

(i.e., the cost to caption).<sup>343</sup> Some others note that a captioning requirement will likely result in a reduction of the amount of PEG programming offered to all viewers.<sup>344</sup>

103. Many commenters urge us to either adopt a blanket exemption of PEG access programming and programmers from our captioning requirements or "identify and provide for alternative funding sources" to allow for some captioning of PEG programs.<sup>345</sup> BellSouth maintains that it would be more efficient to leave PEG captioning requirements to negotiation between local franchising authorities and cable operators rather than to have producers besiege the Commission with individual exemption requests.<sup>346</sup> Kansas City contends that a federal requirement that cities expend public money to caption government access programming could result in the limitation of available PEG programming or preclude the use of local funds for activities preferred by local residents.<sup>347</sup>

104. Commenters representing persons with hearing disabilities oppose an exemption for PEG access programming. Most claim that PEG access provides information about important community events and issues,<sup>348</sup> and that many communities already are or plan to provide captions for some of this programming.<sup>349</sup> Many also assert that there are low cost options for captioning such programming, such as new do-it-yourself hardware and software.<sup>350</sup> They also state that a small fee can be added to monthly cable bills to finance PEG captioning, as has been done by the City of Fremont, California.<sup>351</sup> In addition, NAD notes that the ADA requires effective communications access to local government hearings and

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<sup>343</sup> See, e.g., Alliance Comments at 7; Ann Arbor Comments at 2; Chicago Comments at 2; Fort Wayne Comments at 2; Indianapolis Reply Comments at 2; Lincoln Park Comments at 2; Prince George's Reply Comments at 1; Pocatello Comments at 2; Plymouth Comments at 2; Westsound Comments at 2.

<sup>344</sup> See, e.g., Ann Arbor Comments at 2; Ball State Reply Comments at 17; District of Columbia Comments at 1; ICCA Comments at 1; Madison Reply Comments at 1; SCBA Reply Comments at 11; TCI Reply Comments at 8; Time Warner Reply Comments at 6.

<sup>345</sup> See, e.g., Ann Arbor Comments at 2; Chicago Comments at 1; Cincinnati Comments at 1-2; Dayton Comments at 1; Fort Wayne Comments at 1; Lincoln Park Comments at 1; Plymouth Comments at 1; Westsound Comments at 1.

<sup>346</sup> BellSouth Comments at 17 and n. 27.

<sup>347</sup> Kansas City Comments at 4-5.

<sup>348</sup> ALDA Comments at 5; Captivision Comments at 6; Cassidy Comments at 3; CAN Comments at 6; Council of Organizational Representatives Reply Comments at 7; NAD Comments at 12; NVRC Comments at 5.

<sup>349</sup> See, e.g., ALDA Comments at 5; NVRC Comments at 5; SHHH Comments at 6.

<sup>350</sup> See, e.g., NAD Comments at 13; CAN Comments at 6-7; ALDA Comments at 5.

<sup>351</sup> Cassidy Comments at 3; CAN Comments at 6; Council of Organizational Representatives Reply Comments at 6; MATP Comments at 3; NAD Comments at 13. However, TCI contends that the Fremont tax funds captioning for governmental programming only, not all PEG programming offered in Fremont. TCI maintains that it does not underwrite the cost of captioning in Fremont, but merely collects the tax for the City of Fremont. TCI Reply Comments at 9-10, n. 15.

information provided by PEG programming.<sup>352</sup> NAD suggests that, where real-time captioners or court-assisted reporting services are used to provide access to local government meetings, the captions generated could be used for simultaneous television transmission of those proceedings.<sup>353</sup> Captivision declares that captioning costs could be cut by having the captions manually rolled or pop-up instead of time-coded onto the master tape, and preparation time could be reduced by making scripts available on disk.<sup>354</sup> This commenter acknowledges that live programs would have to be real time captioned, but notes that such programs could be recorded and the provider could then use a captioned submaster for rebroadcast.<sup>355</sup>

105. Leased Access Programming. We did not propose to exempt leased access channels from our captioning requirements since these channels are intended to serve as commercial outlets for programming and, to some extent, are expected to be used by nationally-distributed programming networks.<sup>356</sup> Commenters generally support our position.<sup>357</sup> However, Alphastar declares that leased access programming, including nonprofit educational and informational programming which may ultimately meet the DBS public service obligations, should be exempt.<sup>358</sup>

106. Instructional Programming. We sought comment as to whether locally produced and distributed instructional programming should be encompassed by our general exemptions, and requested 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. We also solicited comment regarding whether nationally-distributed instructional programming should be encompassed by our exemptions.<sup>359</sup> A number of commenters generally support an exemption for instructional programming.<sup>360</sup> Encore contends that the cost of captioning educational

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<sup>352</sup> It also maintains that the state of Rhode Island was successfully sued for failure to make televised legislative proceedings accessible via captions. NAD Comments at 12-13 and n. 6; *see also* Council of Organizational Representatives Reply Comments at 6 (the ADA requires access to many of the programs offered on PEG channels).

<sup>353</sup> NAD Comments at 13.

<sup>354</sup> Captivision Comments at 6.

<sup>355</sup> *Id.* at 6-7.

<sup>356</sup> *Notice*, 12 FCC Rcd at 1077 ¶ 75.

<sup>357</sup> *See, e.g.*, AIM Comments at 3; Council of Organizational Representatives Reply Comments at 5; NAD Comments at 13.

<sup>358</sup> AlphaStar Comments at 12; *see also* 47 U.S.C. § 335 (requiring DBS providers to reserve between 4% and 7% of their channel capacity exclusively for educational or informational noncommercial programming). AlphaStar does not provide any elaboration on this topic.

<sup>359</sup> *Notice*, 12 FCC Rcd at 1077 ¶ 76.

<sup>360</sup> *See, e.g.*, A&E Comments at 24; Encore Comments at 13; Ameritech Comments at 17 (exempt all instructional programming except prerecorded, nationally-distributed instructional programming); APS Comments (continued...)

and instructional programming is prohibitive for the producing institutions, and would exceed the license fees paid by Encore to the producers. Encore claims that it would be forced to drop instructional programming if captioning costs were to increase license fees for the programs by more than 100%.<sup>361</sup> APTS supports an exemption for locally produced and distributed educational and instructional programming, as well as for ITFS programs, noting that such programs have low budgets.<sup>362</sup> It also states that an APTS survey indicates that public stations would not be able to provide such programs if captions were required.<sup>363</sup>

107. Commenters representing persons with hearing disabilities oppose exempting instructional programming from our captioning requirements. For example, AIM asserts that prerecorded, nationally produced instructional programming should be captioned, and declares that large cable companies should help pay for the captioning of local instructional programming.<sup>364</sup> ALDA contends that educational programs broadcast by colleges and universities should not be exempted,<sup>365</sup> while another commenter claims that such programming should be captioned by the school since this is covered by earlier education laws.<sup>366</sup>

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<sup>360</sup>(...continued)

at 24 and SBCA Comments at 13 (supporting an exemption for locally-produced and distributed instructional programs). SBCA also seeks an exemption for private, intra-business communications which involve rentals or leasing of satellite transponders for network applications. SBCA Comments at 14.

<sup>361</sup> Encore Comments at 13.

<sup>362</sup> APTS Comments at 10, and nn. 14-15.

<sup>363</sup> APTS states that it recently conducted a survey of its member stations on issues related to closed captioning, which found that, on average, 75% of the over-the-air programming broadcast by these stations is currently captioned. APTS Comments at 4-5. The survey also found that the main hurdle in providing closed captioning is funding (*id.* at 5), that a captioning requirement would prevent public stations from offering locally-produced instructional programming for in-course credit (*id.* at 10) and from producing programming for the Program Exchange Service (*id.* at 12), and that stations with budgets under \$3 million would be unable to offer any locally produced programming if captioning were required for such programming (*id.* at 11).

<sup>364</sup> AIM Comments at 3.

<sup>365</sup> ALDA Comments at 5.

<sup>366</sup> Cassidy Comments at 3.

108. ITFS providers and wireless cable entities request a specific exemption for ITFS programming.<sup>367</sup> These commenters assert that the effect of a captioning mandate for ITFS would be the reduction or withdrawal of such programming from distribution.<sup>368</sup> A few commenters claim that they have never received a request for captioning of their ITFS programming.<sup>369</sup> Most of these commenters also argue that other federal laws already require ITFS providers to accommodate their students' disabilities on a more individualized basis, and that therefore an exemption for such programming generally will not result in a deprivation of service to the disabled.<sup>370</sup> Furthermore, Arizona State Board notes that ITFS programming is clearly defined in Section 74.931 of the Commission's rules, and can therefore be narrowly defined as a class for exemption purposes.<sup>371</sup>

109. Although it does not explicitly oppose an exemption for instructional programming, WGBH urges us to consider the range of instructional programming budgets, the growing use of such programming in schools, and the lack of accessible programming for deaf and hard-of-hearing students when considering exemptions for this type of programming.<sup>372</sup> Lansing maintains that educational programming should have high priority in the requirements for captioning and that, under the ADA and the Rehabilitation Act of 1973 ("Rehabilitation Act"),<sup>373</sup> there should be no exemption for educational materials.<sup>374</sup>

110. Advertising. We sought comment on whether all or only certain types of advertising should be encompassed by our general exemptions.<sup>375</sup> Many commenters support an exemption for all short-form commercials, arguing that sufficient market incentive exists to encourage increased voluntary

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<sup>367</sup> See, e.g., Arizona State Board Comments at 3-4; Higher Education Comments at 3-5; Illinois Institute Reply Comments at 7-12; Los Angeles Archdiocese Comments at 2, 6-7; Telicare Comments at 2-6; WCA Comments at 11-14. Most of these commenters also seek an exemption for ITFS licensees as a class of provider, see para. xx *infra*.

<sup>368</sup> Arizona State Board Comments at 4; Higher Education Comments at 4; Illinois Institute Reply Comments at 6-7; Los Angeles Archdiocese Comments at 2; Telicare Comments at 6.

<sup>369</sup> Telicare Comments at 2.

<sup>370</sup> Higher Education Comments at 5; Illinois Institute Reply Comments at 7-9; Ball State Reply Comments at 16-17.

<sup>371</sup> Arizona State Board Comments at 4, n 1; see also 47 C.F.R. § 74.931(a), (b) and (c).

<sup>372</sup> WGBH Comments at 10.

<sup>373</sup> 29 U.S.C. § 701 *et seq.*

<sup>374</sup> Lansing Comments at 1. Lansing also states that captioning should be required for educational programming in school and public libraries. Lansing Reply Comments at 1.

<sup>375</sup> Notice, 12 FCC Rcd at 1077 ¶ 77.

captioning of such programs.<sup>376</sup> Most of these parties also support our conclusion that the cost of captioning commercials will be more burdensome for local advertisers, and may prevent local commercials from airing.<sup>377</sup> ALTV contends that keeping track of whether commercials are captioned for purposes of compliance with the proposed transition benchmarks would pose an inordinate burden on local television stations.<sup>378</sup>

111. Some parties argue that all advertising, including long-form or infomercial advertising,<sup>379</sup> should be exempt from our captioning requirements.<sup>380</sup> Similarly, NAB requests that television stations not be required to caption advertisements, infomercials or similar programs that the station is paid to air and that are produced by entities not under the station's control.<sup>381</sup> CBS argues that requiring providers to caption commercials or infomercials would effectively force providers to subsidize advertisers' messages.<sup>382</sup> Access TV contends that the low production budgets and limited audience base for infomercials, along with the unavailability of DOE captioning funds for such programs, support a determination that it would be economically burdensome to require infomercials to be captioned.<sup>383</sup> Commenters assert that much of the pertinent information presented in the audio track of the infomercial is also presented graphically or textually on screen, and that adding captions could block much of the information already displayed textually.<sup>384</sup> DMA and NIMA maintain that the Commission's Telephone Relay Service ("TRS") requirements will help to ensure that viewers with hearing disabilities are able to access telephone information about the products offered in the infomercial.<sup>385</sup>

112. Commenters representing persons with hearing disabilities disagree. For example, a few commenters argue that many, if not most, businesses who make use of television advertising can easily

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<sup>376</sup> AAAA Comments at 2; ABC Comments at 11-12; ALTV Comments at 10; Captivision Comments at 7; CBS Comments at 13; Lifetime Reply Comments at 6-7; NAB Comments at 14; NBC Comments at 12; NCTA Comments at 24-25; Paxson Reply Comments at 5-6; Primestar Comments at 14; USSB Comments at 12.

<sup>377</sup> AAAA Comments at 3; ABC Comments at 10-11; ALTV Comments at 10; NAB Comments at 14-15; NBC Comments at 12-13; NCTA Comments at 25-26; Paxson Reply Comments at 6.

<sup>378</sup> ALTV Comments at 12.

<sup>379</sup> See Access TV Comments at 7; DMA Comments at 3-4; NIMA Comments at 4; Paxson Reply Comments at 7.

<sup>380</sup> See, e.g., NIMA Comments at 2.

<sup>381</sup> NAB Comments at 3.

<sup>382</sup> CBS Comments at 13.

<sup>383</sup> Access TV Comments at 4-5.

<sup>384</sup> *Id.* at 6; DMA Comments at 3; NIMA Comments at 4; Paxson Comments at 7-8.

<sup>385</sup> DMA Comments at 4; NIMA Comments at 4.

afford the cost of captioning, which these commenters claim is only about \$200 per commercial.<sup>386</sup> AIM maintains that national commercials certainly should be captioned, and suggests that captioning of local commercials could be phased in over time.<sup>387</sup>

113. Home Shopping Programming. We tentatively concluded that home shopping programming should not be exempt from our captioning requirements because all of the descriptive material and information provided by home shopping program hosts is not currently available in textual form on the television screen.<sup>388</sup> Captioners and organizations representing persons with hearing disabilities support this proposal.<sup>389</sup> Captivision maintains that a portion of the revenues generated by home shopping can fund captioning.<sup>390</sup> ALDA argues that, without captioning, consumers with hearing disabilities will be unable to make the same informed decisions in making their purchases as those who depend on audio information.<sup>391</sup>

114. Producers of home shopping programs and others involved in direct marketing urge exemption of home shopping programs, contending that all pertinent information which is necessary to make a buying decision is displayed graphically,<sup>392</sup> and that captions would obscure some of this information.<sup>393</sup> QVC asserts that the question should not be whether the home shopping host's oral presentation is completely reproduced in on-screen text or graphics, but whether the programming, taken as a whole, is accessible.<sup>394</sup> HSN recommends that we require electronic retailers to provide product, price and payment information as visual text a substantial percentage of the time, but exempt electronic retailers from general captioning requirements.<sup>395</sup> In addition, the commenters note that, since home shopping programs are generally telecast live, captioning would require real time captioners, but the quality and error problems associated with real time captioning could cause consumer confusion or misinformation

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<sup>386</sup> The Coalition Comments at 6; Council of Organizational Representatives Reply Comments at 7; NAD Comments at 14. *See also Report*, 11 FCC Rcd at 19233 ¶ 47 (costs of captioning commercials estimated at \$250 per minute).

<sup>387</sup> AIM Comments at 3.

<sup>388</sup> *Notice*, 12 FCC Rcd at 1078 ¶ 78.

<sup>389</sup> *See, e.g.*, AIM Comments at 4; ALDA Comments at 5; Captivision Comments at 7; Council of Organizational Representatives Reply Comments at 5; NAD Comments at 14-15.

<sup>390</sup> Captivision Comments at 7.

<sup>391</sup> ALDA Comments at 5.

<sup>392</sup> DMA Comments at 4; HSN Comments at 4; NIMA Comments at 7; QVC Comments at 10-12; ValueVision Reply Comments at 4-5.

<sup>393</sup> DMA Comments at 6; HSN Comments at 6; QVC Comments at 20; ValueVision Reply Comments at 5.

<sup>394</sup> QVC Comments at 24.

<sup>395</sup> HSN Comments at 9.

about products offered.<sup>396</sup> QVC observes that such inaccuracies could inadvertently raise disclosure and deceptive advertising issues,<sup>397</sup> and argues that a class exemption for home shopping programming is particularly warranted in light of limited captioning resources available to produce real time captions.<sup>398</sup> The commenters also state that home shopping programs are highly perishable, which would prevent captioning costs from being spread out over multiple airings.<sup>399</sup> DMA and NIMA maintain that the economics of home shopping programs require any increase in the costs of program production to be reflected in the cost of the products sold, which could make some products unmarketable.<sup>400</sup>

115. Interstitials, Promotional Announcements and Public Service Announcements. We tentatively concluded that interstitials and promotional advertisements should be exempt from our captioning requirements, provided that the basic information provided by these types of announcements is displayed in some textual or graphic form in order to provide accessibility to persons with hearing disabilities.<sup>401</sup> Program producers and providers favor an exemption for interstitials and promotional advertisements.<sup>402</sup> ABC asserts that funds spent captioning such material would be better spent on new program captioning.<sup>403</sup> Others cite the large number of such programs, the brief period from creation to airing, and the short shelf life of this type of programming, and note that captioning would be expensive, logistically difficult, and offer little public benefit.<sup>404</sup> ALTV alleges that requiring captioning of such programming will render assessments of compliance with percentage requirements difficult, since stations would have to review every minute of their schedules rather than simply reviewing individual programs.<sup>405</sup> APS seeks clarification that this exemption would include public television licensees' programming of five

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<sup>396</sup> *Id.* at 8; QVC Comments at 22; ValueVision Reply Comments at 5.

<sup>397</sup> QVC Comments at 22, n. 34.

<sup>398</sup> *Id.* at 25. However, QVC seeks an individual service exemption in the event all home shopping programs are not exempted from our captioning rules. *See* para. xx *infra*.

<sup>399</sup> DMA Comments at 6-7; HSN Comments at 8; QVC Comments at 18.

<sup>400</sup> DMA Comments at 7; NIMA Comments at 8-9.

<sup>401</sup> *Notice*, 12 FCC Rcd at 1078 ¶ 79.

<sup>402</sup> A&E Comments at 24; ABC Comments at 12; AlphaStar Comments at 12; Ameritech Comments at 18; APS Comments at 21-22; CBS Comments at 12; C-SPAN Comments at 9; DirecTV Comments at 11; Encore Comments at 13-14; HBO Comments at 20; NBC Comments at 11-12; NCTA Comments at 21-22; Paxson Reply Comments at 6; Primestar Comments at 11; SBCA Comments at 12-13; TVFN Comments at 4-5; USSB Comments at 10; Viewer's Choice Comments at 7.

<sup>403</sup> ABC Comments at 12.

<sup>404</sup> CBS Comments at 12; C-SPAN Comments at 10; HBO Comments at 20; NBC Comments at 11-12; NCTA Comments at 21-22; Viewer's Choice Comments at 7.

<sup>405</sup> ALTV Comments at 11.

minutes or less duration,<sup>406</sup> while HBO and C-SPAN would define "interstitials" as programs of 15 minutes or less in length, and would exempt all such programs from our captioning requirements.<sup>407</sup>

116. MPAA disagrees that interstitials and promotional advertisements should be required to display their basic message in text or graphic form in order to qualify for exemption, maintaining that fillers, bumpers and wraparounds, which are not primarily textual, often have a limited repeat value, and are therefore not cost-effective to caption.<sup>408</sup> In contrast, Captivision agrees that interstitials and promotional advertisements that provide a graphic display of audio content should be exempt, but contends that, though the short production time of these programs makes captioning more difficult, it does not necessarily make captioning unduly burdensome.<sup>409</sup>

117. Similarly, a few video programming providers have requested an exemption for public service announcements ("PSAs"). A PSA is an announcement for which no charge is made and which promotes programs, activities, or services of Federal, State or local governments (e.g., recruiting, sales of bonds) or the programs, activities or services of nonprofit organizations (e.g., Red Cross blood donations) and other announcements regarded as serving community interests.<sup>410</sup> Parties supporting such an exemption claim that: (1) PSAs are similar to interstitials in that they are unscheduled, brief pieces of programming prepared within a short time frame; (2) PSAs are often produced free of charge by entities who may not have closed captioning capabilities; and (3) a captioning requirement would increase the production costs for PSAs significantly.<sup>411</sup>

118. Commenters representing persons with hearing disabilities generally support our proposal to exempt interstitials where the basic information provided by these types of programs is displayed in textual or graphic form.<sup>412</sup> However, despite its support for an exemption where graphics are offered, ALDA submits that as a general rule, closed captioning should apply to all interstitials.<sup>413</sup> NAD and Council of Organizational Representatives argue that the national broadcasters, large producers and cable

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<sup>406</sup> APS Comments at 22.

<sup>407</sup> HBO Comments at 20; C-SPAN Comments at 10. Similarly, MPAA notes that an exemption for all programs of 15 minutes or less duration will be easier for viewers to monitor for compliance than one based on audience share, market size, etc. MPAA Comments at 18.

<sup>408</sup> *Id.* at 17-18.

<sup>409</sup> Captivision Comments at 6.

<sup>410</sup> See former 47 C.F.R. §§ 73.112, n. 4 and 73.760, n.4.

<sup>411</sup> See NAB *ex parte* letter of July 29, 1997.

<sup>412</sup> AIM Comments at 4; ALDA Comments at 5; CAN Comments at 7; NVRC Comments at 5; SHHH Comments at 7.

<sup>413</sup> ALDA Comments at 4. Similarly, Jerold Jordan asks why interstitials are always accompanied by an audio track if they are so easily understood without captions. Jordan Comments at 2. ALDA includes coming attractions and previous plot summaries at the beginning of programs in the category of "interstitial" programming. ALDA Comments, *id.*

networks could handle the rapid turn-around time for captioning of interstitials by hiring in-house captioners. They contend that only to the extent such programming is provided on a local basis with little funding should it qualify for exemption. For this latter category of interstitial programming, these commenters would require graphic display of the basic information.<sup>414</sup>

119. Political Advertising. We sought comment on whether political advertising should be exempt from our captioning requirements, noting that a captioning requirement could prevent some of this type of advertising from airing.<sup>415</sup> A few commenters argue that a captioning requirement is unnecessary because political advertisers have strong incentive to caption.<sup>416</sup> Captivision notes that a lack of captions will send a message about the candidate.<sup>417</sup> ALTV agrees that a captioning requirement will discourage some candidates from advertising on television, especially candidates in local elections.<sup>418</sup>

120. Deaf advocacy organizations assert that political advertising provides information about candidates that is important to the informed exercise of the constitutional right to vote, and therefore this advertising should not be exempt from our captioning requirements.<sup>419</sup> Some of these commenters request that we mandate captioning of political advertisements for national elections<sup>420</sup> and for any election for which the candidate receives local or federal government funding.<sup>421</sup> NAD contends that it is unlikely a candidate who can afford a television commercial cannot afford the additional \$200 to caption it, and urges that exemptions for local political advertisements should only be granted on a case-by-case showing of undue financial burden.<sup>422</sup> NAD would require those candidates who can demonstrate such a burden to provide text or graphical displays of the information conveyed by the commercials.<sup>423</sup>

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<sup>414</sup> Council of Organizational Representatives Reply Comments at 7; NAD Comments at 15.

<sup>415</sup> Notice, 12 FCC Rcd at 1078 ¶ 80.

<sup>416</sup> ABC Comments at 12; ALTV Comments at 11; Captivision Comments at 7; CBS Comments at 14.

<sup>417</sup> Captivision Comments at 7.

<sup>418</sup> ALTV Comments at 11.

<sup>419</sup> See, e.g., ALDA Comments at 6; CAN Comments at 8; The Coalition Comments at 7; LHH Comments at 8; NAD Comments at 15-16; SHHH Comments at 7.

<sup>420</sup> AIM Comments at 4; NAD Comments at 16.

<sup>421</sup> LHH Comments at 8; NAD Comments at 16.

<sup>422</sup> NAD Comments at 16 and n. 8.

<sup>423</sup> *Id.* See also AIM Comments at 4 (local political advertising could be exempted if there is another way to present the information provided by the audio track); ALDA Comments at 6 (political advertisements for which it would be economically burdensome to caption, such as for local elections, should be exempted but should be required to display graphics or text of the most important information provided).

121. We also sought comment on whether a requirement for closed captioning of political advertisements would be inconsistent with the anti-censorship provisions of the Communications Act.<sup>424</sup> Several commenters argue that the anti-censorship provisions of Section 315 would prevent providers from captioning political advertisements, and maintain that candidates, not providers, should be required to caption such advertisements if they are not exempt.<sup>425</sup> CBS asserts that forcing providers to caption political advertisements raises First Amendment implications, because such a requirement would effectively force providers to subsidize political speech.<sup>426</sup> In contrast, NAD, LHH and WGBH assert that the concerns regarding the anti-censorship provision of the Communications Act are unfounded.<sup>427</sup>

122. Fundraising Activities of Noncommercial Broadcasters. We tentatively concluded that live portions of noncommercial broadcasting stations' fundraising activities should be included within the classes of programming exempt from our closed captioning requirement.<sup>428</sup> We also sought comment on whether there are less economically burdensome alternatives to captioning that would ensure accessibility, and suggested a requirement that periodic textual graphics be displayed during a fundraising program that would summarize the highlights of the program.<sup>429</sup> Commenters generally support our proposal.<sup>430</sup> However, NAD and WGBH request a clarification that the programming offered in conjunction with the live portions of the fundraising would not be exempt.<sup>431</sup> Several commenters also note that WGBH has developed automated software to create a continuous, captioned message which enables viewers with hearing disabilities to participate in the live portions of these programs, and that WGBH has offered this software free of charge to all public broadcasters.<sup>432</sup> One commenter suggests that public broadcasters should recruit volunteers to do captioning, as volunteers answer the phones for these programs.<sup>433</sup>

123. Music Programming. We sought comment on our tentative conclusion that music videos should be captioned, and also solicited comment on a proposal to exempt background music and primarily

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<sup>424</sup> 47 U.S.C. § 315.

<sup>425</sup> ABC Comments at 13; CBS Comments at 14; ALTV Comments at 12; NAB Comments at 15; USSB Comments at 12.

<sup>426</sup> CBS Comments at 14.

<sup>427</sup> LHH Comments at 8; NAD Comments at 16, n. 8; WGBH Comments at 11.

<sup>428</sup> *Notice*, 12 FCC Rcd at 1078-79 ¶ 81.

<sup>429</sup> *Id.*

<sup>430</sup> ALDA Comments at 6; Ameritech Comments at 18; APS Comments at 21-22; APTS Comments at 9; CAN Comments at 8; NAD Comments at 16; NVRC Comments at 5-6; SHHH Comments at 7-8; WGBH Comments at 11.

<sup>431</sup> NAD Comments 16; WGBH Comments at 11.

<sup>432</sup> WGBH Comments at 11-12; ALDA Comments at 6; CAN Comments at 8.

<sup>433</sup> Cassidy Comments at 4.

instrumental music performances (e.g., symphony concerts, ballets) from our captioning requirements.<sup>434</sup> Many commenters agree that music videos should not be exempt, and that programming that is primarily instrumental should be exempt.<sup>435</sup> California concurs that instrumental videos need not be captioned, but notes that, while viewers who are completely deaf may not fully appreciate captions, those who can follow the melody but not the lyrics desire such captioning.<sup>436</sup> A&E states that our proposed exemptions for music programming are appropriate because there is only a marginal value to captioning such programs.<sup>437</sup> However, one commenter asks that we not adopt an automatic exemption for primarily instrumental programming, claiming that it would cost very little to caption the commentary which accompanies ballet programs.<sup>438</sup>

124. A number of commenters seek a general exemption for music videos.<sup>439</sup> These commenters maintain that music lyrics are often subordinate to the actual music and can be unintelligible, making captioning unnecessary or impossible in some situations.<sup>440</sup> RIAA admits that an economic burden exemption for music videos produced by the vast majority of its member companies is unnecessary, but that it might be appropriate for music videos produced by independent record labels.<sup>441</sup> RIAA argues that since an assessment of whether economic burden should apply in individual situations could be difficult and time consuming, it would be more practical to accommodate independent labels and simultaneously recognize the vast number of videos already being captioned by exempting music videos under the general exemption.<sup>442</sup> BET contends that our assumptions regarding the extent of current captioning, shelf-life, and production budgets of music videos are overly generalized and inaccurate for many of these

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<sup>434</sup> Notice, 12 FCC Rcd at 1079 ¶ 82.

<sup>435</sup> See, e.g., AIM Comments at 4; ALDA Comments at 6; California Comments at 5; Captivision Comments at 4; CBA Comments at 5; Council of Organizational Representatives Reply Comments at 5; NAD Comments at 16; NCI Comments at 10-11; WGBH Comments at 12.

<sup>436</sup> California Comments at 5.

<sup>437</sup> A&E Comments at 23-24.

<sup>438</sup> Cassidy Comments at 4.

<sup>439</sup> See, e.g., BET Reply Comments at 13-17; RIAA Comments at 2; SBCA Comments at 14.

<sup>440</sup> RIAA Comments at 3 and n. 3; see also BET Reply Comments at 11.

<sup>441</sup> RIAA Comments at 4; see also BET Reply Comments at 17 (seeking an exemption for videos produced by small label record producers, if the Commission does not exempt all music videos).

<sup>442</sup> RIAA Comments, *id.*; see also Nat'l. Assoc. of Independent Record Distributors Comments at 1 (attached to RIAA Comments): mandatory captioning for all music videos will "create unnecessary expenses" for independent record companies operating with limited budgets, "and could very well prevent many of these videos from being released."

programs,<sup>443</sup> and that a captioning requirement for such programming will result in a reduction of the diversity of such programming available to all viewers.<sup>444</sup>

125. With respect to captioning the lyrics for theme, background and other music that is not an essential program element, ALTV agrees that such captioning is unnecessary because it is rarely essential to understanding any aspect of the program's subject matter and could conflict with dialogue captions.<sup>445</sup> On the other hand, commenters representing persons with hearing disabilities contend that such music should not be exempt because it can add to the viewer's enjoyment of a program or provide information that helps viewers understand the program.<sup>446</sup> One commenter requests that such lyrics always be captioned unless the captioning would interfere with dialogue.<sup>447</sup>

126. We inquired whether live performances should be included within our general exemptions, and proposed to require that any rebroadcast of a live musical performance that is not primarily instrumental be captioned.<sup>448</sup> Several commenters support both of these prospects.<sup>449</sup> For example, HBO argues that such an exemption is appropriate because there are simply too few skilled real time captioners available at present to meet broad requirements for live captioning.<sup>450</sup> HBO also requests that we define a telecast as live if it occurs within 24 hours after the actual event, as concerts are often not performed and telecast simultaneously due to time zone differences.<sup>451</sup> Captivision states that captioning live music programs in real-time is extremely difficult without sufficient advance preparation materials, as it is too hard to hear and understand the music without prior knowledge of lyrics.<sup>452</sup> However, commenters

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<sup>443</sup> BET Reply Comments at 14-15 ("While many major record companies do caption their music videos, many others do not, and those that caption do so in varying amounts. . . . [L]yrics are not always provided by record companies, or available on request to BET. Many videos would have to be captioned without benefit of lyrics, which greatly increases the difficulty, cost and burden . . . of captioning. . . . [T]he typical video is played on BET's music video programs for about 10 weeks and thereafter only rarely replayed. . . . Given the limited production budgets for [some] videos and their generally limited shelf life, the Commission should not assume that all record companies will shoulder the cost of captioning across the board.")

<sup>444</sup> *Id.* at 18-19.

<sup>445</sup> ALTV Comments at 12-13.

<sup>446</sup> *See, e.g.*, AIM Comments at 4; ALDA Comments at 6; Cassidy Comments at 4; CAN Comments at 9; NAD Comments at 16-17.

<sup>447</sup> Cassidy Comments at 4.

<sup>448</sup> *Notice*, 12 FCC Rcd at 1079 ¶ 82.

<sup>449</sup> *See, e.g.*, AIM Comments at 4; Captivision Comments at 7-8; DIRECTV Comments at 9-10; HBO Comments at 21-22; Primestar Comments at 13; USSB Comments at 12.

<sup>450</sup> HBO Comments at 21-22.

<sup>451</sup> *Id.* at 22.

<sup>452</sup> Captivision Comments at 7-8.

representing persons with hearing disabilities contend that live music performances should be captioned,<sup>453</sup> arguing that pre-scripted lyrics can be made available to captioners ahead of time.<sup>454</sup>

127. Alphastar requests that we exempt all music programming from our captioning requirements,<sup>455</sup> while CBA argues that we should exempt music programs where captioning is not undertaken by a national distributor, due to the skill needed to caption song lyrics.<sup>456</sup> BET seeks an exemption of all music performance programming, live and prerecorded, which it defines as video programs where more than 50% of the program content is comprised of musical performances.<sup>457</sup> Alternatively, BET seeks exemption of all primarily instrumental music programming, which it defines as video programs for which at least 50% of the content consists of musical performances without literal lyrics.<sup>458</sup> Also, several satellite providers seek an exemption for their digital audio channel programs, which typically consist of either a static photo or blank screen with music in the background.<sup>459</sup> Primestar contends that digital audio channels are more akin to radio than television services and that the costs of captioning them would likely result in the elimination of the channels.<sup>460</sup>

128. Weather programming. We proposed not to exempt weather programming from our general captioning requirements, but sought comment as to the feasibility of captioning such programming and whether the cost of such captioning would outweigh its utility.<sup>461</sup> We noted our belief that a significant amount of information is conveyed in the audio portion that is not captured by the graphics accompanying the report.<sup>462</sup> Most commenters representing persons with hearing disabilities concurred with this tentative decision,<sup>463</sup> with some observing the importance of weather information to viewers'

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<sup>453</sup> ALDA Comments at 6; CAN Comments at 8; Council of Organizational Representatives Reply Comments at 5, n. 2; MATP Comments at 4; NAD Comments at 17; NVRC Comments at 6; SHHH Comments at 8.

<sup>454</sup> NAD Comments at 17; MATP Comments at 4.

<sup>455</sup> AlphaStar Comments at 12.

<sup>456</sup> CBA Comments at 5-6 and n. 7.

<sup>457</sup> BET Reply Comments at 20-21

<sup>458</sup> *Id.* at 24-25.

<sup>459</sup> SBCA Comments at 14; Primestar Comments at 14; DirecTV Comments at 12.

<sup>460</sup> Primestar Comments at 14. We do not believe that digital audio services of the type described by Primestar fall within the definition of video programming.

<sup>461</sup> *Notice*, 12 FCC Rcd at 1079-80 ¶ 83.

<sup>462</sup> *Id.*

<sup>463</sup> *See, e.g.*, AIM Comments at 3; Cassidy Comments at 4; LHH Comments at 9; MATP Comments at 4; NAD Comments at 17; NVRC Comments at 6.

sense of safety and well-being as a primary reason for requiring captions.<sup>464</sup> Captivision asserts that many health and safety issues are not fully conveyed through the occasional use of on-screen graphics, and that it is difficult or impossible to read the announcer's lips when he or she stands in profile to the camera or speaks offscreen.<sup>465</sup>

129. Few video programming providers specifically address captioning for weather programs, though several discuss captioning requirements for local news generally, which would include weather reports.<sup>466</sup> NAB acknowledges that scripting weather reports in advance may not be burdensome for all television stations, but also indicates that much weather programming contains text and graphics which do not require captions for comprehension.<sup>467</sup> NAB suggests that we encourage stations to add captioning to weather programs, but "remain open to requests for exemption where captions would substantially burden the station."<sup>468</sup>

130. Sports Programming. We did not propose to exempt sports programming as a whole, but sought comment on whether there should be an exemption for particular types of local sports programming.<sup>469</sup> In addition, we solicited comment on whether the textual or graphic presentation of the basic information presented in this type of programming would be an appropriate, less burdensome alternative to a closed captioning requirement.<sup>470</sup> Captioners and commenters representing persons with hearing disabilities support the proposal not to exempt sports programming generally.<sup>471</sup> AAAD agrees that local sports programs could be exempted, but urges that broadcasts that include paid commentators should be closed captioned.<sup>472</sup> California states that though most sports programs incorporate graphics and consist of action, sports commentators provide a substantial amount of information that is not displayed.<sup>473</sup> AIM contends that the significant amounts of money generated by sporting events, such as postseason

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<sup>464</sup> ALDA Comments at 6; CAN Comments at 9. *See also* Ameritech Comments at 19 (weather programming should not be exempt due to health and safety issues).

<sup>465</sup> *Id.*

<sup>466</sup> *See, e.g.*, ALTV Comments at 14-15; NECN Reply Comments at 3-5; Pulitzer Comments at 6; RTNDA Comments at 2-6.

<sup>467</sup> NAB Comments at 16; *see also* Primestar Comments at 13 (captioning is unnecessary because the pertinent information of almost all weather reports is conveyed graphically or textually, including emergency information).

<sup>468</sup> *Id.*

<sup>469</sup> *Notice*, 12 FCC Rcd at 1080 ¶ 84.

<sup>470</sup> *Id.*

<sup>471</sup> *See, e.g.*, AIM Comments at 3-4; ALDA Comments at 4, 6; Captivision Comments at 8; CAN Comments at 9; NAD Comments at 17.

<sup>472</sup> AAAD Comments at 4.

<sup>473</sup> California Comments at 5. *See also* Captivision Comments at 4-5 (the visual nature of and existing graphics in sports programming "in no way can replace the value of captions").

baseball, Monday Night Football, and the NCAA men's basketball tournament, support a requirement that this programming be captioned.<sup>474</sup> Many of these commenters request that we require those sports programs that we exempt from the rules to provide text or graphics of necessary information, such as the score and time remaining in the game.<sup>475</sup> However, Captivision suggests that college sports programs not in the top of their division be subject to a lower economic burden threshold rather than a general exemption, arguing that \$200 to \$300 a game for captioning is a reasonable cost for a college athletic program to absorb.<sup>476</sup> WGBH contends that a requirement that exempt sports programs include on-screen text in place of captions could be intrusive to all viewers, and that captions possibly could be produced just as readily as the on-screen text.<sup>477</sup>

131. With respect to regional sports programming, ALDA acknowledges that captioning of such events is challenging, but submits that the technology allowing remote real-time captioning is already in wide use.<sup>478</sup> Similarly, Captivision states that the technical and logistical problems of delivering different regional games to different affiliates simultaneously can be solved with multiple encoders for each region at the uplink site, asserting that most captioners have satellite links which can pick up many different feeds to permit direct viewing of the various games to be televised.<sup>479</sup> NCI asserts that captioners need not be physically present at the sporting event to produce captions. NCI claims that the entity telecasting the event merely needs to have an encoder on site, which can be placed in the remote broadcast van, and to have a captioner view or hear the event and be connected to the transmission uplink by modem.<sup>480</sup>

132. Video programming interests and collegiate sports associations generally agree that local and regional sports programming should be exempt from our captioning requirements.<sup>481</sup> These commenters argue that captioning of local and regional sports would be economically burdensome because: (a) these sports programs typically have a very small audience or subscriber base over which

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<sup>474</sup> AIM Comments at 3. *See also* Captivision Comments at 5 (production costs for sports programs may not be spread out over multiple viewings, but commercial time and market value are high).

<sup>475</sup> AAAD Reply Comments at 2; AIM Comments at 4; ALDA Comments at 6; CAN Comments at 9; NAD Comments at 17; NVRC Comments at 6; SHHH Comments at 8.

<sup>476</sup> Captivision Comments at 8.

<sup>477</sup> WGBH Comments at 12.

<sup>478</sup> ALDA Comments at 4.

<sup>479</sup> Captivision Comments at 4.

<sup>480</sup> NCI Reply Comments at 4.

<sup>481</sup> *See, e.g.*, ABC Comments at 13-15; CBS Comments at 18-21; DirecTV Comments at 9; NACDA Comments at 7-9; Pac-10 Comments at 2-3; PCTA Reply Comments at 10-12; Primestar Comments at 12-13; Rainbow Reply Comments at 11-14.

to spread the costs of captioning;<sup>482</sup> (b) live sports programs require real time captioning resources, which are scarce and costly;<sup>483</sup> (c) the costs of captioning a sports event cannot be recouped over multiple airings of the program;<sup>484</sup> and (d) sports programming is by nature visually accessible and contains significant amounts of graphic information which increase its accessibility without the need for captions.<sup>485</sup> Viewer's Choice raises these same concerns in support of its request that pay-per-view sports programming be exempt.<sup>486</sup> In addition, several commenters claim that a mandatory captioning requirement for regional college sports coverage may compel providers to eliminate coverage of such events in favor of more national coverage of single games, which would fail to serve regional college team interests.<sup>487</sup>

*b. Exempt Program Services and Providers*

133. Several commenters take issue with our proposal that individual program services should not be exempt from captioning requirements. These commenters note that Section 713(d)(1) is not limited to class exemptions, and that the language of the statute plainly allows exemptions for individual services.<sup>488</sup> They also contend that granting individual exemptions at this stage of the proceeding will reduce the number of discrete cases to be adjudicated under the undue burden process.<sup>489</sup>

134. The services that seek individual exemptions generally contend that they are primarily textual in nature and therefore readily accessible without the need for captions.<sup>490</sup> For instance, BIT and QVC point out that their programming provides textual information in an L-shaped box which covers a

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<sup>482</sup> ABC Comments at 13; CBS Comments at 18; Fox Sports Comments at 4-5; NACDA Reply Comments at 1; NCAA Comments at 7; Pac-10 Comments at 2; PCTA Reply Comments at 10; Rainbow Reply Comments at 13; SBCA Comments at 15; USSB Comments at 10.

<sup>483</sup> Ball State Reply Comments at 20-21; CBS Comments at 20; DirecTV Comments at 9; NAB Comments at 15; NACDA Comments at 7; NBC Comments at 5; Primestar Comments at 12; SBCA Comments at 15.

<sup>484</sup> ABC Comments at 14; CBS Comments at 19; NAB Comments at 15; NACDA Comments at 9; Pac-10 Comments at 3; Primestar Comments at 13; Rainbow Reply Comments at 12; USSB Comments at 10 and 12-13.

<sup>485</sup> ABC Comments at 15; Ameritech Comments at 19; CBS Comments at 21; NAB Comments at 15; NACDA Comments at 4; NBC Comments at 5; Pac-10 Comments at 3; PCTA Reply Comments at 12; Primestar Comments at 13; Rainbow Reply Comments at 12.

<sup>486</sup> Viewer's Choice Comments at 8. Similarly, PCTA argues that the limited programming budgets, revenues, relative market sizes and distribution of regional cable networks in general supports an exemption for all regional cable network programming. PCTA Reply Comments at 5-7.

<sup>487</sup> ABC Comments at 15; NACDA Reply Comments at 1; NCAA Comments at 6-7; Pac-10 Comments at 2.

<sup>488</sup> See, e.g., BIT Comments at 3, n. 2; QVC Comments at 5; Weather Channel Comments at 19-20.

<sup>489</sup> BIT Comments at 3, n. 2; QVC Comments at 6; Weather Channel Comments at 22.

<sup>490</sup> BIT Comments at 4-6; Prevue Comments at 5-6; QVC Comments at 10-13; Weather Channel Comments at 12-18.

significant portion of the screen at all times.<sup>491</sup> Prevue describes its service as a scrolling, alpha-numeric presentation of schedule and program information over the lower half of the screen with short video trailers and other information in the top half.<sup>492</sup> The Weather Channel maintains that its local programming and emergency alerts are entirely textual and therefore completely accessible.<sup>493</sup> These commenters claim that captioning would detract from the accessibility of their programming by obscuring the textual and graphic information already provided.<sup>494</sup> In addition, these commenters state that some of their services provide live programming, 24 hours a day,<sup>495</sup> and the programming provided by each of these services has little residual value and may not recoup captioning costs through multiple airings.<sup>496</sup> According to these commenters, captioning would require full-time stenocaptioning resources, which they claim are extremely limited and can be quite expensive, and which would reduce the availability of such resources for other live programming.<sup>497</sup>

135. Similarly, GSN asserts that its interactive and virtual environment game shows are logistically unsuited for captioning.<sup>498</sup> GSN maintains that the game components for its live, interactive programming fill most or all of the screen, such that it would be impossible to display captions for these games without blocking one or more of the components.<sup>499</sup> GSN further contends that these programs are transmitted live, with players participating by telephone, and that the three-second delay inherent in real-time captioning would prevent viewers with hearing impairments from participating in these games in any event.<sup>500</sup>

136. In addition, QVC seeks an exemption based on the accessibility it provides through other means. It indicates that it provides facilities and personnel dedicated specifically to serve persons with hearing disabilities, including a separate 800 number for a telephone for the deaf ("TTY"), which is staffed 24 hours a day, 365 days a year, by specially-trained sales representatives who only handle TTY calls.<sup>501</sup>

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<sup>491</sup> BIT Comments at 4-7; QVC Comments at 11-12.

<sup>492</sup> Prevue Comments at 5-6.

<sup>493</sup> Weather Channel Comments at 12-14.

<sup>494</sup> BIT Comments at 7-9; Prevue Comments at 6-7; QVC Comments at 20-22; Weather Channel Comments at 15-16. *See also* GSN Reply Comments at 2-3.

<sup>495</sup> QVC Comments at 9; Weather Channel Comments at 1-2.

<sup>496</sup> BIT Comments at 14; QVC Comments at 18; Weather Channel Comments at 10-11.

<sup>497</sup> BIT Comments at 14-15; Prevue Comments at 5; QVC Comments at 17-18; Weather Channel Comments at 7-10.

<sup>498</sup> GSN Comments at 9.

<sup>499</sup> *Id.*; GSN Reply Comments at 3.

<sup>500</sup> GSN Comments at 9.

<sup>501</sup> QVC Comments at 13-14, and n. 20.

QVC also provides an on-line service which is fully synchronized with its television service, and from which orders can be placed and information on products obtained.<sup>502</sup> QVC submits that these additional aspects of its service provide full accessibility to persons with hearing disabilities and support an individual exemption for its service, if a general exemption is not adopted for home shopping programs.<sup>503</sup>

137. Prevue submits that the technology required for the locally customized programming it presents in the top half of the screen is incompatible with caption technology.<sup>504</sup> The top portion of the Prevue screen delivers a dual video feed that is processed at each MVPD reception site to produce local customization, and there is no currently available method which allows coordination of separate captioning data with the video stream selected for display.<sup>505</sup> Moreover, the video offered in these quarter screen sections consist of 10 to 30 second segments of promotional and advertising material with an extremely limited shelf life.<sup>506</sup>

138. Although we sought comment as to whether classes of video providers should be exempt from our closed captioning rules, we declined to propose any such exemptions based on our belief that provider exemptions were unnecessary.<sup>507</sup> We noted that 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. Viewers with hearing disabilities support this tentative decision,<sup>508</sup> and MATP and NCI claim there is no authority in the statute to exempt classes of providers.<sup>509</sup> NCI further argues that exemptions for individual providers should only be granted where it is shown that captioning would preclude the program's production or distribution.<sup>510</sup>

139. However, ITFS licensees and wireless cable providers urge us to exempt ITFS providers as a class. These commenters seek confirmation that the definition of "provider" does not include ITFS licensees, at least to the extent that their programming is delivered to ITFS educational sites, because these

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<sup>502</sup> *Id.* at 15-16.

<sup>503</sup> *Id.*

<sup>504</sup> Prevue Comments at 3-4.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at 4-5.

<sup>507</sup> *Notice*, 12 FCC Rcd at 1080 ¶ 85.

<sup>508</sup> *See, e.g.*, AIM Comments at 4; ALDA Comments at 6; CAN Comments at 9; NAD Comments at 17; NVRC Comments at 6; SHHH Comments at 8.

<sup>509</sup> MATP Comments at 3; NCI Comments at 10, n. 3.

<sup>510</sup> NCI Comments at 11.

providers do not offer a commercial service to the general public.<sup>511</sup> These commenters also assert that an exemption for ITFS providers will not necessarily result in a deprivation of service to persons with disabilities, because other federal laws, such as Section 504 of the Rehabilitation Act,<sup>512</sup> the Individuals with Disabilities Education Act,<sup>513</sup> and Title II, Sections 201-205 of the ADA,<sup>514</sup> already require ITFS licensees to provide more individualized accommodations as needed for the students to whom their programming is directed.<sup>515</sup> The Los Angeles Archdiocese argues that captioning is only one method schools may choose to accommodate students with hearing disabilities, and that schools should not be forced to pay for captioned programs when other accommodations have already been made for students who require them.<sup>516</sup>

140. Some ITFS programming is transmitted by wireless cable operators that negotiate excess capacity agreements with ITFS licensees.<sup>517</sup> Commenters seek a limited exemption for ITFS programming that is distributed on wireless cable systems. They argue that wireless operators cannot afford to caption such programming,<sup>518</sup> while ITFS programmers operate on limited budgets, have limited resources to devote to captioning of their programming,<sup>519</sup> and may not be able to obtain DOE funding for captions due to the limited distribution of this programming or its religious nature.<sup>520</sup> These commenters assert that a captioning requirement for ITFS programming will likely result in the elimination of such programming from distribution on wireless systems.<sup>521</sup>

141. Similarly, some commenters seek an exemption for LPTV providers, arguing that LPTV stations are small businesses with limited financial resources, and that a captioning requirement would

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<sup>511</sup> Arizona State Board Comments at 3; BellSouth Reply Comments at 14; CTN Reply Comments at 4; Los Angeles Archdiocese Comments at 5; Higher Education Comments at 3; Telicare Comments at 2; WCA Comments at 11.

<sup>512</sup> 29 U.S.C. § 794.

<sup>513</sup> 20 U.S.C. § 1400 *et seq.*

<sup>514</sup> 42 U.S.C. §§ 12131-12134.

<sup>515</sup> Arizona State Board Comments at 7-8; Higher Education Comments at 3; Los Angeles Archdiocese Comments at 5.

<sup>516</sup> Los Angeles Archdiocese Comments at 5.

<sup>517</sup> Arizona State Board Comments at 2; Los Angeles Archdiocese Comments at 7; WCA Comments at 12-13.

<sup>518</sup> WCA Comments at 11-12; Arizona State Board Comments at 4.

<sup>519</sup> Arizona State Board Comments at 4-7; Los Angeles Archdiocese Comments at 3; Higher Education Comments at 3; Telicare Comments at 3; WCA Comments at 13.

<sup>520</sup> Telicare Comments at 2; WCA Comments at 13.

<sup>521</sup> Arizona State Board Comments at 4; Los Angeles Archdiocese Comments at 7; Higher Education Comments at 4; WCA Comments at 14.

likely force many of these stations out of operation.<sup>522</sup> Commenters assert that LPTV stations typically serve niche audiences and less populated areas, providing programming of significant public interest.<sup>523</sup> Further, these commenters are concerned that their services face the threat of extinction by the advent of digital television.<sup>524</sup> Three Angels also notes that it would be more administratively efficient to grant a blanket exemption for all LPTV providers than to deal with numerous individual requests for waivers.<sup>525</sup> CBA seeks an exemption for programs produced by a single LPTV station for its own use or for the use of fewer than 15 stations.<sup>526</sup> However, CBA observes that captioning requirements may be feasible for LPTV stations in very limited circumstances, such as: (a) for all programs supplied to LPTV stations by a syndicator or network that is responsible for adding captions; (b) for programmers where LPTV stations are able to buy a captioned version of a program; and (c) for LPTV stations that use teleprompters to feed the script into a caption machine simultaneously, provided that VBI insertion equipment is available at a modest cost.<sup>527</sup> CBA also seeks a clarification that we will not penalize a cable system for carrying uncaptioned programming if the cable system transmits LPTV programs that are exempt. Otherwise, CBA argues, carriage of LPTV stations may be discouraged, reducing program choices for all.<sup>528</sup>

142. SCBA seeks an exemption for small cable operators, defined as systems serving 1000 or fewer subscribers.<sup>529</sup> SCBA claims captioning costs for such operators could range from \$0.30 to \$2.50 per hour per subscriber.<sup>530</sup> SDC contends that C-band satellite distributors cannot be held responsible for captioning requirements as "providers" of video program services because they have no control over the content of their satellite signals, and are incapable of inserting captioning or any other information into the signal at any point.<sup>531</sup> They argue that these distributors merely sell programming packages to consumers and authorize consumers' integrated receiver/decoder boxes for reception of paid for signals.<sup>532</sup>

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<sup>522</sup> LPTV Licensees Comments at 3-4; Three Angels Comments at 4-5; Greene Reply Comments at 2.

<sup>523</sup> LPTV Licensees Comments at 4; Three Angels Comments at 5; Greene Reply Comments at 2.

<sup>524</sup> LPTV Licensees Comments at 4; Three Angels Comments at 3.

<sup>525</sup> Three Angels Comments at 6; Greene Reply Comments at 4.

<sup>526</sup> CBA Comments at 4. CBA explains that LPTV operators often serve a market with a group of stations, all of which broadcast the same programming, and which can be considered a single entity for economic burden purposes. *Id.* at 4, n. 3.

<sup>527</sup> CBA Comments at 6. *But see* Three Angels Reply Comments at 2-3 (CBA's proposals are not generally applicable to all LPTV providers, though passing through captions prepared and inserted by others may be appropriate for all LPTV stations).

<sup>528</sup> CBA Comments at 6 and n. 8

<sup>529</sup> SCBA Reply Comments at 6-8.

<sup>530</sup> *Id.* at 7.

<sup>531</sup> SDC Comments at 2.

<sup>532</sup> *Id.*

However, SDC acknowledges that it may be possible to impose captioning responsibility on C-band distributors that are vertically integrated with programming suppliers, at least for the programming provided to the C-band distributor by that supplier.<sup>533</sup>

## 2. Discussion

143. Section 713's goal is to complete the process of making closed captioned video programming available so that viewers with hearing disabilities are afforded the same opportunities to understand and enjoy this programming as are other members of the public. However, in enacting Section 713, Congress expressly recognized "that the cost to caption certain programming may be prohibitive given the market demand for such programs and other factors." Accordingly, Congress both permitted the Commission to establish an appropriate schedule of deadlines, as discussed above, and provided for exemptions in instances where imposing a captioning obligation would be burdensome. Specifically, Section 713(d)(1) permits the Commission to exempt by regulation programs, classes of programs, or services when the provision of closed captioning would be economically burdensome to the provider or owner of such programming.<sup>534</sup> This provision is closely related to and carries forward in terms of general rule exemptions the same "undue burden" exemptions that are available under Section 713(d)(3) on specific petition. Under this provision the Commission is instructed to consider: (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. These criteria also provide useful guidance in considering more general class exemptions. In order to make sure that the exemption process does not undermine the broad goals of Section 713, we believe exemptions should be limited to only those situations where captioning truly is an economic burden. Section 713 is intended to create a new programming norm where programming is generally accessible to the persons with hearing disabilities through closed captioning.

144. In an effort to determine when a closed captioning requirement would be economically burdensome, we requested detailed comment on appropriate exemptions based on such factors as market size, degree of distribution, audience ratings or share, programming budgets or revenue base, lack of repeat value, or a combination of such factors. We received little information addressing these general criteria; most comments addressed only exemptions for specific programming or services. We understand the difficulty in determining general criteria as to when a captioning requirement is economically burdensome in a particular situation. Such determination can depend on the type of captioning required, the type of programming involved, the cost of captioning at the time (which depends on the market for captioning services at that time), the financial resources of the entity involved, the specific point in the distribution process where captioning takes place, who bears the burden of captioning, the size of the audience for the programming and the repeat value of the programming. Notwithstanding these difficulties, it is unavoidable, if an equitable exemption process is to function, that we focus on the relevant general criteria on which exemptions may be based.

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<sup>533</sup> *Id.* at 3 n. 4.

<sup>534</sup> We note that entities that qualify for an exemption under Section 713 may be obligated under other federal statutes, such as the ADA, to make their services and programs, including video programming services, accessible to an individual with a disability upon request. We do not intend our rules to preclude or supersede the operation of any other federal laws that may require an entity exempt from Section 713 to make its video programming services accessible to people with disabilities.

145. Our analysis of the exemption issue suggests that there are two somewhat different types of situations that need to be addressed. First, there are certain specific classes of situations where captioning would be difficult or technically infeasible, would not add significantly to the information that is already available visually, would create severe logistical problems, or the economic support for the programming is inherently fragile. In such cases, we find that the benefits of captioning will not offset the economic burden that would be imposed by a captioning requirement. These situations we address through the adoption of a limited number of specific category exemptions. A second class of exemptions have been sought where it is contended that the economic underpinnings of the video programming provider in question cannot support the additional expense involved with captioning. We believe it clearly is the case that there are certain kinds of services where the addition of extensive captioning obligations would either make the service nonviable or adversely impact the content of the service provided. The video programming marketplace has evolved to the point where there are now a large number of service providers providing programming for very specific limited local audiences or directing their programming to very limited segments of a national or regional audience. We address these types of situations below through a general exemption rule -- keyed to the applicable gross programming revenues involved -- that seeks in a neutral and nonintrusive fashion to provide exemptions where they are warranted. We address first the specific category based exemption proposals and requests.

*a. Specific Exemption Categories*

146. Non-English Language Programming. For technical reasons, existing captioning decoders can only display letters in the standard Latin alphabet and a few specific special characters such as a musical note or trademark symbol. In light of these technical obstacles we adopt a class exemption for captioning of non-Latin-based language programming.<sup>535</sup> Although we may need to revisit this exemption if technological changes make the encoding of captions for such programming feasible, captioning of programming in languages that cannot be written in a Latin-based alphabet would clearly be economically burdensome given the current state of technology.

147. The captioning of non-English language programming that makes use of a Latin-based alphabet is technically possible. Two obstacles, however, remain to the captioning of this programming. First, with the exception of Spanish, the potential audiences for such programming tend to be very limited and thus the economic support is limited. Census Data (1990) indicate that there are in the United States 198,600,798 individuals who speak only English. The next most spoken language is Spanish, of which there are 17,339,172 speakers. The third most spoken language is French with 1,702,176 speakers. Some 47 additional languages are also reflected in the census data. Second, the personnel and the facilities necessary to caption languages other than English are extremely limited and with respect to live captioning are almost entirely nonexistent. Where the programming is acquired from outside of the United States, in many situations, additional logistical problems are presented due to the timing of the programming delivery process and the fact that the programming is produced primarily for markets outside of the United States, where there is no closed captioning obligation and, indeed, where there may be no technical system and standards for the distribution of such materials. Thus, it would be to impose general captioning obligations on non-English language programming that makes use of Latin-based alphabets at this time.

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<sup>535</sup> The letters that captioning decoders built into television receivers can display are set forth in Section 15.119 of the Commission's rules.

148. The one major exception to this general observation is that pre-scripted programming that makes use of a teleprompter can be captioned using the ENR technique without significant cost and without problems being created by the absence of closed captioning stenotypers, regardless of the language involved. That is, if the on-screen speakers are reading from an electronically formatted teleprompter, that script can also be directed to the line 21 closed caption transmission system without further editorial or other intervention. Because the ENR technique is used mostly frequently with news programming, and because the accessibility of news programming is likely to be of considerable importance to persons with hearing disabilities, we will not extend this general exemption to programming readily captioned through the ENR technique. We are aware that the general non-English language exemption leaves a substantial portion of the population, including in particular the large Spanish speaking population, outside the coverage of these rules. Accordingly, this is an area that warrants careful review and reevaluation during the transition. At that time, we will consider whether a captioning requirement for such programming is needed.

149. Primarily Textual Programming. We also exempt from captioning requirements video programming for which the content of the soundtrack is substantially and materially displayed visually through text or graphics and any programming service which is substantially comprised of alpha-numeric text, with or without accompanying video or graphic elements. We are persuaded by the comments that a requirement for captioning of such programming, where information is already provided visually with little or no relevant audio track, would be unnecessary and economically burdensome as it would outweigh the benefits provided by the captions. This exemption would encompass a programming guide service, such as that described by Prevue, or community bulletin boards, which provide all relevant information about program schedules or events in textual form.

150. A number of parties in their comments have argued that sports programming should be exempt because it is primarily visual and because critical information is visually available through on-screen scoreboards and other graphic materials.<sup>536</sup> Others have argued that home shopping type programming should be exempt because the products in question and the quantity, price and ordering information are visually displayed.<sup>537</sup> Finally, the argument has been made that weather information should be exempt where the weather maps and other critical weather information is visually displayed. In addition to the information already being displayed on the screen, the argument is also made that closed captioning would cover up and obscure the information that is available, rendering closed captions counterproductive.<sup>538</sup> This argument is also urged as a reason for exempting certain interactive (audience participation) game show programming.<sup>539</sup> While sports, shopping, and weather programming may well be more accessible without captioning than are programs that rely more heavily on the spoken word alone, with respect to each of these program types critical portions of the information conveyed is lost if captioning is absent. We also note that users of closed captioning are able to turn off the captioning when they find that captions interfere with other textual or graphical material. Thus, we are not persuaded that the inclusion of sports, shopping or weather programming in a category of exempt "primarily textual"

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<sup>536</sup> See, e.g., NAB Comments at 15; Pac-10 Comments at 3; Rainbow Reply Comments at 12.

<sup>537</sup> See, e.g., QVC Comments at 10-12; HSN Comments at 4; ValueVision Reply Comments at 4-5.

<sup>538</sup> See QVC *ex parte* letter of June 23, 1997; Weather Channel *ex parte* letter of June 18, 1997.

<sup>539</sup> See GSN *ex parte* letters of April 16, 1997, and July 18, 1997.

programming is justified. To the extent that providers of such programming believe that as much or more information would be available without captioning, we will consider applications for exemption based on the individual circumstances under the undue burden standard.

151. Interstitials, Promotional Announcements, and Public Service Announcements. We agree with the tentative conclusion in our *Notice*, and with those filing supporting comments, that interstitial announcements (i.e., programming of brief duration that is used as a bridge between two longer programs) and promotional announcements should be exempt from captioning.<sup>540</sup> We exempt interstitial announcements, promotional advertisements and PSAs that are of ten minutes' duration or less. We are persuaded that the benefits of captioning interstitial materials and promotional announcements are outweighed by the burdens of captioning such programming. As the record demonstrates, the large number of such programs, the brief period from their creation to airing, and their short shelf life make captioning these programs expensive and logistically difficult.<sup>541</sup> A television station or network could easily have several hundred interstitial announcements inserted into its schedule in a single day and much of this material would be inexpensively produced and completed only shortly before its air time. In these circumstances, the cost of captioning this material and the resulting logistical problems would appear to be disproportionate to any benefits received. We note, moreover, that much of the information involved is displayed in visual form in the ordinary course as part of the process of trying to attract the viewer's attention to the announcements involved. We include public service announcements in this category as well because such announcements are essentially without an independent source of financial support, frequently are created with donated production resources, and fill otherwise unsold advertising time.<sup>542</sup> Thus, the additional cost of captioning could interfere with the PSA creation and distribution process. We intend this exemption to cover, for example, programming which is used to fill time between the end of one scheduled program and the beginning of another or to inform viewers of upcoming scheduled programs.

152. Advertising. We conclude that commercials of five minutes' duration or less are not included in the definition of programming here. Advertising is generally regarded as ancillary to the main programming content which is the focus of Section 713. In this regard, we note that the statute did not provide for captions "on all televised material" or did not specifically address advertising as it has in other contexts.<sup>543</sup> In addition, the logistics of distribution of commercials may also impose an economic burden that outweighs the benefits of requiring captions. Video programming distributors receive large numbers of advertisements, often close to air time, and to monitor whether each individual commercial is captioned could be burdensome.<sup>544</sup> Thus, while we recognize that in some contexts programming and advertising

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<sup>540</sup> Public service announcements that are federally funded will not be encompassed by this exemption since they must be closed captioned pursuant to the requirements of ADA. 47 U.S.C. § 611.

<sup>541</sup> See Turner Entertainment Networks *ex parte* letter of July 7, 1997. (During a single year, a network such as TNT, TBS or the Cartoon Network could transmit as many as 400,000 program "elements.")

<sup>542</sup> See NAB *ex parte* letter of July 29, 1997.

<sup>543</sup> See, e.g., Copyright Act of 1976, 17 U.S.C. 111(c)(3), 111(e)(1)(B).

<sup>544</sup> See Turner Entertainment Networks *ex parte* letter of July 7, 1997; NAB *ex parte* letter of July 29, 1997.

may be treated as the same for definitional purposes,<sup>545</sup> here we conclude that it is reasonable to define short form advertising as separate from programming and thus not subject to the captioning obligation. We note, however, that many advertisers, including in particular large national advertisers, have already recognized the benefits of captioning their commercials. We believe that this trend will increase as the closed captioning of video programming becomes the norm and strongly encourage advertisers to participate in making their commercials accessible through captioning.

153. We, however, believe that longer commercials of more than five minutes' duration are included in the definition of programming in this context. We also conclude that infomercials (i.e., program-length commercials) should be subject to the same captioning requirements and transition schedules as all other nonexempt programming offered by a provider. We note that such programs are generally prerecorded, generally distributed nationwide, and are formatted to resemble traditional television programming. We therefore believe that the burdens and benefits of captioning infomercials are likely to be analogous to those for traditional prerecorded programming.

154. Programming on New Networks. We believe that the record supports the conclusion that new programming networks face significant start-up costs and that the additional costs of captioning could pose an economic burden that might deter entry by some networks. Commenters on this issue request an exemption for new national nonbroadcast networks either based on the number of subscribers or for a specified time period after launch, generally recommending criteria of 20 million subscribers<sup>546</sup> or five years.<sup>547</sup> We believe that an exemption for all new networks is appropriate for reasons similar to those presented in the record for national nonbroadcast networks. We do not intend our closed captioning requirements to inhibit new sources of video programming due to our interest in fostering diversity in video programming. Thus, we will adopt an exemption for any new network, whether it is broadcast or nonbroadcast, national or regional. We conclude that an exemption based on years that a programming network has been in operation is more relevant than one that incorporates subscriber numbers when applied to a number of different types of networks. For example, if we were to adopt a 20 million subscriber limit, it is unlikely that any regional network would ever be subject to the rules, yet such networks are intended for smaller subscriber bases and can be successful with far fewer subscribers. Accordingly, a programming network will be exempt from our closed captioning rules for its first four years. The number of years will be calculated from the launch date of the network. A network must comply with the closed captioning rules once its exemption expires. A network will be able to prepare for the required amount of captioning during the period it is exempt, and we do not believe that meeting the required levels of captioning will be an economic burden at that time.

155. Late Night Programming. We agree that the costs of captioning late night programs outweigh the benefits to be derived from captioning such programming at this time. Programming distributed in the middle of the night typically has a very limited audience and receives limited revenues. Indeed for much of the history of television broadcasting, the late night hours were not occupied with

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<sup>545</sup> Compare Section 614 (b)(3)(B) of the Communications Act (cable operators must carry broadcast "program schedules" in full)

<sup>546</sup> See, e.g., Outdoor Life Comments at 33.

<sup>547</sup> A&E Comments at 23; C-SPAN Comments at 10; Lifetime Reply Comments at 4; NCTA Comments at 20; Viacom Reply Comments at 14.