

**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 THE  
NATIONAL CABLE TELEVISION ASSOCIATION**

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**INTRODUCTION AND SUMMARY**

The National Cable Television Association, Inc. ("NCTA") hereby submits its Reply Comments in the above-captioned proceeding. In our initial comments in this proceeding, NCTA recognized that providing programming with captions to serve deaf and hard of hearing viewers is a worthy goal that is shared by the cable industry. Our comments detailed the efforts in the absence of government regulation that have led to a significant increase in the amount of captioned materials provided by cable program networks. We also explained, however, the real world constraints associated with captioning of programming.

Congress granted the FCC significant discretion to determine the appropriate schedule for achieving the captioning goal. It provided the Commission authority to adopt exemptions from the requirements where necessary to preserve the availability of diverse programming. NCTA's Comments, and the comments submitted by numerous program owners and providers, explained

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why the FCC should exercise that discretion to fashion reasonable timetables and appropriate exemptions.

To that end, our Reply Comments propose, among other things, that

- the FCC adopt its proposed 10-year transition plan for new non-exempt programming;
- the FCC should measure compliance on a network-by-network basis, rather than on a system-wide basis, on an annual calendar year basis;
- the rules should not treat reformatting in a manner different from other captioning efforts;
- the record supports reasonable exemptions from captioning requirements, and supports the Commission not imposing a target date or a percentage phase-in for captioning library material;
- the Commission should broadly construe the existing contract provision;
- the ability to make individualized undue burden showing should not be unreasonably constrained; and
- quality standards should not be imposed.

### **ARGUMENT**

#### **I. THE COMMISSION SHOULD ADOPT THE PROPOSED 10-YEAR TRANSITION PLAN FOR NEW, NON-EXEMPT PROGRAMMING**

In our initial comments, NCTA endorsed the Notice's proposal to allow a ten year transition for new, non-exempt programming. Several commenters, however, urge the Commission to adopt more expedited timeframes for phasing in the new captioning requirements for new, non-exempt programming. For example, the Association of Late-Deafened Adults ("ADLA") argues that a "two to three year time frame is reasonable and achievable".<sup>1</sup> Other comments urge that the Commission require "all news, educational, children's and prime time programming to be captioned within a two year period after the effective date of the Commission's rules," and that all other non-exempt new programming should be required to be

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<sup>1</sup> Comments of Association of Late-Deafened Adults, Inc. at 2 (hereinafter "ALDA Comments"); Comments of the Consumer Action Network (hereinafter "CAN Comments").

captioned within four years.<sup>2</sup> Yet others advocate a three to five year transition for new programming.<sup>3</sup>

As described in detail in NCTA's initial comments,<sup>4</sup> a longer transition is critical for the cable programming community to achieve the significantly higher levels of captioning that the rules would require without adversely affecting the availability of diverse programming. It has taken the broadcast networks nearly two decades to attain the high levels of captioning that currently exist. This effort has been made possible, in part, through significant reliance on government grants. Commenters cannot reasonably expect program networks, with their more limited program budgets and lacking government funding, to achieve these same levels on a significantly more expedited basis.

Moreover, existing resources simply do not exist to caption all the new programming that will be required to be captioned. Cable networks alone will need to caption hundreds of thousands of hours of programming annually. Accelerating the time frame for captioning new, non-exempt programming cannot change the fact that the demand for these already limited services will sky rocket. This is particularly true with respect to trained stenocaptioners. There are estimates that only 100 exist nationwide.<sup>5</sup> A more rapid implementation schedule will make

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<sup>2</sup> Comments of the Coalition of Protection and Advocacy Systems at 4 (hereinafter "CPAS Comments").

<sup>3</sup> Comments of Self Help for Hard of Hearing People, Inc. at 3 (hereinafter "SHHH Comments"); Comments of the National Association of the Deaf at 4 (hereinafter "NAD Comments.")

<sup>4</sup> See also Comments of the Motion Picture Association of America at 10; Comments of DirecTV Inc. at 6-7.

<sup>5</sup> Notice at ¶24. One commenter suggests that for every 100 students entering school to learn skills needed for steno-captioning, no more than two will have the additional skills for realtime captioning. VITAC Comments at 7. Even then their skill level would be such that it would be the year 2000 at the earliest before they could be used for steno-captioning. Id. at 8.

captioning efforts that much more expensive to achieve, resulting in an avalanche of undue burden petitions. This is not what Congress intended in providing the Commission ample flexibility to adopt “an appropriate schedule of deadlines for the provision of closed captioning of video programming.”<sup>6</sup> Instead, the legislative history makes clear that “schedules [of deadlines] should not be economically burdensome on program providers, distributors or the owners of such programs.”<sup>7</sup> A longer timeframe is warranted to allow cable networks to incorporate captioning resources into their program budgets at a reasonable pace, to develop relationships to help defray the costs of captioning, if possible, and to reduce the need for individualized undue burden showings.

Several commenters also argue that different transition schedules should apply to different networks, depending on the amount of captioned material they currently air. They propose that the phase-in percentages apply over and above the amount of captioning already being provided by a network on the effective date of the FCC’s rules.<sup>8</sup> In other words, they contend that a network that today captioned 25% of its new programming should be required to caption 25% more of its programming by the end of its first benchmark. The Commission should not adopt this proposal.

Many cable networks have well-established captioning efforts already underway. Those voluntary efforts, undertaken in the absence of any government rules, will undoubtedly continue.

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<sup>6</sup> Section 713(c).

<sup>7</sup> House Report at 114.

<sup>8</sup> NAD Comments at 5; SHHH Comments at 2; Comments of League for the Hard of Hearing at 3 (hereinafter “LHH Comments”); Comments of the National Council on Disability at 3 (hereinafter “NCD Comments”).

Concerns expressed in some comments about “backsliding” are, therefore, unfounded. These networks have already determined that captioning serves their viewers, and any effort to reduce that service would be quickly detected by their customers. The FCC can safely rely on market-place forces -- forces that already have produced these voluntary commitments to caption -- to ensure that these levels of captioning continue.<sup>9</sup>

It would be unreasonable and particularly unfair, though, for the Commission to adopt rules that mandate that these networks achieve an even higher degree of captioning than that required of other networks. Such an approach most heavily burdens those networks that have already voluntarily undertaken the most captioning efforts to date. Moreover, some cable networks have received government funding to help defray the costs of captioning some of their programming. To the extent that government resources are reduced, as several commenters predict, it will take more network resources -- as well as additional time-- to maintain existing levels of captioning.<sup>10</sup> Assigning each network its own specific captioning benchmark also will lead to difficult monitoring and administrative problems during the transition. Separate transition benchmarks for each network would require the Commission to keep track of the existing level of captioning of each of the more than 140 national cable networks, and to adopt

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<sup>9</sup> One commenter claims that certain cable networks already are reducing the amount of captioned material that they present, allegedly in response to the Commission’s proposal. Comments of Steve and James Berke at 1. We believe this allegation is unfounded. While it is true that certain programs may no longer be captioned, those captioning resources have instead been allocated to new, original program series with repeat value. Rather than representing a lessened commitment to captioning, these examples merely demonstrate why no government rule dictating which programs a particular network should caption is appropriate here. Networks should remain free to decide how best to serve their audience with the resources available.

<sup>10</sup> Even some commenters that are urging the Commission to adopt this approach acknowledge that “an abrupt cut off of Department of Education funding would have a catastrophic impact on the availability of captioning.” SHHH Comments at 4.

different benchmarks every several years. The administrative burdens for both cable networks and the FCC would be enormous. For all these reasons, the Commission should apply uniform benchmarks to each network for new, non-exempt programming during the transition period.

Several commenters propose an inflexible approach to captioning efforts that would mandate that particular types of programs should be captioned first, or that particular percentages should be achieved during a particular day-part.<sup>11</sup> The Commission should avoid these efforts to micromanage networks' choices regarding which programs to caption first. As described in NCTA's Comments on the Notice of Inquiry, the majority of captioned material currently is presented during prime-time. These programs typically have the largest audience, and the largest budgets.

It is therefore not surprising that more dollars have been directed toward captioning those programs. Given that the marketplace has already responded to serve the largest potential audience, imposing an additional layer of government regulation on a given network's programming schedule is unnecessary. Any rule in this area also would needlessly complicate the captioning effort and would fail to provide the flexibility necessary to achieve captioning in a manner that minimizes government interference in the programming arena.

The Commission should also eschew involvement in choosing among types of program services to be captioned first and should not adopt a more stringent schedule for captioning certain types of programs like news and public affairs. The record demonstrates that marketplace forces have led to significant captioning of news programming, both on a national and local

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<sup>11</sup> See e.g., CAN Comments at 4.

level.<sup>12</sup> Marketplace forces and additional efforts by program networks will ensure that an increasing amount of news and public affairs programming is available in a captioned format. C-SPAN's comments demonstrate, however, that the type of unscripted, public affairs programming that it airs presents unique challenges to captioning. It is significantly more difficult to caption shows that are not scripted and for which real time captioning would be necessary. These are the very types of captioning resources that are in shortest supply, and for which an expedited schedule would impose the greatest burden.

The Commission should adhere to its long-standing principle of avoiding involvement in precisely this type of content-based decision,<sup>13</sup> and instead should let individual networks respond to the needs and desires of their viewers without the government dictating these types of choices.

Finally, the record demonstrates why the Commission should not require that every new, non-exempt program should be captioned at the end of the transition period. Instead, the FCC should provide a safety valve and cap the transition at a level below 100 percent.<sup>14</sup> This will provide needed flexibility for cable networks which, due to unique challenges or operational difficulties, may not be able to caption all new, non-exempt programming prior to airing.<sup>15</sup>

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<sup>12</sup> See, e.g., Comments of the Radio-Television News Directors Association at 2.

<sup>13</sup> See, generally, WNCN Listeners Guild, 450 U.S. 582 (1981) (upholding FCC decision to afford broadcast licensees broad discretion in selecting programs based on audience preferences.)

<sup>14</sup> See, e.g., Comments of ALTV at 8.

<sup>15</sup> See, e.g., Comments of TV Food Network at 6; Comments of Encore Media Corp. at 8.

**II. THE COMMISSION SHOULD MEASURE COMPLIANCE WITH THE TRANSITION BENCHMARKS ON A NETWORK-BY-NETWORK BASIS**

Virtually all the commenters agree with NCTA's initial Comments that compliance with the transition benchmark should be measured on a network-by-network basis, rather than across the entire array of cable system channel carriage.<sup>16</sup> As Cox Enterprises describes, the Notice's system-wide measurement proposal represents a "logistical nightmare for cable operators."<sup>17</sup> As NCTA pointed out in its Comments, an individual operator is unable to monitor the nearly *half a million hours of programming provided on its system annually*. An operator receives dozens of satellite-delivered channels and simultaneously retransmits them to its customers. It would be impossible to caption any of that programming at the cable system level as well as irrational to force multiple systems to incur the costs of captioning the same program. Furthermore, as the record demonstrates, measuring captioning over a system's entire array of channels would needlessly complicate planning and budgeting for captioning at the network level as well. A network's captioning benchmarks could fluctuate from system to system, based on the captioning efforts of other networks that each system carries. Therefore, a network's captioning obligations would be subject to a wide variety of factors outside its control.

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<sup>16</sup> See, e.g., Comments of the WGBH Educational Foundation at 5 ("A system-wide accounting of captioned programs by MVPDs would create an unfair and unequal burden not only on those cable channels and broadcast networks that have been captioned more than the minimum required, but it would also require MVPDs to tediously count the captioned program hours it transmits and then use some undefined formula to demand of one or more other channels to provide additional captioned programs. The coordination of such a process would be virtually impossible and the timing of such decisions would not allow advance planning by either programmer or provider."); NAD Comments at 6 ("Because deaf and hard of hearing individuals seek a diversity of captioned programming, we urge that each channel be individually required to comply with the percentage requirements."); NCD Comments at 6 -7; VITAC Comments at 4.

<sup>17</sup> Comments of Cox Enterprises at 7.

For these reasons, the Commission should provide that a transitional phase-in for new, non-exempt programming will apply on a network-by-network basis, rather than across an array of networks carried by a multichannel video programming distributor.

**III. COMPLIANCE EFFORTS SHOULD BE MEASURED OVER A REALISTIC TIME FRAME**

Our initial comments proposed that the Commission measure a network's compliance with the transition benchmarks for new programming based on its effort over the last calendar year. Measuring captioning efforts over too short a timeframe will result in captioning considerations dictating the content of program networks.

For example, reviewing captioning efforts on a weekly basis, as some commenters have suggested,<sup>18</sup> in many cases would not accurately reflect a cable network's overall captioning effort. As NCTA's initial Comments explained, unlike a typical broadcast networks, a cable network might not present the same series each week -- or might present a series of episodes spanning a number of years, some of which are captioned, and others of which are not. A weekly measurement could, therefore, constrain many programming decisions; clearly something Congress sought to avoid.

For these reasons, the Commission should adopt rules that take a longer view of a network's captioning percentages. These percentages should be measured over the entire year.

**IV. THE COMMISSION SHOULD NOT TREAT REFORMATTING DIFFERENTLY FROM OTHER CAPTIONING EFFORTS**

Several commenters urge that the Commission treat reformatting as a separate matter from other captioning requirements. They propose that the FCC require reformatting of all

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<sup>18</sup> See, e.g., ALDA Comments at 4; CAN Comments at 5.

programs that were previously captioned. This rule apparently would apply to all library and new programming that were captioned in their original form. This argument, however, is based on a misconception about reformatting. While certain commenters suggest that missing captions can be "easily avoided" in the case of reformatting,<sup>19</sup> the experience of numerous cable program networks in this area suggests that this is not the case.

First, a feature film that is originally available in a captioned format must be reformatted once it is shown on a basic cable network or a local television station. MPAA's Comments explain how reformatting is not uniform. Different outlets have different editing needs, such as editing a film to make it more appropriate for a particular audience by deleting certain scenes or language or compressing a program to air in a particular timeframe. In addition, a cable network and a local station may have different commercial break requirements -- and these can even vary from cable network to cable network. For example, a basic cable network may provide its own commercials and also may make time available for cable systems to insert their own local advertisements. These fundamental business reasons result in a program being edited in different ways.<sup>20</sup> Given the lack of uniformity in editing programs, there currently is no "easy" way to ensure that captions follow a program.

Second, the copy of a program licensed to a cable network may not contain captions, even though it was captioned for its initial exhibition. A licensee may have a version that differs from the original. Moreover, the captions may be owned by a separate entity -- such as the

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<sup>19</sup> See, e.g., WGBH Comments at 6; NAD Comments at 7-8 (arguing that all programming that previously contained captions must be transmitted with those captions, even if the program has been edited.)

<sup>20</sup> MPAA Comments at 6-7.

agency that originally performed the captioning. A program network, as a result, might be unable to itself reformat the captioning due to the proprietary nature of the captioning performed by the agency.

Third, reformatting may be appropriate when only minor edits occur. But where significant edits take place, captions for the entire program can be lost. An entirely new captioned version -- with all the costs that it would entail -- would need to be created.

In short, at the present time, the method by which captioning is encoded and received with a program tape makes reformatting neither an "easy" nor a cost-free process. As a result, the Commission should not establish more stringent timetables or rules for the presentation of previously captioned programming.

#### V. **THE COMMISSION SHOULD ADOPT REASONABLE EXEMPTIONS**

The comments of several captioning advocates suggest that very few exemptions from the captioning obligations are warranted -- or none at all.<sup>21</sup> But the record the Commission has already assembled demonstrates that imposing captioning requirements on all programs and all networks would prove economically burdensome or highly difficult to accomplish as a practical matter. The statute clearly contemplates under these circumstances that the Commission should grant exemptions to relieve "programs, classes of programs, or services" from captioning obligations.<sup>22</sup> This contrasts with case by case undue burden petitions, which remain a safety

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<sup>21</sup> See, e.g., Comments of the Coalition of Protection and Advocacy Systems at 6 ("[t]here should be no category of programming that is exempt from captioning requirements. Deaf and hard of hearing individuals have a right, the same right as individuals without a hearing loss, to full accessibility to all types of programming, not subject to the undue burden exemption.")

<sup>22</sup> Section 713(d)(1).

valve for particular situations where captioning would be burdensome for programming or services that do not fall into an established exemption category.

Adopting reasonable categories of exempt programs or services not only is authorized by the statute, but also makes sense from an administrative and practical standpoint. Doing so will avoid the detailed government involvement in the day-to-day aspects of network programming. It will also alleviate the strains on resources that would be consumed by the need for frequent individualized administrative filings.

The comments filed by the cable programming community in this proceeding demonstrate that certain exemptions are warranted based on these considerations. The record also supports granting the exemptions detailed in NCTA's initial comments in this proceeding.

**A. New Cable Networks**

First, the record supports exempting new program services based on the significant challenges that start-up networks already face. The joint comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET on Jazz and America's Health Network<sup>23</sup> demonstrate that in order to reach break-even and begin making a profit, these new networks will have to reach at least 20 million subscribers.<sup>24</sup> Launching a new network costs approximately \$100 million to \$125 million or more, and new networks incur losses for many years. Imposing captioning costs on top of these existing financial burdens would cause new networks to reduce the quality and quantity of programming that they can provide, and will thus reduce the

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<sup>23</sup> Hereinafter "New Network Comments".

<sup>24</sup> Id. at 5.

attractiveness of new networks, retarding their growth in distribution and advertising.<sup>25</sup>

C-SPAN's Comments similarly explain that "unless a specific exemption is provided for .... programming services [such as C-SPAN 3] at the outset, the captioning burden could easily prevent [start-up and limited distribution network's] creation or hasten their demise."<sup>26</sup>

The Comments of A&E Television Networks, The History Channel and Ovation also express the view that "in light of the significant costs involved, and the fact that new networks do not break even (on average) until five years after launch, the Commission should exempt any new network from captioning requirements."<sup>27</sup> We agree. The Commission should exempt new networks from any captioning requirements for at least five years from launch, and should provide them with the benefit of the 10-year transition period for new, non-exempt programming after the five-year start-up period expires. The FCC also should consider whether to incorporate a subscriber threshold so as not to burden those networks that fail to achieve the distribution necessary to gain financial viability even after 5 years have passed.<sup>28</sup>

**B. Overnight**

Second, captioning should not be mandatory during the overnight period between 2:00 AM and 6:00 AM. The extremely small audience during this period, and the correspondingly lower budget productions aired during this time, make captioning costs highly burdensome. This

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<sup>25</sup> Id. at 21 - 22.

<sup>26</sup> Comments of C-SPAN and C-SPAN 2 at 10.

<sup>27</sup> Comments of The A&E Television Networks, the History Channel and Ovation at 23.

<sup>28</sup> See C-SPAN Comments at 10 (proposing 5 year grace period and 15 million household threshold); New Network Comments at 33 (proposing exemption for low-penetrated basic networks).

is true not only for cable networks,<sup>29</sup> but also for broadcast networks, as NBC's, CBS's, and ABC's Comments explain. Total national audience for even a broadcast network's overnight programming tends to be less than one percent of television households at any given hour.<sup>30</sup> As described in NCTA's initial comments, to the extent new programming is repeated during the overnight hours, captioned programming will be available. But requiring all programming to be captioned during this late night time period would significantly and adversely affect all cable program networks.

**C. Interstitial/Promotional Programming**

Third, the FCC should also exempt interstitial and promotional material. Interstitial and promotional material constitutes a small percentage of a program network's day, and has a short shelf-life. Nevertheless, the record demonstrates the significant burden that would be imposed if this type of short-form programming were required to be captioned.<sup>31</sup> Moreover, the rapid turnaround in creating this programming creates difficult practical problems in creating and airing any such programming in a captioned format.<sup>32</sup>

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<sup>29</sup> See C-SPAN Comments at 11-12.

<sup>30</sup> Comments of NBC at 9. Comments of ABC, Inc. at 13-14 (proposing exemption for overnight news).

<sup>31</sup> See, e.g., Television Food Network's Comments, which describe how "such short-form program material constitutes a very small percentage of TVFN's daily or weekly programming; yet the cost of captioning such brief segments comprises a disproportionately large part of the cost of production that networks might be forced to eliminate promos or interstitial from their channels."

<sup>32</sup> See, e.g., Comments of WGBH at 11 ("The daily volume and fast turnaround of newly produced program promotions makes a clear justification for exemptions for this class of programming."); HBO Comments at 20.

The NAD, however, argues that an exemption for this type of programming is not warranted for larger organizations. NAD proposes that “national broadcasters, large producers, or cable stations” should hire live in-house captions in order to deal with these tight timetables.<sup>33</sup> This solution would be costly and impractical. The cost of hiring a trained stenocaptioner- has been estimated to be \$50,000-\$60,000 per year, exclusive of benefits.<sup>34</sup> In addition, in-house captioning and encoding equipment costs tens of thousands of dollars. And, contrary to NAD’s suggestion, the skills required for real time captioners for many networks may not be needed on a full-time basis, such as in the case of networks that primarily present pre-recorded material already captioned by the program owner. The costs of a full-time stenocaptioner, therefore, would be incurred simply for a fraction of the day. This is precisely the type of economic burden for which an exemption is warranted, regardless of the size of the program network.

Finally, as the Notice points out, much interstitial programming already contains text that provides much of the relevant information contained in the audio track. However, the Commission should not mandate that, in order to be exempt, this type of information must be displayed graphically or in text.<sup>35</sup> Not all interstitial programming lends itself to a graphic or text display. Yet all this programming shares the same characteristics of being ephemeral or short-duration warranting an exemption. Captioning efforts should be directed toward longer lasting programming, not to this type of limited shelf life material.

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<sup>33</sup> NAD Comments at 15.

<sup>34</sup> See Comments of The Weather Channel Comments at 8.

<sup>35</sup> See, e.g., Comments of NAD at 15.

**D. Local Origination**

Fourth, the record strongly supports exempting local origination (“LO”) programming.<sup>36</sup> U.S. West’s Comments demonstrate that mandatory closed captioning would have a devastating impact on the quantity and quality of local programming: “Falling hardest on LO studios which have the smallest budgets and audiences, mandatory closed captioning would, at the very least, significantly diminish hours of LO programming in all studios and force closure of some -- a perverse result.”<sup>37</sup> Captioning costs exceed the cost of LO programming -- generally in the range of \$100 per hour.<sup>38</sup> Time Warner Cable’s Comments also explain how captioning costs not only could fundamentally reduce the quality of local origination programming, but also could discourage the introduction of new LO services.<sup>39</sup>

LO programming obviously differs from national programming in its ability to absorb these costs. But LO programming also differs in many respects from other local programming offered by a typical local broadcast station. This programming typically has a small potential audience, and a relatively smaller viewing audience than the audience for other local programming, such as broadcast network affiliate local news.<sup>40</sup> And unlike local broadcasters, who might provide only a few hours of local programming while filling their day with network or

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<sup>36</sup> The Notice only discusses exemptions in the context of “new” programming. However, if, contrary to NCTA’s proposal, the Commission mandates captioning of “library” programming (see infra), at a minimum all library programming used on LO channels should be exempt.

<sup>37</sup> Comments of US West, Inc. at 5.

<sup>38</sup> Id.

<sup>39</sup> Comments of Time Warner Cable at 7-8.

<sup>40</sup> Id. at 9.

syndicated material, LO channels are filled with locally produced programming shown for many hours a week. Furthermore, typical LO programming fare -- such as local call-in shows, sporting events, and parades -- is not the type of programming for which electronic newsroom captioning is feasible. Therefore, captioning efforts would require significant man-power on an on-going basis.

For all these reasons, the FCC should exempt cable local original channels from any captioning mandate.

**E. PEG Access Programming**

Numerous PEG access programmers filing in this proceeding show that, as is the case with LO, access programming budgets simply cannot absorb the costs that mandatory captioning would occasion.<sup>41</sup> According to the Alliance for Community Media, the annual yearly budget for a full-service PEG access center is \$227,147. Many budgets are less than \$50,000 per year, with some as low as \$2,000 to \$3,000.<sup>42</sup> Mandatory captioning would have a devastating impact on these services.

Several commenters suggest that the solution to funding access program captioning might be to require cable companies to bear these captioning costs,<sup>43</sup> or to force operators to caption PEG programming.<sup>44</sup> But cable operators are barred from exercising control over access

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<sup>41</sup> See, e.g., Comments of the Alliance for Community Media at 4-6; Comments of the Greater Metro Telecommunications Consortium and the National Association of Telecommunications Offices and Advisors at 9 (mean budget for those with any budget at all just over \$100,000 per year).

<sup>42</sup> Comments of the Alliance for Community Media at 5.

<sup>43</sup> See, e.g., Comments of Dayton Access Television at 1; Comments of Cincinnati Community Video at 1; Comments of Access Fort Wayne at 1.

<sup>44</sup> CAN Comments at 6.

programming. In addition, payments made in support of access programming are generally capped under law at 5 percent of the gross receipts received from the operation of a cable system.<sup>45</sup> Underwriting the captioning efforts of access programmers will therefore require diverting resources from other PEG functions.

As described in GMTC and NATOA's Comments, voluntary efforts to provide access to PEG programming will continue. But mandating such effort for all access programming would have a significant deleterious effect.

**F. Advertisements**

Sixth, the record shows that a significant percentage of national advertisements are already captioned. NAD acknowledges that "the FCC is correct in noting that the incentive for advertisers to caption will increase as the percentage of captioned programming increases. Already, thousands of advertisements are captioned each year."<sup>46</sup> Marketplace forces can be relied on to ensure that those advertisers who can afford the cost of captioning will continue to do so.<sup>47</sup>

However, the record also demonstrates that captioning for certain types of national advertising would lead to little benefit and instead would merely increase the price of goods advertised. For example, NIMA International --representing companies involved in direct response television -- demonstrates in its comments that the benefits of captioning are plainly

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<sup>45</sup> 47 U.S.C. §542(g)(1) and (2).

<sup>46</sup> NAD Comments at 14.

<sup>47</sup> Comments of the American Association of Advertising Agencies at 2 (noting annual increase in number of captioned commercials) (hereinafter "AAAA Comments").

outweighed by the cost and competitive consequences that would ensue from the requirements.<sup>48</sup>

The Direct Marketing Association Comments similarly explain that all the key information needed to make an informed purchasing decision is conveyed without the use of captions in the material its members present.<sup>49</sup>

The record also supports NCTA's proposal to exempt local advertisers from a mandatory captioning requirement. Captioning costs for local advertisers would constitute a significant portion of their budget. The AAAA Comments confirm that the economics of local advertising differs significantly from national advertising, and the "\$300 average charge to add overnight captioning could put the television medium beyond the reach of some. This not only would negatively affect the marketer, but would also prevent valuable information from reaching the consumer."<sup>50</sup> Captioning costs would constitute an economic burden for these types of commercials and, as NCTA's Comments demonstrate, should not be required for local advertisements. Instead, the Commission can safely rely on the incentive local advertisers have to reach as many potential customers as possible to ensure that those local businesses that can afford to do so will caption.

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For all these reasons, we urge the Commission not to mandate captioning for these types of programs and networks. Instead, captioning efforts should be voluntary and market driven for these types of services.

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<sup>48</sup> Comments of NIMA International at 6.

<sup>49</sup> Comments of the Direct Marketing Association at 2.

<sup>50</sup> AAAA Comments at 3.

**VI. THE COMMISSION SHOULD NOT ADOPT A TIMETABLE OR PERCENTAGE PHASE-IN REQUIREMENT FOR LIBRARY PROGRAMMING**

Numerous commenters agree with NCTA that the FCC should not mandate captioning of library programming at this time. However, certain other commenters argue that all library programming should be captioned, albeit on a somewhat longer schedule than new programming. The proposal to caption all library programming that is aired after the rules' effective date is contrary to the statute and its legislative history, and should not be adopted by the Commission.

NAD, for example, contends “[t]hat, in fact, Congress always intended that library programming which would be exhibited to the public would be shown with captions,” and that it only meant to exclude from the captioning obligation “those programs which continue to gather dust on closet shelves.”<sup>51</sup> Had Congress intended that all video programming that is exhibited would be captioned, however, it would have written an entirely different law. There would have been no reason to distinguish in the statute, as Section 713(b) clearly does, between video programming first published prior to the effective date of the FCC's regulations and video programming first published after the effective date of the FCC's regulations. Instead, if, as NAD claims, the FCC only were given discretion to adopt a longer phase-in for library product, the statute could have made that clear by differentiating between new and library programming in Section 713(c), where it addresses the schedules of deadlines. The statute was not written that way, and the legislative history confirms that Congress did not intend that the FCC require all library programming to be captioned. The House Report makes plain that “[e]conomic or logistical difficulties make it unrealistic to caption all previously produced programming. In

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<sup>51</sup> NAD Comments at 9-10.

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 captions.”<sup>52</sup>

The record demonstrates, consistent with this legislative intent, why the Commission should not adopt captioning requirements for library programming at this time. Captioning costs were not part of the economic formula when these programs were created, sold to a third party, or licensed. Imposing these costs now will cause significant distortions to the programming marketplace, and could well lead to certain programs not being aired.

The record also shows that popular classic movies or program series are already being captioned, even absent government mandates. For example, CBS’ Comments show that it already captions all library programming appearing on its network, and intends to do so in the future. HBO’s Comments demonstrate how the amount of captioned library programming that it airs increased dramatically over a 10-year period.<sup>53</sup> And as newer captioned material replaces older uncaptioned shows, the total number of programs containing captions will continue to increase.

For all these reasons, we urge the Commission not to mandate captioning of library programming at this time. Instead the FCC can satisfy its statutory mandate to “maximize the accessibility” of previously published programming by allowing the marketplace to work. In order to ensure that such an approach would lead to an increase in captioned material, the Commission should review captioning efforts with respect to library programming at the end of the 10-year transition period for new, non-exempt programming.

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<sup>52</sup> House Report at 114 (emphasis added).

<sup>53</sup> HBO Comments at 18.

**VII. THE COMMISSION SHOULD BROADLY CONSTRUE THE “EXISTING CONTRACT” PROVISION**

Congress separately addressed the issue of existing contracts by providing for an exemption under Section 713(d)(2) where supplying captioning would be “inconsistent” with contracts in effect on February 8, 1996. We believe the Notice adopts too narrow an interpretation of this provision, confining its reach to contracts that explicitly bar captioning. Even NAD expresses its view that Section 713(d)(2) was intended to cover other situations, such as where “syndicated programs had already been distributed to local broadcasters on videotape, and where requiring the recall and captioning of these tapes would have resulted in a heavy financial burden for those syndicators.”<sup>54</sup>

There are many instances where captioning would be “inconsistent” with cable networks’ contracts as well, and the FCC’s rules should so provide. For example, Encore Media Corporation’s Comments describe how typical program contracts include broad prohibitions against a licensee like Encore making any changes, modifications, or additions to the films covered by the contracts.<sup>55</sup> Encore proposes that any contracts that either “(1) grant exhibition rights and then reserve to the studio all rights not granted... or (ii) expressly prohibit a licensee from ‘editing or altering’ a licensed film” should also be exempt under this provision.<sup>56</sup> HBO also proposes that existing contracts that have not already allocated the captioning right to licensees should be exempted from the rules.<sup>57</sup> We agree that clearly providing this type of exemption will help

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<sup>54</sup> NAD Comments at 18.

<sup>55</sup> Encore Media Corporation Comments at 14-17.

<sup>56</sup> *Id.* at 16.

<sup>57</sup> HBO Comments at 26.

avoid the difficult contractual issues that could arise if captioning were required during the course of an existing license term.

**VIII. UNDUE BURDEN SHOWINGS SHOULD NOT BE UNREASONABLY  
CONSTRAINED**

NAD argues that the Commission should adopt an unduly narrow reading of the undue burden exception. It urges that “size of the market, degree of program distribution, and audience ratings or share are not permissible factors for consideration under the undue burden subsection of Section 713.”<sup>58</sup> The legislative history of this section, however, flatly contradicts this reading of the statute,<sup>59</sup> and demonstrates why the Americans with Disabilities Act (“ADA”) precedent that NAD relies on is inapposite.

NAD uses the ADA to support its conclusion that captioning is required “for a program when the overall resources of a provider, producer, or owner are sufficient to handle captioning costs, even when the particular production budget of or revenues derived from that particular program may not be substantial, and even when the audience watching such program may be small.”<sup>60</sup> NAD’s position could have devastating consequences for the diversity of programming shown to the public, and ignores legislative intent.

As NCTA’s Comments explain, budgets are based on the economics of a particular program. Programming decisions invariably are based on expectations of viewership of each

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<sup>58</sup> NAD Comments at 20.

<sup>59</sup> House Report at 115.

<sup>60</sup> NAD Comments at 20.