d)(3) provides for the Commission to establish a procedure to consider exemptions from our closed captioning rules on a case-by-case basis and to tailor a remedy to fit those circumstances. Significantly, the language of this provision does not limit the Commission to considering only these factors, but rather seems to invite the consideration of other relevant factors. According to the legislative history, Congress intended to permit the Commission to balance the need for closed captioned programming against the possibility of

¹⁶⁸ 47 U.S.C. § 613(d)(3).

¹⁶⁹ 47 U.S.C. § 613(e).

¹⁷⁰ 47 U.S.C. § 613(d)(3).

inhibiting the production and distribution of programming and thereby restricting the diversity of programming available to the public.¹⁷¹

2. *Request For Comment*

91. The Undue Burden Standard/Factors. We request that commenters address the factors the Commission should consider when deciding whether particular petitions for exemptions based on undue burden should be granted. As already noted, the specific standard for an exemption is whether the captioning would involve "significant difficulty or expense" and Congress identified four factors that are to be considered in addressing this question. Because the statute states that the factors to be considered "include" the four listed factors, the statute seems to invite the Commission to consider other relevant factors besides those specifically listed in Section 713(e).¹⁷² Thus, we ask commenters to identify additional factors that might demonstrate that a closed captioning requirement imposes an undue burden on a video programmer or provider and should be exempt from a captioning requirement. Commenters supporting wider discretion for parties seeking an exemption should offer guidelines to assist parties seeking relief and the Commission in its decision making process.

92. How the Exemption Factors Should be Applied. Some commenters have proposed standards for individual exemptions based on the undue burden criteria. The Massachusetts Commission for the Deaf and Hard of Hearing urges the Commission to adopt an objective standard to determine if captioning is an undue burden on a small entity.¹⁷³ Conversely, one commenter contends that formulas not be used because "creative bookkeeping" might be used to manipulate such a standard.¹⁷⁴ NAD suggests that the Commission avoid specific standards and instead require a relatively high threshold for programmers to demonstrate an undue burden.¹⁷⁵

¹⁷¹ The Conference Committee reported that: "In making such determinations, the Commission shall balance the need for closed captioned programming against the potential for hindering the production and distribution of closed captioning." Conference Report at 183. The House Report noted that: "In 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." House Report at 114.

¹⁷² We note that, although the House version of this provision contained only the four factors enumerated in Section 713(e), the House Report suggests consideration of the following: (1) the nature and cost of providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner; (3) the financial resources of the program provider, distributor, or owner and the financial impact the program; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; and (7) the existence of alternative means of providing access to the hearing disabled, such as signing. We seek comment on this language. House Report at 115; Conference Report at 183 (citing discussion of House proposal).

¹⁷³ Massachusetts Commission for the Deaf and Hard of Hearing Comments at 3.

¹⁷⁴ Dominick Comments at 31.

¹⁷⁵ NAD Comments at 40.

Furthermore, NAD suggests the Commission adopt the undue burden standard provided in the ADA as a model.¹⁷⁶

93. The League for the Hard of Hearing ("LHH") suggests that the undue burden test should involve a cost/benefit analysis.¹⁷⁷ Specifically, the LHH proposes the Commission determine an acceptable percentage of production costs for captioning.¹⁷⁸ Productions for which the cost of captioning would exceed that percentage would not be required to be captioned.¹⁷⁹ The LHH also suggests that at times the Commission should consider the percentage of the advertising budget required to provide closed captioning.¹⁸⁰ One commenter proposes that programs with production budgets of less than \$25,000 should be eligible.¹⁸¹ They also suggest that captioning should be required if it would represent less than 10% of the production budget.¹⁸²

94. NAB suggests that the Commission should employ this provision to allow stations to experiment with other less expensive means of achieving the end result such as on-screen "bugs" containing score and other information for sports programming.¹⁸³ A&E Television Networks ("A&E") suggests that in formulating an undue burden standard, the Commission should consider much the same type of economic factors to be considered in developing exemptions under Section 713(d)(1).¹⁸⁴

95. To the extent objective criteria can be developed, we believe that would facilitate action on exemption requests. Thus, we invite commenters to suggest what objective criteria might be applicable. Commenters should address whether or not we should require parties to provide specific facts or meet objective tests to prove an undue burden or whether petitioners should have wider discretion in demonstrating that, under their specific circumstances, the closed captioning requirements would constitute an undue burden. Commenters supporting objective tests should provide specific examples of the kinds of financial, demographic or other data they believe we should consider when making these determinations. Commenters also should provide

¹⁷⁶ *Id.* at 40-41.

¹⁷⁷ LHH Comments at 4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Stuart and Marilyn Gopen Comments at 28-31.

¹⁸² *Id.*

¹⁸³ NAB Comments at 10.

¹⁸⁴ A&E Comments at 21.

specific parameters for evaluating these data. Commenters supporting wider discretion for parties seeking an exemption should offer guidelines to assist both parties seeking relief and the Commission in its decision making process. We also seek comment on what specific information petitioners should provide in order to demonstrate the factors needed to prove an undue burden.

96. As noted, NAD urges that we adopt rules patterned after the ADA's undue burden standard.¹⁸⁵ However, we do not believe that the ADA process is directly transferable. In this regard, we note that there are significant differences between the ADA undue burden standard and the four factors adopted by Congress in Section 713.¹⁸⁶ However, we seek comment on what, if any, portion of the ADA process may provide useful insight in the context of the captioning exemption.¹⁸⁷

97. Finally, we seek comment on the possibility of allowing undue burden exemptions subject to conditions in some instances. This would allow us to require an alternative means of serving persons with hearing disabilities while waiving our closed captioning requirements. For instance, a small local station might seek an exemption from closed captioning its local news. In some situations, we might find it appropriate to grant an exemption subject to a condition that the station provide, for example, greater use of textual graphics. Such conditional exemptions would allow us to encourage alternative (though admittedly less desirable) means of providing service to persons with hearing disabilities in situations where no service would otherwise be available.

98. Procedure. In developing procedures and standards for evaluating individual petitions for exemption from our closed captioning rules, we must consider the administrative burden on the parties to such a proceeding. We particularly note that in many situations, the parties most likely to seek an exemption will be smaller entities with limited financial resources.

¹⁸⁵ See, e.g., NAD Comments at 40-41.

¹⁸⁶ In contrast with the ADA undue burden standard, the legislative history here explicitly states that, when considering exemptions, "the Commission should focus on the individual outlet and not the financial conditions of that outlet's corporate parent, nor the resources of other business units within the parent's corporate structure." House Report at 114-115. This is in contrast to the Department of Justice's regulations implementing the ADA which state that among the factors to be considered is: "the overall financial resources of any parent corporation or entity." 28 C.F.R. § 36.104. The potential economic effect on the availability of local and niche programming also adds weight to the argument against direct application of the ADA interpretation of undue burden in the context of closed captioning. It appears likely that a local television station, for example, might elect to cease providing a locally produced public affairs program, instead electing to provide a nationally distributed program with captioning if the additional cost of captioning made the local program financially unattractive. This might well be true regardless of whether the television station was independently owned or has some connection to other resources.

¹⁸⁷ We acknowledge, in this regard, that Section 713's definition of "undue burden" was discussed in the legislative process as being patterned after use of this term in the ADA. "Undue burden" in the ADA, in turn, was patterned after the term "undue hardship," as that term has been used in the implementation of the Rehabilitation Act since 1973. S. Rep. No. 116, 101st Cong, 1st Sess. at 63 & 35-36. See, e.g., 140 Cong. Record H 5216 (letter of June 8, 1994 to Congressman Markey).

In order to accommodate the needs of such entities, we seek to establish procedures that minimize administrative burdens while ensuring that the statutory requirements for such showings are fulfilled. We are also concerned that our procedures allow for quick and efficient resolution of these matters.

99. We propose to use standard "special relief" or waiver type procedures that are familiar and readily accessible to many of the parties that might seek such an exemption.¹⁸⁸ An exemption requested under Section 713(d)(3) should allow for public notice and opportunity for public comment on the petition and factual information would have to be supported by affidavits. Furthermore, such an individualized process will allow the Commission to determine that the programming provider or owner meets some criteria that justifies waiving the rule for a given reason and will further allow the Commission to fashion a remedy designed for those circumstances. The exemption process would permit the Commission to grant a party a partial waiver or temporary waiver if warranted instead of a complete exemption from the rules. For example, a cable channel might distribute mostly foreign language programming which might be exempt. If, however, it also were to distribute a limited amount of English language programming, it might seek a waiver of the rule in order to avoid captioning a relatively small portion of its programming if doing so would constitute an undue burden.

100. In the alternative, we could allow video services providers or owners to petition for exemptions as part of more widely applicable rulemakings. To the extent that rules of general applicability could be adopted to address exemptions for broader classes of programming or providers than what fall within our general exemptions, this may be more efficient and less cumbersome than individual petitions for waiver. This could conceivably result in fewer proceedings since the result of one rulemaking could be applied to many different situations and would be applicable to all similarly situated video providers.

101. We also solicit comment on which parties should be permitted to seek an exemption from our closed captioning requirements. Specifically, should we limit the process to video service providers or owners or should we also permit program producers and syndicators to seek an exemption? Allowing producers or syndicators to petition for an exemption could be more efficient since the resulting exemption could allow the programming in question to be more widely distributed. Accordingly, commenters should address the advantages and disadvantages of allowing different parties access to the exemption process.

102. Finally we seek comment on whether exemptions granted under Section 713(d)(3) should be for a limited period of time only. This would allow the Commission to periodically reevaluate a particular waiver to determine if it is still warranted.

¹⁸⁸ For example, broadcasters and cable operators already use this procedure when seeking market modifications for must carry purposes. Cable operators also use this procedure when seeking small cable system status.

G. Standards for Accuracy and Quality

I. Background

103. Section 713 does not require the Commission to adopt rules or standards for the accuracy or quality of closed captioning. However, in the *Notice of Inquiry*, we sought comment on these issues based on reported problems with existing closed captions.¹⁸⁹ As the *Report* indicates, viewers recount numerous problems with closed captioning.¹⁹⁰ These include problems associated with the depiction of the audio portion of a video program, such as the accuracy of the transcription of the dialogue, appropriateness of display speed in terms of the audience's reading capability, spelling and grammatical accuracy, and overall completeness of the captioning service in terms of not omitting critical portions of the dialogue.¹⁹¹ There are also technical problems such as the captions not being delivered intact, captions not synchronized with the video portion of the program, captions ending before the end of the programming, programming without captions even though the program indicates captioning, or captions transmitted during one offering of the program but not another.¹⁹²

104. Inherent in a captioning obligation is the possibility of some definition of a minimal level of quality necessary to demonstrate compliance with the requirement. Thus, we believe that it is well within the Commission's discretion to consider whether to adopt rules, standards, or guidelines that address these matters.

105. We observe that commenters disagree on the effect that mandatory captioning will have on the quality and accuracy of closed captioning. Some argue that market forces should be allowed to control this aspect of captioning, thereby both increasing the quality of captioning and keeping costs down.¹⁹³ These commenters contend that it is in the interest of program producers and providers to ensure that the captioning included in their programming is of high quality. Others believe that mandatory captioning without quality standards will promote a decline in captioning quality.¹⁹⁴ NCI, one of the larger caption suppliers, states that the Commission should consider minimum quality standards, sufficient to ensure consistent, adequate service to the public

¹⁸⁹ *Notice of Inquiry*, 11 FCC Rcd at 4927-4928 ¶ 33.

¹⁹⁰ *Report*, FCC 96-318 ¶¶ 89-92.

¹⁹¹ NCI Comments at 7.

¹⁹² *Report*, FCC 96-318 ¶¶ 89, 91; Atlanta Hears Chapter/Self Help for Hard of Hearing People Comments at 2-3; Boston SHHH Comments at 2; Burlington Chapter of North Carolina Association of the Deaf ("Burlington Chapter") Comments at 3-4; Clepper Comments at 2; Costa Comments at 2.

¹⁹³ CaptionMax Comments at 3; ALDA Comments 9.

¹⁹⁴ NAD Comments at 17-18.

without impairing competition among captioning services.¹⁹⁵ However, MCS, another large supplier of captioning, disagrees and states that standards are unnecessary.¹⁹⁶

106. Numerous commenters representing the hearing disabled state that there is a need for the Commission to adopt minimum standards or guidelines to ensure that individuals with hearing disabilities have equivalent access to video programming as is available to other viewers.¹⁹⁷ They also assert that closed captioning should be treated like the soundtrack, inseparable from the program.¹⁹⁸ Thus, they contend that guidelines are needed to address the accuracy, content, style, and readability, including whether captions should be verbatim.¹⁹⁹ These commenters recommend the following guidelines for the Commission's consideration:²⁰⁰

- Caption data and information contained in the soundtrack must be delivered intact throughout the entire program.
- Captioning must transmit information about the audio portion of the program which is functionally equivalent to the information available through the program's soundtrack.
- Captions must include all elements of the soundtrack necessary for accessibility, including verbal information, identification of the speaker (if it is not apparent), sound effects, and audience reaction.
- Standards for proper spelling, grammar, timing, accuracy, and placement should be devised.
- Captions should be provided in the style and standards that are appropriate for the particular type of programming that is being captioned, e.g., real-time captioning should be required for local newscasts and other live programming.
- Captioning must be reformatted as necessary if the programs on which they are included have been compressed or edited.

¹⁹⁵ NCI Comments at 7-8.

¹⁹⁶ MCS Comments at 9-10.

¹⁹⁷ CAN Comments at 16

¹⁹⁸ ALDA/Potomac Comments at 1; ALDA Comments at 9.

¹⁹⁹ CAN Comments at 16-17; NVRC Comments at 7.

²⁰⁰ CAN Comments, *id.*; Burlington Chapter Comments at 3-5; ALDA Comments at 10; Virginia Association of the Deaf ("VAD") Comments at 2-3.

- Captioning must remain intact as it moves from its point of origination throughout the distribution chain to the local video provider. Program tapes should be labeled as to whether they are captioned to ensure that the closed captioned master tape is used for duplication as the program moves throughout the distribution chain.
- Open character generated announcements must not obscure program captioning, and vice versa. Standards must be developed to ensure the appropriate placement of these scrawls.

107. In addition, commenters suggest that the Commission seek input from consumers with hearing disabilities in establishing these guidelines and to review the guidelines to ensure that they are having the desired effect.²⁰¹

108. Commenters also address whether captioning services or individuals providing the captioning should meet certain credentials, especially for real time captioning.²⁰² Several commenters state that criteria should be established to certify caption writers. For example, one commenter proposes that real time caption writers be capable of a minimum rate of 250 words per minute with almost no errors and that off-line captioning should contain no errors.²⁰³ In order to eliminate the problems associated with electronic newsroom captioning,²⁰⁴ it has been recommended that the Commission require local news and other live programming to be captioned by real time stenocaptioners.²⁰⁵ Currently, the number of real time captioners is small.²⁰⁶

109. With respect to the technical quality of existing closed captions, we observe that the basic technical compatibility among captioning services is assured by virtue of Section 15.119 of our rules, which sets forth the technical requirements for transmission and display of closed captioning.²⁰⁷ In addition, Section 76.606 requires that cable operators deliver existing captions intact. However, it is reported that transmission problems result in missing or incomplete captions. Sometimes captions are stripped when the signal from the point of origination passes through a local provider. This results from an engineering monitoring error at the provider.²⁰⁸

²⁰¹ CAN Comments at 16; NVRC Comments at 7.

²⁰² CAN Comments, *id.*

²⁰³ Dominick Comments at 4.

²⁰⁴ See ¶ 21 *supra*.

²⁰⁵ VAD Comments at 2-3

²⁰⁶ VITAC Reply Comments at 1.

²⁰⁷ NCI Comments at 7.

²⁰⁸ CAN Comments at 15.

Examples of this problem are the loss of captions at the end of network programs²⁰⁹ or the failure of cable companies to turn on equipment needed to transmit existing captions.²¹⁰ In addition, as programming is duplicated or prepared for transmission, improperly adjusted signal processing equipment can delete line 21, introduce errors, or result in captions not being synchronized with the video portion of the program. Time compression of programming to fit it into specific time blocks may also destroy captions. Finally, interference and poor quality reception may impair caption quality, sometimes causing individual letters to appear as square white blocks.²¹¹ Open character generated announcements, such as emergency warnings, school closing and weather advisories can be obscured by the captions or vice versa.²¹²

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110. We believe that the technical quality issues should be addressed by the Commission. Current technology is sufficient to ensure that every video programming provider is capable of transmitting the captioning included with the programming to consumers.²¹³ The loss of captioning at the end of the programming and other reported technical problems appear to be the result of lax maintenance and monitoring of equipment. We believe that program providers should be responsible for the transmission of the captioning and must take whatever steps are necessary to monitor their equipment and signal transmission to ensure that captioning is included with the video programming that reaches consumers. Thus, we propose to adopt guidelines relating to the technical quality of closed captioning. We note that Section 76.606 of the Commission's rules requires cable operators to deliver existing captions intact. We propose to extend the provisions of this rule to all video program providers, regardless of distribution technology, to ensure that programming with closed captions is delivered to viewers in a complete manner.

111. With respect to the non-technical aspects of quality and accuracy, however, it is our tentative view that we should not attempt to impose standards at the start of our phase-in of closed captioning regulation. The non-technical aspects of the quality of captioning include such matters as accuracy of transcription, punctuation, placement, identification of nonverbal sounds, pop-on or roll-up style, verbatim or edited for reading speed, and type font. We seek comment as to whether accuracy of spelling in captions should be considered a non-technical issue, or whether our captioning rules should include requirements for spelling accuracy. In this context,

²⁰⁹ Report FCC 96-318 ¶ 89.

²¹⁰ CAN Comments at 15.

²¹¹ Report, FCC 96-318 ¶ 93.

²¹² CAN Comments at 14.

²¹³ We note that the ATSC-DTV standard reserves a fixed 9600 bits-per-second data rate for closed captions. See *ATV R & O* ¶ 45.

we note that spelling accuracy is included in the minimum standards for TRS.²¹⁴ We know that the quality of captioning is a matter of considerable importance to those viewing captions. We recognize that captions must provide information substantially equivalent to that of the audio portion of a video program in order to be useful and ensure accessibility to individuals with hearing disabilities. Captions also should not interfere with the viewability of the video portion of the program. However, we believe that there are good reasons to defer action on this issue in order to provide time for the captioning community to adjust and adapt to the new environment created by our rules. If, after a period of experience, it becomes apparent that quality levels are unsatisfactory, we can revisit this issue.

112. This tentative judgment is based on several considerations. We are concerned about the availability of captioning services and stenocaptioners, the cost of captioning the significant amounts of video programming we propose to require to be captioned, and the difficulty of developing and administering quality standards.

115. It is evident that there is going to have to be an increase in the resources and individuals involved in the captioning process. Until now, much captioned programming has been prerecorded -- prime time series, movies, first run syndication programming, etc. Under the rules we propose, we will require increasing amounts of live programming to be captioned where the captions must be created simultaneously with the programming. Live captioning involves different and more advanced skills than those needed for prerecorded programming. It is unclear that the number of stenocaptioners with advanced training to provide such captions at the highest quality levels is sufficient at this time to meet the expanded demand for stenocaptioning services that our proposed rules will engender. Thus, at the beginning, as experience is being gained, quality captioning service may simply not be available. However, we believe that to postpone implementation of closed captioning regulations would disserve those individuals who will benefit from the availability of captioning.

114. Moreover, in some contexts it may be virtually impossible to meet very high levels of accuracy. As the record indicates, real time captioning is difficult and requires considerable training and expertise. In addition, accurate real time captioning of complex, highly technical or unfamiliar subject matter may be dependent on the availability, quality and breadth of computer dictionaries that are activated by the steno machine inputting the captions. To impose a standard of quality on the captioning of such programming might result in the loss of service, which is not the intent of Section 713 or our rules. Thus, adequate but not high quality captions may need to be acceptable for at least the short term.

115. The cost of closed captioning can be expensive, especially for high quality captioning of live programming. Imposing a higher cost, quality requirement would cause captioning to be more "economically burdensome" and thus necessitate more exemptions from the requirement and a lower overall availability of captioning. As discussed above, the cost of

²¹⁴ 47 C.F.R. § 64.604(a)(1).

captioning can vary from \$120 to \$2500 per hour, based primarily on the quality demanded. When considered in the context of the large amounts of programming to be captioned, the difference between the minimum and maximum cost of captioning can be substantial. For example, a broadcast station that produces three hours of live local programming a day (e.g., local news broadcasts), would need to spend \$131,000 a year to caption that programming at the lowest reported rate for real time captioning of \$120 an hour, but \$1,310,400 a year at \$1200 per hour, the highest estimated rate for real time closed captioning.²¹⁵

116. Administrative oversight of quality issues also would pose difficult problems. We believe that it would be difficult to establish criteria that would provide threshold measures of the usefulness of the captioning, such as a maximum number of typographical errors or misspelled words per hour of programming. At this point in the development of closed captioning, it appears that there is a diversity of opinion even within the community of hearing disabled and among captioning services regarding what should be considered high quality and accurate closed captions. Moreover, there does not appear to be a consensus regarding the best style or manner of captioning.²¹⁶ Thus, at the outset at least, we believe it preferable for those providing captioning to get the basic infrastructure in place and for the Commission to use its resources to monitor and administer the basic obligations. We would, however, encourage industry groups and individuals with hearing disabilities to work together to establish voluntary standards similar to the guidelines proposed in the comments.²¹⁷

117. Furthermore, we are concerned that regulation of "quality" could hinder the development and expansion of closed captioning unnecessarily, and unintentionally limit the number of programs and the types of programs that will be captioned. While it appears, for example, that a verbatim transcription is generally to be preferred, this is not always the case. In some circumstances, for example, spoken words may need to be edited for reading speed. Children's programs, for example, may be edited for a slower reading speed. If quality were defined in terms of the accuracy of a verbatim transcription, any regulations we adopt could interfere with the captioners' art. Additionally, we do not have clear evidence regarding whether it would be better not to have captions at all for a considerable period of time or for several limited categories of programming rather than captions with some errors which allow the viewer the opportunity to take advantage of available programming, albeit not perfect in terms of the closed captioning.

118. We further believe that the adoption of rules that require closed captioning as an integral part of video programming will provide a marketplace incentive for program providers and producers to distribute the best quality captioning possible. It appears that all of the parties

²¹⁵ These estimates are calculated as cost of captioning times three hours a day times seven days a week times 52 weeks a year.

²¹⁶ *Report*, FCC 96-318 ¶ 18.

²¹⁷ *See* ¶ 106 *supra*.

involved have incentives to increase the quality of captioning within the allowable cost constraints. Moreover, as the demand for captioning increases, we expect competition among caption suppliers also will serve to set an industry standard for acceptable levels of quality and accuracy. While not proposing specific standards now, we propose to monitor the closed captioning that results from the implementation of our rules and to revisit this issue in the future if we believe that standards for quality and accuracy may be warranted.

119. We seek comment on these tentative conclusions not to adopt specific standards at this time. We ask that parties who disagree with this approach provide specific standards or guidelines that could be implemented, monitored, and enforced as we phase in our closed captioning requirements. Commenters are asked to consider the costs of implementation of any standards they proposed, the effect on the quantity of captioning that can be produced under the proposed standards, and the availability of captioners with the required skill levels to fulfill such requirements.

120. We also do not propose to establish minimum credentials for those employed to provide closed captioning for video programming. We believe imposition of such a standard would unnecessarily delay implementation of any closed captioning requirements, without any evidence that only those passing a specific test are the best qualified to provide this service. Moreover, we expect that the quality of closed captioning will improve as the amount of captioning increases and that the marketplace will establish standards for those employed to prepare captions. We seek comment on this tentative conclusion. Commenters who disagree with this assessment are asked to provide specific evidence for the need for such standards and to provide precise standards for caption providers that the Commission could implement and enforce.

121. We further conclude that it is not appropriate or necessary to restrict the captioning methodology used to achieve the goal of maximizing available captioning as long as the criteria for captioning proposed above are met. We seek comment on this conclusion. We are concerned that any restrictions on the method of captioning would prevent certain types of programming from being captioned. For example, we note the drawbacks of the ENR method, especially when not all aural portions of a program are scripted. While we would prefer that program providers use other methods that permit more complete captioning, we are aware that this method has an advantage over other methods in that once an initial investment is made in equipment and software, it is relatively cost free. Using this method of captioning, material that might otherwise not be captioned could be captioned. In the alternative, every broadcast station with local programming and cable system with local origination programming would need to employ staff captioners, which could be prohibitively expensive and result in the loss of programming. Thus, we believe that, at least for the short term, we should not prevent program providers from using this or any other method. We seek comment as to whether we should revisit this issue during the implementation period established by our rules. Commenters supporting regulation of the methods used for closed captioning should provide information regarding the rationale for limiting the permissible captioning methodology. In addition, comments should set forth specific proposals for such requirements.