Law Offices
HOLLAND & KNIGHT
A Registered Limited Liability Partnership

2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202
202-955-3000
FAX 202-955-5564

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MARVIN ROSENBERG
202-457-7147
mrosenbe@hklaw.com

March 31, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 95-176
Closed Captioning and
Video Description of
Video Programming

Dear Mr. Caton:

Transmitted herewith, on behalf of United States Satellite Broadcasting Company, Inc., is an original and four copies of its Reply Comments in the above-referenced Docket.

Should there be any questions, please communicate with the undersigned.

Cordially,

Marvin Rosenberg

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Enclosures

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MAR 31 1997

Federal Communications Commission
Office of Secretary

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

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

REPLY COMMENTS
of
UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

Dated:
March 31, 1997

Marvin Rosenberg
David Vaughan

Holland & Knight LLP
Suite 400
2100 Pennsylvania Ave., NW
Washington, DC 20037-3202
202-457-5921

Counsel for United States Satellite Broadcasting Company, Inc.

SUMMARY

United States Satellite Broadcasting Company, Inc.'s ("USSB") reply comments point out that DBS, broadcast, wireless and cable providers agree that it would be burdensome and inefficient to require that closed captions be added at the distribution level. Like other commenters, USSB urges that the Commission "re-think" its proposed position on this point and make programmers responsible for close-captioning, not MVPDs. If MVPDs are to be responsible, USSB agrees with those commenters who noted that, unless programmers are also made responsible, many distributors will not have the leverage to obtain closed captioning from programmers. Thus, USSB agrees that programmers must be required to make captioned programming available to all MVPDs on a nondiscriminatory basis.

USSB agrees with the need to exempt certain categories of programming such as commercials, fast-breaking news, interstitials, political commercials, public service programming, foreign language programming, etc. In particular, USSB urges that programs intended for a niche market or which only attract a niche audience should be exempt. These include by way of example foreign sports such as cricket and soccer, regional sports, and religious programming for which there is a limited residual market or a limited window of time for rebroadcast. USSB proposes factors to be considered in deciding upon such exemptions. In no event should a

distinction be made between pay-per-view and other forms of reception in providing an exemption.

With respect to existing contracts, USSB agrees that programming should be exempt for the life of the contract unless a programmer agrees to provide closed captioning at an earlier time.

USSB also agrees with those commenters who proposed that compliance should be set at a percentage less than 100% for non-exempt programming to allow for vagaries of programming and to avoid the frequent need for seeking waivers. USSB also agrees with those commenters who urge that MVPDs be permitted to elect whether to base compliance on a per-channel, sub-system or system-wide basis if MVPDs are made responsible under the final rule.

Finally, USSB points out that its reply comments are not a substitute for its original comments. USSB intends that all of its comments be reviewed for an understanding of its position.

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

In the Matter of	)	
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Implementation of Section 305 of the Telecommunications Act of 1996	)	
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Video Programming Accessibility	)	
	)	

REPLY COMMENTS
of
UNITED STATES SATELLITE
BROADCASTING COMPANY, INC.

United States Satellite Broadcasting Company, Inc. ("USSB") submits these reply comments in connection with the Commission's Notice of Proposed Rulemaking ("Notice") requesting comments on proposed closed captioning requirements. These reply comments supplement USSB's comments filed February 28, 1997 and are not intended to be a substitute for those comments. These reply comments are intended only to highlight certain points and/or comment on points emphasized by other commenters.

I. Responsibility for Captioning.

DBS, broadcast, wireless and cable providers continue to agree that it would be burdensome and inefficient to require that captions be added at the distribution level. See Comments of the

National Association of Broadcasters, 2-3; Comments of DIRECTV Inc., 4; Comments of BellSouth Corporation, BellSouth InterActive Media Services, Inc. and BellSouth Wireless Cable, Inc.; Comments of Paxson Communications Corporation, 4-5.

The National Captioning Institute thus urges the Commission to "re-think" whether captioning responsibility for certain programs should be placed on distributors. See Comments of the National Captioning Institute, 13-14. "As a general principle, NCI believes it is important for the Commission to place the captioning responsibility at the point in the video production/distribution process where it makes the best economic sense to do so. We believe that will ensure that the Congressional mandates are fulfilled and that the burdens on particular entities are minimized." Id. at 14. USSB agrees.

USSB believes that programmers should be responsible for providing any required captioning and that providers should only be responsible[1] for transmitting captioning as provided by programmers.[2] Without responsibility to comply with closed

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[1] To the extent that providers originate programming, they should bear responsibility for non-exempt programming as programmers.

[2] Thus, the Commission noted that broadcast stations probably should be made responsible for captioning programs that are re-broadcast by a MVPD, rather than the MVPD. Notice, para. 44. See Comments of United Video Satellite Group, Inc., 2-3; Comments of DIRECTV Inc., 7 n. 20. In this connection, USSB believes that unless broadcasters are made solely responsible for non-exempt programming retransmitted by DBS (or other MVPDs) providers, MVPDs will be reluctant to retransmit non-exempt programming originated by broadcasters.

captioning rules, programmers are likely to play providers off against one another and/or refuse to provide certain types of programming while concentrating on other more easily captioned programming. See Comments of BellSouth Corporation et als., 2, 8; Comments of National Council on Disability, 5-6. In no event should MVPDs be responsible for failure to comply with closed captioning rules if they have made a good faith effort to have programmers provide closed captioning. See Comments of PrimeStar Partners L.P., 4.

USSB agrees that programmers should be required to make captioned programming available to all MVPDs on a nondiscriminatory basis. See Comments of BellSouth Corporation, et als., 19-20; Comments of National Council on Disability, 5-6.

II. Exemptions of Programming and Providers Based on Economic Burden.

To the extent that the Commission's proposals have been based upon the understanding that an exemption can be granted only where each member of a class is economically burdened or a limited definition of economic burden, those proposals should be analyzed anew as explained more fully in USSB's original comments.

A. Programming Exemptions.

USSB believes that consideration for an exemption should include relative market size for a program, class of program or service, the degree of distribution, audience ratings or share, relative programming budgets, and/or lack of or limited repeat value of programs. These would include programs aimed at niche

markets or niche audiences such as foreign sports, regional sports, special religious programs, etc. all of which are narrowly targeted to meet the viewing tastes of a limited audience and have a limited residual market or a limited window of time for re-broadcast. USSB also believes that the nature and cost of providing closed captions and the impact upon operations of providers as well as programmers and owners should be considered. For example, fast-breaking news should be exempt. In no event should a distinction be made between pay-per-view and other forms of reception.

USSB agrees with those commenters who recommend that commercials, interstitials and promotional advertisements should be exempt, as well as political commercials for the reasons previously stated by USSB and other commenters. See Comments of ABC, Inc., 10-13. In addition, there appears to be a strong consensus that overnight news and regional sports programming should be exempt because of audience size, low advertising revenues, and general lack of secondary distribution. Id.

With respect to foreign language programming, USSB agrees that requiring foreign language captioning is likely to affect adversely the availability of such programming because of the cost, liability and insufficient availability of fluent captioners.[3] See Comments of Univision Communications Inc.; Comments of Grupo Televisa, S.A., 4-8; Comments of Paxson Communications Corporation, 9-10.

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[3] USSB also remains concerned that the transmission of programs simultaneously in two languages may not be technically feasible if closed captions are also required.

High-power DBS providers are required to provide noncommercial programming of an educational or informational nature. These programs typically operate on a relatively small production budget. Closed captioning is likely therefore to place a too heavy burden on producers of these programs. For this reason alone, such programming should be exempt from regulation. See Comments of BellSouth Corporation, et als., 16-18; Comments of PrimeStar Partners L.P., 12.

USSB agrees that responsibility for political advertising should not be imposed on providers. If closed captions are required, they should be the sole responsibility of those persons sponsoring the advertising rather than the provider. With respect to political advertisements and political programming generally, USSB remains concerned that unauthorized captioning may violate political rights of speech and expression and would be inconsistent with Section 315 of the Communications Act.

With respect to existing contracts, in the event that providers are made responsible for compliance, existing contracts for programming that do not require closed captioning should be exempt for the life of the contract subject to the programmer agreeing to provide closed captioning. In no event should MVPDs be required to renegotiate existing contracts before the end of their current terms. See Comments of PrimeStar Partners L.P., 4, 15.

B. Library Programming.

USSB and other commenters believe that the market will best determine whether there is sufficient interest for captioning

"library programming" and that the Commission should impose no requirement at this time, electing to monitor this situation with a view to a subsequent rulemaking if indicated by experience. See also Comments of National Association of Broadcasters, 10-12; Comments of ABC, Inc., 8-10. Captioning such programming long after it was produced is simply too expensive and difficult. Id.

C. Provider Exemptions.

In deciding whether providers should be responsible for compliance with the proposed regulations rather than programmers, the Commission must consider whether imposing the economic burden of captioning upon a nascent industry such as DBS providers (particularly firms that have a history of net operating losses) is reasonable and not base the decision solely on whether certain providers have the technical capacity to provide closed captioning.

III. Availability of Captioning Personnel.

Throughout the Notice, the Commission recognizes the limited availability of competent captioning personnel. E.g., Notice, paras. 23-25, 112.

In particular, the Commission should be aware that the most likely location for DBS providers to insert captions for live programming will be at DBS uplink facilities. These facilities are located primarily to take advantage of prevailing weather conditions and are often at remote locations. Thus, they are not likely to be locations where already scarce captioners reside. Cf. Comments of National Broadcasting Company, Inc., 5 (discussing

difficulty of having captioning encoding equipment and skilled captioners at uplink feeds at regional sports events).

IV. Standards for Accuracy and Quality.

Commenters were also generally agreed that voluntary standards should be required rather than mandated, particularly at this time. See Comments of ABC, Inc., 16. USSB also remains concerned that imposing responsibility for compliance upon providers, rather than programmers, may expose providers to claims of censorship, infringement, defamation, and other legal liability. For this reason, USSB continues to urge that any responsibility for compliance be placed upon programmers and/or shared by programmers.

USSB's concern that it may violate the intellectual property rights of programmers, program owners or others if it unilaterally interprets the works of a third party by providing closed captions, also was mentioned by other commenters.[4] See Comments of United Video Satellite Group, Inc.; Comments of BellSouth Corporation, et als., 9 n. 11.

V. Enforcement and Compliance Requirements.

USSB agrees with those commenters who believe that compliance should be set at a percentage less than 100% for non-exempt programming to allow for the vagaries of programming and to

[4] In the event that liability for compliance is placed upon providers, the Commission should consider a rule exempting providers from liability for defamation, infringement of intellectual property rights, and other private liability with respect to the good faith provision of closed captioning.

avoid the burden of seeking individual waivers. See Comments of PrimeStar Partners L.P., 5-6. Thus, C-SPAN suggested that 80% be used. See Comments of C-SPAN AND C-SPAN 2 (National Cable Satellite Corporation), 12-13; Comments of Pay-Per-View-Network, Inc. d/b/a Viewer's Choice, 4-5.

USSB also agrees that MVPDs should be permitted to elect whether to base compliance on a per-channel, sub-system or system-wide basis. Comments of PrimeStar Partners L.P., 6-8.

Rather than imposing additional recordkeeping requirements upon providers, the Commission should leave it to individual providers' discretion to maintain those records, if any, a provider believes necessary to demonstrate compliance with the regulations as issued and to resolve any disputes that may arise thereunder. See Notice, para. 150.

* * * * *

In conclusion, responsibility for compliance with the closed captioning rules should be imposed on programmers and not distributors. In the event, responsibility is imposed on

distributors, responsibility should also be imposed on programmers. Exemptions should be liberally provided with an eye toward revisiting such issues based upon experience.

Respectfully submitted,

Marvin Rosenberg
David Vaughan

Holland & Knight LLP
Suite 400
2100 Pennsylvania Ave., NW
Washington, DC 20037-3202
Tel: 202-457-5921

Counsel for United States Satellite Broadcasting Company, Inc.

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