

programming at all due to the costs of producing and distributing programming for such a limited audience. We therefore include in the rules an exemption for video program providers distributing programming in the late night or overnight time period. We may review this decision in the future to determine whether we should modify this exemption.

156. Programs that are distributed between 2 a.m. and 6 a.m. local time will be exempt. Based on the recommendation of commenters, we select these times based on the small size of the viewing audience during this period.⁵⁴⁸ Video programming providers distributing a service that is exhibited for viewing in more than one time zone will be exempt from closed captioning that service for any continuous four hour time period they may select, commencing not earlier than 12 a.m. local time and ending not later than 7 a.m. local time in any location where that service is intended for viewing. This exemption is to be determined based on the primary reception locations of the programming, and remains applicable even if the transmission is accessible and distributed or exhibited in other time zones on a secondary basis. This time period will permit those programmers that distribute programming simultaneously to the 48 contiguous states to take advantage of this exemption.⁵⁴⁹ As is the case generally with our rules, providers must pass through the captions where the programming contains captions. Notwithstanding this exemption, we anticipate that much of the programming shown at those hours will consist of programming that is already captioned, or repeats of programming that will have to be captioned under our new rules. Any captioned programming shown during overnight hours may not be counted toward benchmarks the provider must meet, since, as explained in an earlier section, overnight hours are excluded in calculating the total hours requirement. As we implement our closed captioning rules, we will consider whether there is a continued need to exempt this daypart and whether captioning of programming distributed during the late night time period should be counted towards compliance with the rules.

157. Music. We suggested in the *Notice* that an exemption might be desirable where the music is primarily instrumental (non-vocal) in nature, such as a symphony or ballet. The purely non-vocal portions of such programming would not be captioned. We believe, however, that even when there are some spoken words, such as an introductory discussion of the performance, the entire program should be exempt if it is primarily non-vocal in nature. Such an exemption is warranted because the resources necessary to caption even minor portions of the program would appear to outweigh the benefits. Accordingly, we include in the rules an exemption for programming that is primarily non-vocal music.⁵⁵⁰

158. Locally Produced and Distributed Non-News Programming With Limited Repeat Value. Both cable system operators and broadcasters in their comments have emphasized that there are certain types of locally produced and distributed programs that are of primarily local public interest, have little repeat value and have an inherently fragile economic support system. Much of this programming is produced on a very low budget basis, is not remunerative in itself, is presented essentially as a "public service," and has only a one time appeal to a local audience. Thus, a captioning requirement could result in a sufficient economic burden that such programs are not televised at all. The possibility that the output

⁵⁴⁸ See, e.g., C-SPAN Comments at 11; NCTA Comments at 20-21; Paxson Reply Comments at 7.

⁵⁴⁹ Video programming distributors providing service outside the 48 contiguous states, in areas such as Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands and other U.S. territories, may treat as exempt programming that is exempt under this provision when distributed in the contiguous states.

⁵⁵⁰ For example, a program of which 80% is non-vocal music would be exempt.

of such programming might be reduced based on a captioning burden is sufficiently realistic that we believe a narrowly focused exemption for programming of this type is in order. We intend, however, that it apply only to a limited class of truly local materials, including, for example, local parades, local high school and other nonprofessional sports, live unscripted local talk shows, and community theatre productions. We would not include within this category local news, programs readily captioned through an ENR process, or programs that have repeat value. The programming in question would have to be locally created and not networked outside of the local service area or market of a broadcast station or an equivalent area if produced by a cable system operator or other MVPD. We anticipate a review of the use of this exemption during the transition process to make sure that it is being used for only its intended purpose and to see, in practice, if its scope is appropriately targeted.

159. ITFS Programming. We will exempt ITFS programming from our closed captioning requirements. This programming is intended for specific receive sites and not for general distribution to residential television viewers. To the extent that persons with hearing disabilities are the intended recipients of this programming, we conclude that other laws require that accommodations be made to make this instructional programming accessible. We also will not require wireless cable operators that retransmit ITFS programming to consumers to provide closed captioning for such programming. We note that wireless cable operators that lease ITFS channels for use during those parts of the day when instructional programming is not offered simply pass through the programming rather than allowing the channel to go dark. We believe that a captioning requirement for wireless cable operators under these circumstances would likely result in an economic burden since they probably would not be able to recoup these costs through advertising or subscriber revenues. With respect to other local instructional programming, we believe that our general exemption for local programming or our general revenue exemption will encompass cases where closed captioning is an economic burden.

b. General Revenue Based Exemption

160. As indicated above, commenters have urged that we include as specifically exempt from captioning the following: new national cable networks, cable local origination programming, noncommercial programming, nonprofit networks, cable PEG access programming, leased access programming, instructional programming, home shopping, political advertising, fundraising activities of noncommercial broadcasters, music programming, weather programming, sports programming, low power television station programming, interactive game show programming, and programming provided by operators of small cable systems, ITFS operators and C-band satellite distributors.⁵⁵¹

161. Although some of the category specific arguments made address unique aspects of the service or programming for which an exemption is sought, the proponents of most of these categorical exemption proposals simply urge that the programming in question lacks a sufficient economic base from which to fund the additional costs associated with captioning. Thus, it is contended that, rather than being shown with captions, the programming will never be shown at all or that the costs associated with captioning will cause a proportionate decline in programming investments and hence in the quality of the programming involved. Given the inevitable existence, in a competitive market, of programming that is on the margin of economic viability, these arguments have warranted careful review. Because of the difficulties of defining by specific service or program types what should or should not be included in an

⁵⁵¹ As indicated above at para. 29, we will not require the video programming distributor to be responsible for the closed captioning of video programming under the exclusive editorial control of others.

exempt class, we have decided to address the aspect of the "economically burdensome" exemption equation through the adoption of a broad revenue based formula that is discussed below, rather than attempt to address individually each of the varied circumstances in which a class exemption might be appropriate.

162. In searching for criteria to address those providers that lack the necessary resources to support a captioning obligation, we note first that an enormous number of different circumstances exist. Thus, while LPTV stations generally serve a small localized audience, some operate in urban centers with service areas equivalent to full power broadcast stations; while some cable networks may not thrive without broad national distribution, others successfully perform the same functions as local broadcast stations in regional markets; while professional sports, as a general matter, may have a stronger economic base than nonprofessional sports, there are many situations where collegiate sports programming attracts a large and loyal audience and there are professional sports with only a minimal following; that profit and nonprofit entities may significantly overlap in the functions they perform; that specific programs may individually garner limited audiences or economic support but may be important loss leaders or brand identifiers, etc. In looking for common criteria that might either be used to identify categories to exempt or as the basis for a more generalized exemption, we have explored the following different measurement standards or criteria: potential audience (circulation or subscribers), actual audience (share or rating), program production costs, cost of captioning per viewer or potential viewer, profitability, cash flow, or revenues. Each of these presents difficulties, but we have concluded that a revenue based exemption test, as discussed below, best accommodates the variety of different situations involved while still being administratively practical. It specifically recognizes that all providers are not financially equal and that the burden imposed by our captioning requirements will vary with the size and resources of the provider. We believe that a general exemption such as this is contemplated by, and consistent with, the statute and will encompass many of the more narrowly-focused exemption proposals raised in the record without creating anomalous situations due to the manner in which more limited exemptions are defined. It also does not require us to anticipate, and address individually, programs, classes of programs, or services that would be deserving of exemption by regulation, including circumstances which may not have been raised in the record. Where parties believe it fails to sufficiently identify their specific circumstance, the option of an "undue burden" petition, as discussed below, will still remain available.

163. This exemption test has a number of conceptual advantages. First, because the issue in question is the economic burden of captioning, it properly focuses on one of the key indicia of economic strength, without at the same time forcing us to become engaged in difficult accounting issues that might, for example, be associated with a profitability analysis. Second, rather than leaving programming providers either covered by or exempt from the rules, it operates in a flexible fashion so that as revenues increase the amount of captioning increases. Rather than providing complete exemptions as advocated by many of the commenters, providers will be required to do some captioning; that is, they will be required to caption to the extent that such a requirement is not economically burdensome. Therefore, nearly every provider will be responsible for some captioned programming, thus increasing the overall amount of closed captioned programming. As captioning resources increase and new technology allows captioning to be done more easily and efficiently, we expect the cost of captioning to decrease, and therefore the funds allocated should, over time, purchase more captioning. Third, it is designed to allow service providers room to make their own decisions as to which programs captioning resources are best devoted. Finally, it is equitable in its application as between different technologies and different kinds of networks and service providers so that competition takes place without the captioning regulations and exemptions tilting the marketplace toward any service provider.

164. Under this exemption, all program providers will fall within our general rules for closed captioning. However, no video programming provider shall be required to expend more than 2% of the annual gross revenues that program provider received from that channel during the previous year. Where a provider has spent 2% of its revenues but does not reach the relevant captioning benchmark, the provider need not spend more money on captioning so as to meet that benchmark. One exception to this requirement will be for program providers with annual gross revenues of less than \$3,000,000 during the previous year. No video programming provider will be required to expend any money to caption any channel of video programming producing annual gross revenues of less than \$3,000,000 other than the obligation to pass through video programming already captioned, and not requiring reformatting, when received. This \$3,000,000 revenue exemption is intended to address the problems of small providers that are not in a position to devote significant resources towards captioning (i.e., those who would find it economically burdensome) and who would, even if they expended 2% of their revenues on captioning, provide approximately two hours a week, a minimal amount of captioned programming at a \$500 an hour captioning cost.

165. Annual gross revenues shall be calculated for each channel individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel. Revenue for channels shared between network and local programming shall be separately calculated for network and for non-network programming, with neither the network nor the local video programming provider being required to spend more than 2% of its revenues for captioning. Thus, for example, compliance with respect to a network service distributed by a multichannel video service distributor, such as a cable operator, would be calculated based on the revenues received by the network itself (as would the related captioning expenditure). For local service providers such as broadcasters, advertising revenues from station-controlled inventory would be included. For cable operators providing local origination programming, the annual gross revenues received for each channel will be used to determine compliance. Evidence of compliance could include certification from the network supplier that the requirements of the test had been met. In order to make this exemption workable from a practical point of view, multichannel video programming distributors, in calculating non-network revenues for a channel offered to subscribers as part of a multichannel package or tier, will not include a pro rata share of subscriber revenues, but will include all other revenues from the channel, including advertising and ancillary revenues. Revenues for channels supported by direct sales of products will include only the revenues from the product sales activity (e.g., sales commissions) and not the revenues from the actual products offered to subscribers.

166. For purposes of the expenditure portion of this exemption, captioning expenses include direct expenditures for captioning and reformatting of captions as well as allowable costs specifically allocated by a programming supplier through the price of the video programming to that video programming provider. To be an allowable allocated cost, a programming supplier may not allocate more than 100% of the costs of captioning to individual video programming providers. A programming supplier may allocate the captioning costs only once and may use any commercially reasonable allocation method. This allocation process is intended to avoid creating unwarranted distinctions between programming purchased that is already captioned and captioning that the provider itself creates.

167. Providers will have full discretion as to how to allocate the 2% cap of revenues to captioning. For example, a provider may elect to spend its captioning funds on programming that is widely viewed rather than other programming offered that is less popular or, alternatively, the expenditure might be for less widely viewed programming, such as local public affairs, that may be of more

importance to the hearing disabled community in light of the absence of alternative sources for that type of information.

168. Our conclusion that an expenditure of 2% of revenues on captioning properly equates with the "economically burdensome" criteria set forth in the statute is based on a judgment as to the point at which service providers are likely to have significant incentives to shift programming content towards already captioned or otherwise exempt material rather than make that material accessible to persons with hearing disabilities. We have found in the legislative history and in the comments received no specific indication as to the meaning of the term "economically burdensome." The "undue burden" concept has its origins in provisions of the Americans with Disabilities Act of 1990⁵⁵² and the other related legislation.⁵⁵³ Although there has been a considerable amount of litigation and scholarly discussion of the appropriate methodology for evaluating this issue as a consequence of these earlier laws, no readily adaptable formulation that could be transferred to this proceeding has been found in that history either.⁵⁵⁴ The analytical problem is exacerbated by the difficulty of knowing in what circumstances the costs may be directly passed on to consumers or shared with other entities in the program creation and distribution chain. There are also differences between services that are likely to have relatively fixed costs, such as those that are involved daily in the direct creation of programming and those that purchase programming and may have a more flexible cost structure in terms of program inputs.⁵⁵⁵ Clearly, when the burden involved would result in a reduction of programming output rather than an increase in captioned material, the statutory test would be met. The legislative history suggests the need to balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.⁵⁵⁶ In our judgment, and with a full recognition of the need to address a variety of different situations, we believe that the use of a revenue base and a 2% exemption level should result in captioning expenditure levels that can be absorbed without adverse consequences to the product output of video service providers in most cases.

⁵⁵² Pub. L. No. 101-336, 104 Stat. 327.

⁵⁵³ Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 355 (1973).

⁵⁵⁴ For a discussion of the precedents and some suggested methods of addressing the burden issue, see e.g., Steven B. Epstein, *In Search of a Bright Line: Determining When an Employer's Financial Hardship Becomes 'Undue' Under the Americans with Disabilities Act*, 48 Vand. L. Rev. 391 (1995); Steven F. Stuhlberg, *Reasonable Accommodation Under the Americans with Disabilities Act: How Much Must One Do Before Hardship Turns Hard?* 59 U. Cin. L. Rev. 1311 (1991).

⁵⁵⁵ See Cole, Raywid & Braverman *ex parte* letter of July 16, 1997.

⁵⁵⁶ House Report at 115.

B. EXEMPTIONS BASED ON EXISTING CONTRACTS**1. Background**

169. Section 713(d)(2) exempts video programming providers or owners from our closed captioning requirements to the extent that such requirements are inconsistent with existing contracts.⁵⁵⁷ Specifically, Section 713(d)(2) states:

a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such captions would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law.⁵⁵⁸

170. In the *Notice*, we sought comment on a tentative conclusion that the class of contracts covered by Section 713(d)(2) includes contracts which specifically prohibit closed captioning.⁵⁵⁹ We also requested comment on other contractual provisions which might properly be exempt pursuant to Section 713(d)(2).⁵⁶⁰ In soliciting comment on such contract provisions, however, we noted that too broad an interpretation of Section 713(d)(2) could result in a substantial portion of new programming provided pursuant to such contracts not being closed captioned.⁵⁶¹ We further observed that such a result may be contrary to Congress' intent to make video programming fully accessible.⁵⁶²

171. Several commenters assert that they are unaware of any contracts that specifically ban closed captioning.⁵⁶³ A&E, for example, asserts that our interpretation of this provision is not realistic and would be an illusory exemption as few, if any, contracts affirmatively prohibit closed captioning.⁵⁶⁴

⁵⁵⁷ 47 U.S.C. § 613(d)(2).

⁵⁵⁸ *Id.*

⁵⁵⁹ *Notice*, 12 FCC Rcd at 1081 ¶ 86.

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *See, e.g.*, MPAA Comments at 19-20; Encore Comments at 15-16; NAD Comments at 18.

⁵⁶⁴ A&E Comments at 24-25.

172. Generally, commenters representing persons with hearing disabilities urge us to construe this provision of the 1996 Act as narrowly as possible.⁵⁶⁵ Several commenters suggest that provisions which affirmatively prohibit captioning are invalid or should be subject to a good faith test.⁵⁶⁶ NAD recommends that we limit this definition to situations where the parties are acting in good faith and have not merely colluded in order to avoid the closed captioning requirements.⁵⁶⁷ Similarly, NCD expresses concern regarding collusion between affiliated entities. NCD also suggests that parties relying on this exemption should be required to ascertain whether the provision remains critical to its author or might be waived. According to NCD, this is especially critical with regard to long term contracts which provide for periodic redetermination of certain terms and conditions. At the very least, NCD suggests that parties relying on such an exemption should be required to certify that they have made reasonable good faith efforts to secure a waiver or modification of the anti-captioning requirements.⁵⁶⁸ NAD, while questioning the validity of contracts which prohibit captioning, asserts that the existing contract provision was intended to cover the limited situation where syndicated programs had already been distributed to local broadcasters on videotape and where requiring the recall and captioning of such tapes would result in a heavy financial burden to video service providers.⁵⁶⁹

173. In the *Notice*, we sought comment on other contractual provisions which might be construed as inconsistent with the closed captioning requirements and thus subject to the exemption provided in Section 713(d)(2).⁵⁷⁰ Several commenters assert that many contracts prohibit the video programming provider from altering the programming in any way.⁵⁷¹ Encore cites contractual language that grants the provider limited exhibition rights but reserves all other rights to the grantor.⁵⁷² Encore also

⁵⁶⁵ See, e.g., AIM Comments at 4.

⁵⁶⁶ See, e.g., Jordan Comments at 24 (suggesting that no valid reason exists for such a contractual provision and accordingly such provisions should be preempted); CAN Comments at 10 (suggesting that there are few if any legitimate reasons for a contract provision prohibiting captioning and the Commission should require providers seeking an existing contract exemption to demonstrate a reasonable good faith justification for such a clause); NVRC Comments at 6; ALDA Comments at 7. SHHH believes that our interpretation of the existing contract provision may be necessary to avoid burdensome litigation but suggests that there are few, if any, valid reasons for specifically prohibiting closed captioning. SHHH Comments at 8-9.

⁵⁶⁷ NAD Comments at 18-19.

⁵⁶⁸ NCD Comments at 4.

⁵⁶⁹ NAD Comments at 18-19. See also WGBH Comments at 12-13.

⁵⁷⁰ *Notice*, 12 FCC Rcd at 1081 ¶¶ 86-88.

⁵⁷¹ See, e.g., HBO Comments at 26; Encore Comments at 15. Some commenters contend that licensing agreements are so restrictive as to justify imposing responsibility for captioning on the producer or owner rather than the video programming provider. See, e.g., TCI Reply Comments at 4-7; Alphastar Comments at 6-7; Primestar Reply Comments at 7.

⁵⁷² Encore Comments at 15-16. For instance, Encore cites one of its library agreements that states, "Licensee shall not have the right to edit, alter (including but not limited to Exhibiting only a portion of a Licensed Film), time (continued...)"

argues that the proposed definition of existing contracts fails to recognize the copyright issues involved. According to Encore, industry practice considers a closed captioned film to be a separate version or derivative work similar to a Spanish language version, an airline version or a broadcast version.⁵⁷³ Finally, ICCP raises international copyright issues regarding contracts to distribute foreign programming.⁵⁷⁴ According to ICCP, foreign copyright law often recognizes "moral rights."⁵⁷⁵

174. Other commenters argue that the absence of any provision for closed captioning is sufficient to make a contract inconsistent with our closed captioning requirements.⁵⁷⁶ These commenters argue that it would be unfair to impose closed captioning requirements upon contracting parties that had already negotiated an agreement that did not contemplate either party providing closed captioning.⁵⁷⁷

175. A number of commenters representing the video programming industry seek to expand the statutory provision to include contracts that predate the adoption of our captioning rules but became effective after the effective date of the 1996 Act.⁵⁷⁸ MPAA recommends that we exempt all pre-rule programming licensed pursuant to contracts in effect on the date the captioning rules are adopted.⁵⁷⁹ Similarly, NCTA argues that all contracts in effect as of that date should be grandfathered because renegotiating existing affiliation contracts would impose significant burdens, both financially and

⁵⁷²(...continued)

compress or expand any of the Licensed Films or any portions thereof." The same agreement also provides that the "Licensor reserves the right to exploit the Licensed Films, the elements and parts thereof . . . Licensor reserves all copyrights, and all the other rights in the images and sound embodied in the Licensed Films." *Id.* at 15.

⁵⁷³ Encore Comments at 14-17.

⁵⁷⁴ ICCP Comments 7-8; ICCP Reply Comments at 6.

⁵⁷⁵ According to ICCP, under international copyright law, "moral rights" are defined as the personal right protecting the bond between the author and his work and are independent of the author's economic rights. Moral rights may be expressly reserved as part of the contract or may be inherent and may not be waived under foreign law. ICCP Comments 7-8

⁵⁷⁶ *See, e.g.*, NCTA Comments at 19; WCA Reply Comments at 12; A&E Comments at 25. *But see* CAN Reply Comments 7.

⁵⁷⁷ *See, e.g.*, Primestar Comments at 15; Ameritech Comments at 20; HBO Comments at 26; TCI Reply Comments at 4. *See also* BellSouth Reply Comments at 8 (arguing that video programming providers would be vulnerable in renegotiating contracts with video program producers).

⁵⁷⁸ Many of these commenters combine this argument with the assertion that contracts that are silent as to closed captioning should be exempt. *See, e.g.*, USSB Comments at 13; MPAA Comments at 19.

⁵⁷⁹ MPAA Comment at 19-20. *See also* NCTA Comments at 35. *But see* NAD Reply Comments at 16 (opposing MPAA's position and noting that Section 713(d)(2) specifically refers to the date of enactment of the 1996 Act to determine the applicability of this exemption to such contracts).

operationally, on video programming providers and program owners.⁵⁸⁰ TCI advocates that we grandfather all contracts which predate the effective date of the captioning rules as compared with the statutory provision which addresses only contracts in effect as of the passage of the 1996 Act.⁵⁸¹ These commenters assert that fairness dictates that we expand the statutory exemption to include at least some of the contracts agreed to prior to promulgation of our rules but after enactment of the 1996 Act.

2. Discussion

176. We conclude that our initial interpretation of this provision is essentially correct. We believe that Congress intended this provision to be narrowly construed. We need only look at the final clause of Section 713(d)(2) to conclude that Congress did not intend this provision to frustrate the overall objective of Section 713 to increase the availability of captioned programming.⁵⁸² Therefore, we will exempt from our requirements those contracts that specifically prohibit closed captioning and were in effect on February 8, 1996. We will further exempt video programming providers from responsibility for captioning programming if to do so would result in a breach of a contract in effect on February 8, 1996. We conclude that a broader interpretation of this exemption would be contrary to the overall intent of Section 713 to increase the availability of closed captioned video programming. We further note that this exemption does not relieve a video programming provider of any other obligations it may have under other Federal law.⁵⁸³

177. We reject the argument that we should exempt contracts that lack provisions concerning closed captioning. This interpretation would exempt virtually all pre-enactment contracts. We conclude that if Congress had intended to exempt all pre-enactment contracts, it would not have limited this provision to "inconsistent" contracts. We believe that our interpretation of this provision is consistent with the overall statutory goal of making video programming more accessible through increased closed captioning. To the extent that adding captions creates a burden, we expect that the needs of the contracting parties to maximize the usefulness of their respective products will ensure that captioning is efficiently provided. Similarly, we reject the assertion that we should exempt contracts which contain language specifically restricting or limiting the rights being granted to the video programming provider unless captioning programming pursuant to such contracts would result in a breach of contract. In the event of a complaint, the entity relying on the exemption shall bear the burden of demonstrating that the captioning constitutes a breach of the contract.

⁵⁸⁰ NCTA Comments at 35; Primestar Comments at 15; USSB Comments at 13. *See also* TCI Reply Comments at 5-6 (arguing that by making the video programming provider responsible for the captioning of programming and applying these requirements to contracts which predate the proposed regulation, we would undermine the ability of the video services provider to negotiate with the producer or owner to ensure that the producer or owner will actually provide the captioning).

⁵⁸¹ TCI Reply Comments at 5.

⁵⁸² 47 U.S.C. § 613(d)(2).

⁵⁸³ The legislative history specifically notes that cable operators and common carriers establishing video platforms may not refuse to carry programming or services which are required to be carried under the carriage provisions of Title VI of the Communications Act or pursuant to retransmission consent obligations due to closed captioning requirements. Conference Report at 183.

178. Section 713(d)(2) is explicit regarding the applicable date of this provision, i.e., "contracts in effect on the date of enactment of the Telecommunications Act of 1996." Thus, we find the proposal to include within this exemption contracts which were signed prior to the adoption date of our closed captioning rules but after the enactment date of the statute to be inconsistent with the plain language of the statute. Moreover, we note that parties entering into contract agreements between the enactment date of the statute and the adoption of our rules have been aware that closed captioning rules would be adopted.

179. In adopting this interpretation of Section 713(d)(2), we note that the transition schedule we have adopted does not require captioning until the first calendar quarter of 2000, approximately four years after the cutoff date for such contracts. Given that these contracts are typically for terms of five to ten years,⁵⁸⁴ we expect that many of the contracts in effect on February 8, 1996, will have already expired from routine attrition. By the time the final benchmarks take effect on January 1, 2006 and January 1, 2008, for new and pre-rule programming respectively, we believe that most pre-statute contracts will have expired. Thus, we expect only a small and continually decreasing number of contracts to be covered by this exemption. In order to maximize this effect, this exemption is applicable to contracts in effect on or before February 8, 1996 and will not apply to renewal or extensions of such contracts. Parties renegotiating or renewing such contracts will have an opportunity to incorporate our closed captioning requirements into their agreements.

180. In addition to rejecting interpretations of this section that are overly broad, we also reject those interpretations that are more narrow than the statute intends. Several of the commenters suggest that clauses prohibiting captioning should not be enforceable or they should be subject to a "good faith" test, but these commenters fail to provide any support for their interpretation of Section 713(d)(2).⁵⁸⁵ Significantly, these commenters are unaware of any such contracts.⁵⁸⁶ The statute does not appear to contemplate any sort of a "good faith" test for contracts. Given the apparent rarity of such contracts we believe it is unnecessary to require video programming providers to demonstrate "good faith" or otherwise restrict the availability of this requirement.⁵⁸⁷ We further believe that such an interpretation completely undermines the significance of Section 713(d)(2). Such an interpretation would create such a high threshold and be applicable to so few contracts as to render that provision meaningless. We further reject the assertion by some commenters that this provision was meant only to apply to programs in the

⁵⁸⁴ Alphastar Comments at 7. *See also* Encore Comments at 4; Encore Reply Comments at 5 (asserting that licensing contracts are usually for a term of seven years).

⁵⁸⁵ *See, e.g.*, Jordan Comments at 3; Cassidy Comments at 4.

⁵⁸⁶ Jordan Comments at 24; CAN Comments at 10; NAD Comments at 18-19. WGBH, while recognizing the reasonableness of our interpretation, is unaware of any such contracts and doubts that any exist. WGBH Comments at 12. Kaleidoscope asserts that generally contracts do not prohibit captioning except that some contracts bar the "alteration" of the programming. Kaleidoscope indicates, however, that certain producers of sign language instructional material specifically prohibit captioning of these materials. Kaleidoscope Comments at 15. Commenters representing the programming industry are also unaware of any contracts which affirmatively prohibit captioning. These commenters, however, cite the absence of such contracts as evidence that Congress intended a broader interpretation of Section 713(d)(2). *See, e.g.*, A&E Comments at 24-25; Encore Comments at 15-16; MPAA Comments at 19-20.

⁵⁸⁷ NAD Comments at 18-19.

possession of broadcasters at the time the rules become effective.⁵⁸⁸ There is nothing in the statute that would provide any authority to limit this exemption to one type of programming. Such an interpretation is primarily concerned with the physical possession of the programming rather than the compatibility of the contract with a closed captioning requirement.

181. Finally, we reject the argument raised by some commenters that a broader interpretation is needed to avoid copyright conflicts. Because these requirements are broadly applicable, we believe that the copyright owners will have significant incentives to ensure that their programming is closed captioned regardless of whether a particular contract calls for the programming to be closed captioned. Thus, if the copyright owner wishes the programming to retain any significant value, the programming will necessarily be captioned.

C. EXEMPTIONS BASED ON THE UNDUE BURDEN STANDARD

1. Background

182. Section 713(d)(3) permits a video programming provider or program owner to petition the Commission for an exemption from the closed captioning requirements where it can be shown that such requirements would result in an "undue burden."⁵⁸⁹ Section 713(e) defines undue burden as a significant difficulty or expense.⁵⁹⁰ In determining whether our closed captioning requirements would result in an undue economic burden, the factors we are required by the statute to consider include: (a) the nature and cost of the closed captions for the programming; (b) the impact on the operation of the provider or program owner; (c) the financial resources of the provider or program owner; and (d) the type of operations of the provider or program owner.⁵⁹¹

183. In the *Notice*, we discussed the legislative history of Section 713(d)(3) and tentatively concluded that Congress intended to permit us to balance the need for closed captioned programming against the possibility of inhibiting the production and distribution of programming and thereby restricting the diversity of programming available to the public.⁵⁹² We also noted that this provision does not limit

⁵⁸⁸ See, e.g., NAD Comments at 18; WGBH Comments at 12-13.

⁵⁸⁹ 47 U.S.C. § 613(d)(3).

⁵⁹⁰ 47 U.S.C. § 613(e).

⁵⁹¹ 47 U.S.C. § 613(e).

⁵⁹² *Notice*, 12 FCC Rcd at 1081 ¶ 89, citing Conference Report at 183; See also House Report at 114 (instructing the Commission to balance the need for closed captioned programming against the potential for hindering the production and distribution of programming). The legislative history cites seven factors, including the first three of the four factors cited above, that shall be considered for exemptions under the economically burdensome standard. The other factors are: (a) the cost of the captioning, considering the relative size of the market served or the audience share; (b) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (c) the non-profit status of the provider; and (d) the existence of alternative means of providing access to the hearing impaired, such as signing. House Report at 115; Conference Report at 183.

us to the enumerated factors, but rather seems to invite the consideration of other relevant factors.⁵⁹³ In soliciting comments on the implementation of Section 713(d)(3), we specifically requested that commenters address the standards or factors to be reviewed when considering an undue burden petition, and the procedures appropriate in reviewing such petitions.⁵⁹⁴

a. Factors to be Considered

184. Several groups representing persons with hearing disabilities suggest that we should adopt a high threshold for petitions seeking an exemption for an undue burden.⁵⁹⁵ For instance, MATP maintains that because the number of persons with hearing disabilities is increasing, we should consider the expanding need for closed captioning and that a broad based undue burden standard substantially restricts equal access for people with hearing loss.⁵⁹⁶ Other commenters assert that closed captioning technology is widely and inexpensively available and has not proven to be technically or operationally "significantly difficult."⁵⁹⁷ These commenters further assert that we should only use the factors enumerated in the *Notice* and if we do, only a handful of local programs in the smallest markets would warrant an undue burden exemption.⁵⁹⁸ CAN and other commenters suggest that we should only grant an exemption where the programming would not otherwise be provided.⁵⁹⁹

185. Some commenters representing persons with hearing disabilities propose objective standards for evaluating petitions for undue burden exemptions. Captivision suggests that the standard should differ for national and local programming.⁶⁰⁰ It further recommends that petitioners be required to include five bids from various captioners to demonstrate that captioning would be disproportionate to other production costs.⁶⁰¹ Further, NCD suggests that we reserve the right to grant the petition in part by

⁵⁹³ *Notice*, 12 FCC Rcd at 1083 ¶ 91.

⁵⁹⁴ *Id.* at 1083-1086 ¶¶ 91-102.

⁵⁹⁵ *See, e.g.*, Captivision Comments 8-9; Cassidy Comments at 4; NAD Comments at 19-20; LHH Comments at 9.

⁵⁹⁶ MATP Comments at 4-5.

⁵⁹⁷ LHH Comments at 9; WGBH Comments at 13. *See also* International Computer Comments at 1 (asserting that it has developed a relatively inexpensive product to encode closed captioning that can be used for live and prerecorded video programming and stating that the availability of this product should ameliorate the need for undue burden exemptions for whole classes of programs and video programming providers).

⁵⁹⁸ LHH Comments at 9; WGBH Comments at 13.

⁵⁹⁹ CAN Comments at 13; NCI Comments at 11; NVRC Comments at 6; SHHH Comments at 9; ALDA Comments at 7.

⁶⁰⁰ Captivision Comments at 9. *See also* MCS Comments at 11-12.

⁶⁰¹ Captivision Comments at 9. *See also* NCD Comments 4-5; MCS Comments at 14; MCS Reply Comments at 6 (also suggesting that the cost information provided as part of such a showing should not be granted confidential status).

simply reducing the amount of captioning required.⁶⁰² CSD comments that we should consider the ability of broadcast stations to pass costs through to advertisers when considering the undue burden standard.⁶⁰³ To ease the administrative burden of evaluating requests for undue burden, MCS proposes a system of weighting various factors to determine whether an exemption should be granted.⁶⁰⁴ Finally, MCS recommends that petitioners, particularly those that affect large regional or national areas, be limited to one undue burden exemption per year during the eight year transition period.⁶⁰⁵

186. Commenters representing the video programming industries urge us to be flexible in our interpretation of the undue burden standard and consider factors beyond those enumerated in the statute.⁶⁰⁶ For example, Encore recommends that the Commission refrain from establishing specific standards to ensure maximum flexibility in considering undue burden petitions.⁶⁰⁷ According to Encore, the nature of an undue burden means it is unusual and presumably involves specific circumstances which must be resolved with a more flexible interpretation of the rules.⁶⁰⁸

187. Other commenters suggest specific factors we should consider in addition to the statutorily enumerated factors. For instance, GSN urges us to consider program format and the complexity of closed captioning a particular show in determining whether to grant an exemption petition.⁶⁰⁹ APTS contends that we should consider creating a presumption in favor of small public broadcasters if a general class exemption is not created for the local productions of small public broadcasters under Section 713(d)(1).⁶¹⁰ Also, even if such a general class exemption is available, APTS recommends a presumption in favor of the local productions of any public broadcasters.⁶¹¹ Similarly, LPTV Licensees recommend that, if we decline to adopt a blanket exemption for LPTV stations, there should a lower threshold for LPTV stations to demonstrate an undue burden.⁶¹²

⁶⁰² NCD Comments 4-5.

⁶⁰³ CSD Comments at 2.

⁶⁰⁴ MCS Comments at 10-11 (proposing a formula and assigning specific weighted values to specific factors for the Commission to consider). *See also* ETWN Reply Comments (supporting MCS's weighted average formula but asserting that it should be modified for nonprofit networks).

⁶⁰⁵ MCS Comments at 17.

⁶⁰⁶ *See, e.g.*, A&E Comments at 24-26; Ameritech Comments at 20-21; HBO Comments at 25; NCTA Comments at 30-31; RTNDA Comments at 8; LPTV Licensees Comments at 5-6.

⁶⁰⁷ Encore Comments at 17.

⁶⁰⁸ *Id.* at 17. *See also* LPTV Licensees Comments at 5-6.

⁶⁰⁹ GSN Comments at 10.

⁶¹⁰ APTS Comments at 12-13.

⁶¹¹ *Id.* at 11-12, n 17.

⁶¹² LPTV Licensees Comments at 5.

188. The Weather Channel asserts that we should establish rebuttable presumptions to streamline the undue burden petitions process and to make a more efficient use of captioning and administrative resources.⁶¹³ Among the categories of programming the Weather Channel recommends be presumptively exempted are: (a) 24-hour live, unscripted programming; (b) perishable programming; (c) programming in which the audio information is simultaneously reproduced in graphical or textual form; and (d) any programming which would be diminished in value if closed captioned.⁶¹⁴

189. In the *Notice*, we referred to the legislative history that states that we should ". . . focus on the individual outlet and not on the financial condition of that outlet's corporate parent, nor on the resources of other business units within the parent's corporate structure."⁶¹⁵ Several commenters representing persons with hearing disabilities advocate using the ADA⁶¹⁶ interpretation of undue burden which takes into account the financial resources of the parent corporation.⁶¹⁷ For example, AIM maintains that we should apply the ADA definition of undue burden so as to apply the standard up the corporate chain, although it acknowledges that this view is not consistent with the legislative history.⁶¹⁸

190. NAD suggests that, even if a corporate parent's resources are not considered in the undue burden determination, there are other components of the ADA's analysis that apply. NAD argues that, like the ADA, the instant "undue burden" standard directs us to balance the nature and the cost of providing captions with resources of the provider and type of operation of the operator, and narrowly permits an exemption only upon a showing that captioning would result in a "significant difficulty or expense." NAD argues that this standard only permits an exemption where the covered entity can prove that accommodating the disability would so adversely affect the finances or administration of its operation as to be unduly burdensome. According to NAD, this interpretation is consistent with the legislative intent, which directs us to balance the need for closed captioned programming against the potential for hindering the production and distribution of programming. Further, NAD asserts that size of market, program distribution and audience ratings or share are not permissible factors for consideration. According to NAD, captioning should be required 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 a particular program may not be substantial.⁶¹⁹

191. NCTA concurs with our preliminary determination that the undue burden standard here differs from the ADA standard in that it does not intend for us to look to the assets of affiliated

⁶¹³ Weather Channel Comments at 24.

⁶¹⁴ *Id.* at 25-28.

⁶¹⁵ *Notice*, 12 FCC Rcd at 1081 at ¶ 90, n. 171, citing House Report at 183.

⁶¹⁶ 42 U.S.C. § 12182(b)(2)(A)(ii).

⁶¹⁷ *See, e.g.*, AIM Comments at 4; Cassidy Comments at 3; NVRC Comments at 7; ALDA Comments at 7. *See also* NAD Comments at 19-20.

⁶¹⁸ AIM Comments at 4. *See Notice*, 12 FCC Rcd at 1081 ¶ 96, n. 186.

⁶¹⁹ NAD Comments at 19-21. *See also* Council of Organizational Representatives Reply Comments at 9.

companies.⁶²⁰ NCTA asserts that only the economic viability of the program should be considered, and not the overall financial resources of the provider or program owner.⁶²¹ NCTA argues that programming budgets are based on the economics of a particular program and our rules should reflect the economic reality of the budgeting process.

b. Procedures

192. Generally, parties representing both the video programming industries and persons with hearing disabilities support the use of existing procedures when considering undue burden petitions.⁶²² A number of commenters, however, emphasize the need for procedural safeguards when considering undue burden petitions.⁶²³

193. Commenters representing persons with hearing disabilities are concerned with the need for public notice and comment.⁶²⁴ Captivision urges the Commission to make public notice and comment an integral part of the petition process.⁶²⁵ MCS urges the Commission to rely heavily on electronic filing mechanisms, such as e-mail.⁶²⁶ NAD further suggests that the Commission post all undue burden petitions on its World Wide Web page to facilitate public awareness of the petition.⁶²⁷

194. In the *Notice*, we requested comment as to whether program owners, producers and syndicators should be permitted to file under the undue burden petitioning process. Generally, commenters representing persons with hearing disabilities recommend restricting the availability of this process to video distributors.⁶²⁸ CAN asserts that allowing producers or syndicators to petition for undue burden exemptions would be inconsistent with Congressional intent and our proposal to apply the closed captioning requirements to video programming distributors.⁶²⁹ Similarly, NVRC opposes permitting producers or syndicators to file for undue burden petitions unless they are also subject to our requirements.⁶³⁰ NAD suggests that only distributors be permitted to seek an exemption given our

⁶²⁰ NCTA Comments at 31; NCTA Reply Comments at 23. *See also* CBS Comments 17.

⁶²¹ NCTA Comments at 31; NCTA Reply Comments at 23.

⁶²² *See, e.g.*, WGBH Comments at 13.

⁶²³ *See, e.g.*, WGBH Comments at 13-14; Captivision Comments at 9; MCS Comments at 12.

⁶²⁴ *Id.*

⁶²⁵ Captivision Comments at 9.

⁶²⁶ MCS Comments at 10-11; NAD Reply Comments at 23.

⁶²⁷ NAD Reply Comments at 23.

⁶²⁸ *See, e.g.*, AIM Comments at 4; ALDA Comments at 7.

⁶²⁹ CAN Comments at 14.

⁶³⁰ NVRC Comments at 7.

proposal to place the responsibility for closed captioning on the distributor. NAD contends that undue burden exemptions should only be available where the distributor can demonstrate that neither the distributor nor the producer can be expected to caption the programming.⁶³¹

195. Video programming industry commenters recommend that we make the undue burden process more widely available.⁶³² For example, NCTA asserts that allowing cable networks to petition for an undue burden exemption would be consistent with the intent that captioning be inserted as economically as possible.⁶³³

196. Both the video programming industry and persons with hearing disabilities express concern that undue burden petitions be resolved quickly and efficiently. NCTA suggests that we adopt timetables for resolving undue burden petitions expeditiously.⁶³⁴ SCBA recommends that we adopt a streamlined procedure to allow small cable operators with fewer than 15,000 subscribers to demonstrate an undue burden, suggesting that small cable operators be permitted to file a letter that sets forth any information they believe justifies an exemption rather than a more formal petitioning process.⁶³⁵ Finally, Ameritech proposes that we adopt a relatively short period of time for rendering a decision in such cases since the programming may be unavailable to the public during the pendency of the petition.⁶³⁶

c. Conditions, Restrictions and Limitations

197. Generally, commenters representing persons with hearing disabilities support our proposal to grant undue burden exemptions subject to conditions in some instances.⁶³⁷ Para Technologies, for instance, encourages us to consider conditional or temporary undue burden exemptions since technology is likely to gradually alleviate many undue burdens.⁶³⁸ Kaleidoscope suggests that, if a petitioner proposes an alternative mechanism, it should be required to demonstrate the reasonableness of the proposed substitute.⁶³⁹ NAD, however, opposes conditioning an undue burden exemption on greater use of graphics,

⁶³¹ NAD Comments at 22.

⁶³² See, e.g., Ameritech Comments at 21; Outdoor Life Comments at 41; HBO Comments at 24.

⁶³³ NCTA Reply Comments at 24-25.

⁶³⁴ NCTA Comments at 31. See also NAD Reply Comments at 23.

⁶³⁵ SCBA Reply Comments at 8-9. SCBA also urges that we waive the usual filing fee for such petitions. *Id.* at 10.

⁶³⁶ Ameritech Comments at 21.

⁶³⁷ See, e.g., AIM Comments at 4; ALDA Comments at 7; NVRC Comments at 7; WGBH Comments at 14. See also Fox Comments at 13.

⁶³⁸ Para Technologies Comments at 7.

⁶³⁹ Kaleidoscope Comments at 18-19.

except in situations where the exemption would be granted anyway.⁶⁴⁰ Commenters representing persons with hearing disabilities suggest limiting the duration of undue burden exemptions to allow us to periodically reevaluate the justification for a particular exemption.⁶⁴¹ NAD and others urge us to limit such exemptions to one year so that the need for an undue burden exemption may be reviewed.⁶⁴² CAN asserts that classes of programming should not be granted undue burden exemptions.⁶⁴³ In contrast, NCTA recommends we permit petitions of general applicability and allow the ruling to apply to all similarly situated entities.⁶⁴⁴

2. Discussion

198. We conclude that the undue burden exemption is intended to be sufficiently flexible to accommodate a wide variety of circumstances for which compliance with our closed captioning requirements would pose a significant financial or technical burden.⁶⁴⁵ Accordingly, we will establish a petitioning process that allows us to consider any factors relevant to a petitioner's situation and provides parties significant leeway with respect to the information that can be submitted to demonstrate how the statutory factors specified in Section 713(d)(3) are met. We also will consider any other data or information in addition to that noted in Section 713(e) presented by petitioners that they believe is relevant to an analysis of whether a requirement for closed captioning causes an undue burden in their individual circumstances.

199. We will use a petition process for consideration of requests for exemptions based on the undue burden standard. Any party within the video programming distribution chain can file such a petition. Section 713(d)(3) specifically permits program providers and owners to file such petitions. The legislative history of Section 713(d)(3) instructs the Commission to consider the potential for hindering the production and distribution of video programming.⁶⁴⁶ The legislative history of Section 713 generally contemplates considering the effect of closed captioning requirements on video programming providers, owners and distributors.⁶⁴⁷ Thus, we also will permit program producers, owners and distributors (e.g.,

⁶⁴⁰ NAD Comments at 21.

⁶⁴¹ See, e.g., AIM Comments at 4; CAN Comments at 14; WGBH at 14; SHHH Comments at 9.

⁶⁴² NAD Comments 22. See also NVRC Comments at 7; CAN Comments at 14; SHHH Comments at 9; Kaleidoscope Comments at 19; Council of Organizational Representatives Reply Comments at 8; ALDA Comments at 7.

⁶⁴³ CAN Comments at 14. See also NAD Comments at 21.

⁶⁴⁴ NCTA Comments at 31. See also USSB Reply Comments at 3.

⁶⁴⁵ Conference Report at 183.

⁶⁴⁶ *Id.*

⁶⁴⁷ See, e.g., Conference Report at 182-183 (requiring that implementation schedules not be an economic burden to program providers, distributors, or owners and instructing the Commission to consider the impact on the operations of the program provider, distributor or owner and the financial resources of the program provider, distributor or owner when considering a petition for exemption under Section 713(d)).

syndicators) to request exemptions based on this standard. As we have previously noted, closed captioning is most likely to be done at the production stage or prior to distribution where it is most economically and technically efficient.⁶⁴⁸ Thus, we expect that most captioning will be done through arrangements between the video programming distributors responsible for compliance and these other entities. Since the actual captioning is likely to take place before the video programming distributor receives the programming, we believe it is appropriate to permit program owners, producers and distributors to petition for undue burden exemptions. Furthermore, it would be inefficient to require each individual video program distributor to petition for an exemption when a more centralized entity, such as the video program producer, owner or syndicator, can petition for an exemption before distributing the programming to a number of video programming distributors.

200. A petition for exemption will be placed on public notice to allow for public comment. Any interested person may file comments or oppositions to the petition within 30 days of the public notice. Comments or oppositions must be served on the petitioner and must include a certification that the petitioner was served. The petitioner may file a response to any opposition or comment within 20 days of the close of the comment period. The petitioner will provide copies of the response to parties who filed oppositions or comments. Upon a showing of good cause, the Commission may lengthen or shorten the response period and waive or establish other procedural requirements. During the pendency of an undue burden petition, the programming subject to the request for exemption will be considered exempt from the closed captioning requirements. We will consider requests for full or partial exemptions from the closed captioning requirements. The petition may seek exemption for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider. The petition must include sufficient evidence to demonstrate that compliance with the requirements to closed caption programming would cause an undue burden under Section 713(d)(3). In addition to these factors, the petition may describe any other factors the petitioner deems relevant to our decision as to whether closed captioning entails a significant difficulty or expense.

201. To the extent feasible, petitioners should provide proposals regarding alternative mechanisms that might constitute a reasonable substitute for the closed captioning requirements that would make their programming more readily accessible to persons with hearing disabilities, but may not be as burdensome as closed captioning. These alternatives may include, but are not limited to, text or graphic display of the content of the audio portion of the programming or the use of sign language interpretation. While such alternative mechanisms are not substitutes for closed captioning, they may provide a means to make the programming more accessible to persons with hearing disabilities without placing an undue burden on video programming providers, owners or producers. Accordingly, in an effort to make even exempt programming more accessible, we encourage petitioners seeking undue burden exemptions to devise innovative alternatives for such programming and may consider such proposals when deciding whether to exempt programming under the undue burden standard. We also encourage petitioners to propose alternative implementation schedules or benchmarks that could minimize the burden of compliance with the rules, but would increase the amount of captioning available for their viewers.

202. Several commenters urged that we establish specific presumptions or standards for considering these petitions. In light of the complexities of implementing the new closed captioning requirements and the significant number and types of affected entities, we will not at this time establish

⁶⁴⁸ House Report at 114.

standards for evaluating petitions. We believe that such procedures are, at a minimum, premature because we are not yet aware of the kinds of situations that will result in closed captioning being an undue burden. In reaching this conclusion, we are allowing petitioners sufficient discretion to demonstrate burdens that are unanticipated in the generally applicable rules and exemptions. Such standards would prevent us from exercising our discretion and restrict the expansion of our understanding of the effects of our closed captioning rules. For instance, relying on an objective test, as recommended by Captivision, MCS, and other commenters,⁶⁴⁹ might well result in a rigid rule that would not provide the flexibility that Congress intended.⁶⁵⁰ The rebuttable presumptions suggested by parties such as the Weather Channel, GSN, APTS or SCBA,⁶⁵¹ might well prevent us from examining the effect our closed captioning requirements would have on a specific video programming provider or even a class of programmers. Similarly, we reject the weighted formula crafted by MCS. On its face, such a formula seems unnecessarily constrained and eliminates the flexibility Congress intended to provide in Section 713(d)(3). MCS fails to justify the various weights and values it has adopted as part of its formula or explain the methodology used to develop the formula.

203. We recognize the special needs of persons with hearing disabilities and the accessibility that can be provided by the Internet and electronic mail. The Commission is currently exploring the possibility of electronic filing for its proceedings.⁶⁵² The outcome of that proceeding will determine whether we will be able to accept petitions for exemptions under the undue burden standard that are filed electronically. Until that time, we encourage parties filing petitions under this provision to include a disk containing the text of their petitions along with the paper copy so that we can place the petition on our Internet site. In any event, we will place notice of the receipt of petitions on our Internet site.

204. In the *Notice*, we tentatively concluded that the undue burden test should apply to the individual outlet in question and not its affiliates or parent corporations.⁶⁵³ We based this conclusion on the legislative history, which explicitly provides that when considering such exemptions we should focus on the individual outlet and not on the financial condition of the outlet's corporate parent or the resources of other business units within the parent's corporate structure.⁶⁵⁴ While some commenters advocate that an assessment of the need for an undue burden exemption should take into account the financial resources of the petitioner, its affiliates and parent corporation, as is done under the ADA, they fail to reconcile this

⁶⁴⁹ See, e.g., MCS Comments at 11-12; Captivision Comments at 11-12; CSD Comments at 2; NCD Comments at 4-5.

⁶⁵⁰ Other objective tests, such as requiring the petitioner to submit estimates from different captioning agencies, as suggested by Captivision, appear to be unnecessarily burdensome. Furthermore, specific tests might prove irrelevant depending on the specific nature of the undue burden alleged.

⁶⁵¹ See, e.g., Weather Channel Comments at 25-28; GSN Comments at 10; APTS Comments at 12-13; SCBA Comments at 8-9.

⁶⁵² *Electronic Filing of Documents in Rulemaking Proceedings*, Notice of Proposed Rulemaking, GC Docket No. 97-113, 12 FCC Rcd 5150 (1997).

⁶⁵³ *Notice*, 12 FCC Rcd at 1085 ¶ 96, n. 186, citing House Report at 114-115.

⁶⁵⁴ Conference Report at 183.

position with the legislative history of the 1996 Act that rejects such a requirement.⁶⁵⁵ Other commenters argue that we should only focus on the resources available for production of a particular program. We find this approach could unnecessarily limit the availability of captioning and would thus also frustrate Congressional intent. Where appropriate, we will, therefore, consider the resources of the individual outlet and its ability to provide closed captioning when deciding whether to grant a petition for an undue burden exemption. In this regard, we will examine the overall budget and revenues of the individual outlet and not simply the resources it chooses to devote to a particular program. We find this approach consistent with the legislative history that directs us to evaluate the resources of the individual outlet seeking an exemption and not those of the parent corporation and other affiliates.⁶⁵⁶

205. In the *Notice*, we also requested comment on the advisability of limiting the duration of undue burden exemptions. Based on the record before us, we recognize that changes in technology, the economics of captioning, or the financial resources of a video programming provider may affect the justification for an undue burden exemption. We do not believe, however, that a rule imposing a specific time limit on exemptions is appropriate. We believe that it is better to maintain the flexibility to limit the duration of an undue burden exemption if the facts before us indicate that the particular circumstances of the petition warrant a limited exemption.

VII. STANDARDS FOR ACCURACY AND QUALITY

206. Section 713 does not require us to adopt rules or standards for the accuracy or quality of closed captioning. However, throughout this proceeding, commenters have reported problems associated with the technical and non-technical aspects of existing closed captions.⁶⁵⁷ In the *Notice*, we stated that inherent in a captioning obligation is the possibility of some definition of a minimal level of quality necessary to demonstrate compliance with the requirement. Thus, we concluded that it is well within the Commission's discretion to consider whether to adopt rules, standards, or guidelines that address these matters.⁶⁵⁸

207. In the *Notice*, we proposed rules to address technical quality issues, including captions not being delivered intact, captions not synchronized with the video portion of the program, captions ending before the end of the programming, programming without captions even though the program indicates captioning, or captions transmitted during one offering of the program but not another. Specifically, we proposed to extend the existing cable rule that requires the delivery of existing captions to consumers intact and to require video programming providers to take whatever steps are necessary to ensure that the equipment and signal transmissions are capable of delivering existing captions.⁶⁵⁹ With respect to the non-technical aspects of captioning, such as spelling, grammar, placement and style, in the *Notice* we stated our tentative view that we should not impose standards at the start of our phase-in of closed captioning

⁶⁵⁵ See e.g., AIM Comments at 4; Cassidy Comments at 3; NVRC Comments at 7; ALDA Comments at 7.

⁶⁵⁶ Conference Report at 183.

⁶⁵⁷ *Notice of Inquiry*, 11 FCC Rcd at 4927-4928 ¶ 33; *Report*, 11 FCC Rcd at 19251-19253 ¶¶ 89-92.

⁶⁵⁸ *Notice*, 12 FCC Rcd at 1087 ¶ 104.

⁶⁵⁹ *Id.* at 1090 ¶ 110.

regulation, although we indicated that we might revisit the issue at a later date if quality levels appeared unsatisfactory.⁶⁶⁰ In the *Notice*, we also sought comment on a proposal not to establish minimum credentials for those employed to provide closed captioning for video programming.⁶⁶¹

A. Standards for the Technical Aspects of Closed Captioning

I. Background

208. The technical problems identified by commenters include captions not being delivered intact, captions not synchronized with the video portion of the program, captions ending before the end of the programming, programming without captions even though the program indicates captioning, or captions transmitted during one offering of the program but not another.⁶⁶² In the *Notice*, we noted that current technology is sufficient to ensure that every video programming provider is capable of transmitting to consumers the captioning included with the programming. We also observed that the basic technical compatibility among captioning services is assured by virtue of Section 15.119 of our rules, which sets forth the technical requirements for transmission and display of closed captioning.⁶⁶³ We further asserted that many of the reported technical problems appear to be the result of lax maintenance and monitoring of equipment.⁶⁶⁴ We concluded that video program providers must be responsible for the transmission of the captioning and should take whatever steps are necessary to monitor their equipment and signal transmission to ensure that captioning is included with the video programming that reaches consumers. Specifically, we proposed to extend Section 76.606 of our rules that requires cable operators to deliver existing captions intact to all video program providers, regardless of distribution technology, to ensure that programming with closed captions is delivered to viewers in a complete manner.⁶⁶⁵

209. Commenters representing a variety of interests, including video programming providers,⁶⁶⁶ programming networks,⁶⁶⁷ individuals with hearing disabilities,⁶⁶⁸ and captioning services,⁶⁶⁹ state that it

⁶⁶⁰ *Id.* at 1090-93 ¶¶ 111-119.

⁶⁶¹ *Id.* at 1093 ¶ 120.

⁶⁶² *Report*, 11 FCC Rcd at 19251-19253 ¶¶ 89, 91.

⁶⁶³ *Notice*, 12 FCC Rcd at 1089-90 ¶ 109.

⁶⁶⁴ *Id.* at 1090 ¶ 110.

⁶⁶⁵ *Id.*

⁶⁶⁶ ABC Comments at 16; USSB Comments at 15-16; WCA Comments at 16; BellSouth Comments at 18-19; Bell Atlantic Comments at 6; DirectTV Comments at 12-13; Ameritech Comments at 23.

⁶⁶⁷ HBO Reply Comments at 21-22.

⁶⁶⁸ NAD Comments at 22-23; CAN Comments at 14; ALDA Comments at 8; LHH Comments at 9-10; NVRC Comments at 7; SHHH Comments at 9; Council of Organizational Representatives Reply Comments at 9.

⁶⁶⁹ WGBH Comments at 14; NCI Comments at 14.

is appropriate for us to require video programming providers to deliver captions to consumers intact. These commenters believe that such a rule and its enforcement should remedy a number of identified problems.⁶⁷⁰ In this regard, NCTA asserts that the cable industry's obligation to transmit captions intact pursuant to Section 76.606 has ensured that captioning that arrives at the cable headend is delivered to consumers.⁶⁷¹ DirecTV, however, suggests that, in crafting the rule, we should ensure that it is adaptable to the distribution systems and decoder boxes of new MVPD services.⁶⁷² Ameritech is concerned about the implications of a specific requirement for MVPDs to monitor the simultaneous transmission of 500 channels of digital programming.⁶⁷³

210. A number of commenters claim that the requirements of Sections 15.119 and 76.606 are not always followed or enforced.⁶⁷⁴ Several commenters are concerned that not all caption producers adhere to the voluntary industry guidelines published by the Electronic Industry Association, "EIA-608 Recommended Practice for Line 21 Data Service."⁶⁷⁵ They recommend that we explicitly direct caption providers to follow the provisions of EIA-608⁶⁷⁶ and assert that, if the use of this technical document is required for all caption providers, it will help assure a reliable and standardized service.⁶⁷⁷ HBO, however, states that in similar situations where industry guidelines exist we have refrained from further micromanagement and that we should refrain from imposing industry guidelines in this context as well.⁶⁷⁸

2. Discussion

211. We adopt a rule that requires all video programming providers, regardless of distribution technology, to ensure that programming with closed captions is delivered to viewers in a complete manner. We find it unacceptable that existing captions might fail to be transmitted in a complete and intact manner to consumers. The reported problems -- such as captions not being delivered intact, captions not synchronized with the video portion of the program, captions ending before the end of the programming, programming without captions even though the program indicates captioning or captions transmitted during one offering of the program but not another -- deny accessibility to persons with hearing disabilities

⁶⁷⁰ CAN Comments at 14-15; ALDA Comments at 8; Stavros Reply Comments at 3; Council of Organizational Representatives Reply Comments at 9.

⁶⁷¹ NCTA Comments at 32.

⁶⁷² DirecTV Comments at 13.

⁶⁷³ Ameritech Comments at 23.

⁶⁷⁴ WGBH Comments at 14-15; CAN Comments at 15; Para Technologies Comments at 7.

⁶⁷⁵ WGBH Comments at 14; CAN Comments at 15; ALDA Comments at 8.

⁶⁷⁶ WGBH Comments at 14; NVRC Comments at 7. WGBH also states that captioners should be directed to follow the parallel specifications that are being developed for advanced television closed captioning, tentatively designated EIA-708. WGBH Comments at 14.

⁶⁷⁷ CAN Comments at 15.

⁶⁷⁸ HBO Reply Comments at 22.

even when captioning seems to be available. Thus, we will adopt and enforce a rule to ensure that captioned programming is always delivered to viewers complete and intact. This rule, Section 79.1(c), is an extension of the existing provision of the cable rules that requires cable operators to deliver existing captions intact. Accordingly, video programming providers must pass through any captioning they receive that is included with the video programming they distribute as long as the captions do not need to be reformatted. We believe that our enforcement of this new rule and the enforcement of the requirements of Sections 15.119 and 73.682 in conjunction with the mandatory captioning requirements will ensure the technical quality for the closed captioning that is delivered to viewers' television receivers.

212. We also will require video programming distributors to be responsible for any steps needed to monitor and maintain their equipment and signal transmissions to ensure that the captioning included with the video programming reaches consumers. Programming distributors will be responsible for any corrective measures necessary to ensure that the captioning is consistently included with the video programming delivered to viewers. With respect to Ameritech's concern about the need to monitor the simultaneous transmission of 500 channels of digital programming, we note that the video programming distributor's responsibility is to ensure that the equipment used to transmit these channels to viewers is capable of passing the captioning through along with the programming is in proper working order. They may rely on certifications from video programming suppliers that the programming contains captions and will not need to actually review every program before distribution to consumers.⁶⁷⁹

213. Section 73.682(a)(22) refers to "EIA-608 - Recommended Practice for Line 21 Data Service" published by EIA, which provides voluntary industry guidelines to protect against interference to closed captioning from other data transmitted on line 21 of the VBI. We have relied on this industry standard for specific information on the use of line 21 and have found it a useful supplement to the specific requirements of our rules.⁶⁸⁰ EIA-608 provides industry standards to ensure compatibility between the various uses of line 21, yet due to its broad acceptance the need for increased government regulation has been minimized. We believe that it is appropriate to continue to rely on this voluntary standard and expect those involved in the closed captioning of video programming to follow its procedures. We conclude that this approach is beneficial, especially in light of the ability of the industry to modify the standards to accommodate new uses of line 21.⁶⁸¹

⁶⁷⁹ Ameritech Comments at 23.

⁶⁸⁰ 47 C.F.R. § 73.682. EIA-608 supplements the rule by providing guidance on how line 21 can be used to transmit optional caption features, text-mode data, and extended data services that can provide information about current and future programming.

⁶⁸¹ For example, EIA has proposed revisions to these standards that include, among other things, a proposal on how program ratings information could be transmitted on line 21, field 2. See Standards Proposal No. 3688, Electronics Industries Association, February 12, 1996 and Standards Proposal No. 3688-1-A, EIA, May 10, 1996. See also n. 671, *supra*, referring to EIA-708.

B. Standards for the Non-Technical Aspects of Closed Captioning

I. Background

214. The non-technical aspects of captioning include such matters as accuracy of transcription, spelling, grammar, punctuation, placement, identification of nonverbal sounds, pop-on or roll-up style, verbatim or edited for reading speed, and type font.⁶⁸² In the *Notice*, we tentatively concluded that we should not impose standards for quality and accuracy at the start of our phase in of closed captioning regulation, although we recognized that the quality of captioning is a matter of considerable importance to those who view captions.⁶⁸³ We based our tentative judgment on several considerations. In particular, we were concerned about the availability of captioning services and stenocaptioners, the cost of captioning the significant amounts of video programming we propose to require to be captioned, and the difficulty of developing and administering quality standards.⁶⁸⁴ However, we proposed to revisit this issue if, after a period of experience, it became apparent that quality levels were unsatisfactory.⁶⁸⁵

215. Video programming distributors⁶⁸⁶ and programming networks⁶⁸⁷ support our proposal not to adopt standards for the quality and accuracy of the non-technical aspects of captioning at this time.⁶⁸⁸ Several commenters believe that we should allow a reasonable amount of time for captioners, program producers and video programming providers to adjust to the new captioning requirements before determining whether there is a need for quality and accuracy standards.⁶⁸⁹ A number of commenters state that marketplace forces and the complaint-driven enforcement process will provide incentives for program producers and owners to distribute the best quality captioning possible.⁶⁹⁰ For example, NAB asserts that the quality of captioning will increase as captioning becomes more widespread, technology improves, and

⁶⁸² *Notice*, 12 FCC Rcd at 1087, 1090-91 ¶¶ 103, 111.

⁶⁸³ *Id.* at 1090-91 ¶ 111.

⁶⁸⁴ *Id.* at 1091-93 ¶¶ 112-118.

⁶⁸⁵ *Id.* at 1090-91, 1092-93 ¶¶ 111, 118.

⁶⁸⁶ USSB Comments at 15; Ameritech Comments at 22; DirecTV Comments at 13; BellSouth Comments at 19; Primestar Comments at 15; SBC Comments at 6.

⁶⁸⁷ ABC Comments at 16; CBS Comments at 2, 8; A&E Comments at 17; HBO Comments at 27; Kaleidoscope Comments at 20; C-SPAN Comments at 10-11; E! Comments at 7-8; TVFN Comments at 7; Lifetime Reply Comments at 8; NAB Comments at 17; NCTA Comments at 3 and 32; ALTV Comments at 3; MPAA Comments at 22; RTNDA Comments at 8.

⁶⁸⁸ In addition, two captioning vendors generally agree with our conclusion not to adopt standards. VITAC Comments at 11; MCS Comments at 5.

⁶⁸⁹ Ameritech Comments at 22; ABC Comments at 16.

⁶⁹⁰ MPAA Comments at 22; Primestar Comments at 15; NCTA Comments at 32; HBO Comments at 27-28.

captioning personnel become more experienced.⁶⁹¹ MPAA contends that adequate controls already exist and notes that video programming providers and producers currently return prerecorded captions with errors to caption suppliers for correction.⁶⁹² It also claims that contracts for captioning live programming contain quality control standards, and captioners that provide poor service will not have their contracts renewed and, in some cases, can be penalized for breach of contract.

216. HBO argues that quality standards would be difficult to administer, stifle the development and expansion of captioning, and limit the types of programs that would be captioned.⁶⁹³ In the *Notice*, we listed guidelines for the quality and accuracy of captioning that had been proposed by commenters in response to the *Notice of Inquiry* in this proceeding.⁶⁹⁴ We also stated that we would encourage industry groups and individuals with hearing disabilities to work together to establish voluntary standards similar to these proposed guidelines.⁶⁹⁵ Para Technologies observes that some of the proposed guidelines are content oriented and are subjective and artistic in nature and that a requirement that these guidelines be used as standards would prove too restrictive.⁶⁹⁶ MPAA notes that program dialogue does not adhere to rules of grammar, but rather follows the characteristics of normal conversation or is ungrammatical as a matter of artistic choice.⁶⁹⁷ Thus, according to MPAA, for us to enforce standards of quality and accuracy could require extensive reviews of programming, an inefficient method that would impose a significant administrative burden.⁶⁹⁸

⁶⁹¹ NAB Comments at 18.

⁶⁹² MPAA Reply Comments at 16.

⁶⁹³ HBO Reply Comments at 22. *See also* MPAA Reply Comments at 17; Paxson Reply Comments at 8.

⁶⁹⁴ The guidelines proposed by commenters and cited in the *Notice* were: (a) caption data and information contained in the soundtrack must be delivered intact throughout the entire program; (b) captioning must transmit information about the audio portion of the program which is functionally equivalent to the information available through the program's soundtrack; (c) captions must include all elements of the soundtrack necessary for accessibility, including verbal information, identification of the speaker (if it is not apparent), sound effects, and audience reaction; (d) standards for proper spelling, grammar, timing, accuracy, and placement should be devised; (e) captions should be provided in the style and standards that are appropriate for the particular type of programming that is being captioned, e.g., real time captioning should be required for local newscasts and other live programming; (f) captioning must be reformatted as necessary if the programs on which they are included have been compressed or edited; (g) captioning must remain intact as it moves from its point of origination throughout the distribution chain to the local video provider. Program tapes should be labeled as to whether they are captioned to ensure that the closed captioned master tape is used for duplication as the program moves throughout the distribution chain; and (h) open character generated announcements must not obscure program captioning, and vice versa. Standards must be developed to ensure the appropriate placement of these scrawls. *Notice*, 12 FCC Rcd at 1088-89 ¶ 106.

⁶⁹⁵ *Id.* at 1092 ¶ 116.

⁶⁹⁶ Para Technologies Comments at 9.

⁶⁹⁷ MPAA Reply Comments at 16-17.

⁶⁹⁸ *Id.* at 17.