

217. Commenters supporting the adoption of quality and accuracy standards generally represent persons with hearing disabilities.<sup>699</sup> They are concerned that captions are not useful if they are not accurate or the "functional equivalent" of the audio portion of the programming.<sup>700</sup> A number of commenters state that without standards there will be little incentive for program producers to contract with high quality captioning providers.<sup>701</sup> In addition, several commenters contend that the marketplace will not ensure high quality captions because closed captions are sold to video providers and programmers and are not sold directly to television viewers who are deaf.<sup>702</sup>

218. In the *Notice*, we asked parties that disagreed with our proposal not to adopt standards for the non-technical aspects of captioning at this time to provide specific standards or guidelines that could be implemented, monitored, and enforced as we phase in our closed captioning requirements.<sup>703</sup> Many of the commenters on this issue recommend that we adopt the guidelines listed in the *Notice*<sup>704</sup> or a slightly modified version of these guidelines rather than simply encouraging their use.<sup>705</sup> In support of the adoption of guidelines, a number of parties state that minimum guidelines are needed to ensure full

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<sup>699</sup> Jordan Comments at 3; CAN Comments at 15-16; ALDA Comments at 8; NAD Comments at 23-24..

<sup>700</sup> AAAD Comments at 2; VITAC Comments at 10-11; CAN Comments at 15-17.

<sup>701</sup> CAN Comments at 17; SHHH Comments at 10; LHH Comments at 10; WGBH Comments at 15-16; NAD Comments at 26

<sup>702</sup> LHH Comments at 10; CAN Reply Comments at 9; Stavros Reply Comments at 3.

<sup>703</sup> *Notice*, 12 FCC Rcd at 1093 ¶ 119.

<sup>704</sup> Jordan Comments at 3; ALDA Comments at 8-9; LHH Comments at 10, Stavros Reply Comments at 4. WGBH and Para Technologies support the adoption of only the most technically quantifiable of these proposed guidelines. WGBH Comments at 15; Para Technologies Comments at 9.

<sup>705</sup> These proposed quality guidelines include: (a) captions must include all elements of the soundtrack necessary for accessibility including, but not limited to, verbal information (including information on voice inflections), identification of the speaker (if it is not apparent), sound effects, background noise, type of music, and audience reaction; (b) captions must be provided in the style and standards that are appropriate for the particular type of programming (e.g., real time captioning for live programming); (c) captions must contain spelling and grammar that accurately enable the viewer to understand the audio content of the program, with typographical errors kept to a minimum; (d) the placement of captions must reflect the source of audio information contained in the soundtrack; (e) captions must be synchronized with the audio content of the program, with some allowance made for programming that is live or recorded shortly before air time; (f) captions must be reformatted as necessary when the programming is compressed or otherwise edited; (g) care must be taken to ensure that captions remain intact throughout the distribution chain; (h) closed captioned master tapes used for duplication should be labeled as such (e.g., "cc") as they move through the distribution chain; and (i) open character generated announcements, such as emergency warnings, names of speakers, weather advisories, and school closings, must not obscure or be obstructed by closed captions. NAD Comments at 24-25; CAN Comments at 17-18; Thompson and D'Angelo Reply Comments at 5; Woodson Reply Comments at 1. CAN's proposal includes several standards that would have to be met on the effective date of our rules and additional standards that should be adopted within two years. CAN Comments at 17-18.

accessibility and to keep mistakes to a bare minimum.<sup>706</sup> NAD states that some basic, but minimum, standards for captioning quality are needed to provide guidance for new entrants into the captioning field and to indicate what is legally required under Section 713.<sup>707</sup>

219. Alternatively, VITAC proposes that a program should only be considered captioned if it is captioned from start to finish and the captions are as close to verbatim as technically possible. VITAC suggests that we require virtually all the words to be spelled correctly, and it would set criteria that no more than two tenths of a percent (0.2%) of the words in a prerecorded show and 3% of the words in a live show may be wrong, misspelled or absent, with the only exception being when captions would significantly conflict with other information presented visually.<sup>708</sup>

220. NCI recommends a procedure of self-policing and self-reporting by those who are responsible for ensuring that captions are distributed.<sup>709</sup> Under its proposal, captioning service distributors would be required to provide a simple annual report to the Commission regarding the quality and accuracy of their captioning services. These reports, which would be available for public inspection, would cover such matters as spelling accuracy, accuracy of transcription, punctuation, placement, identification of nonverbal sounds, and other matters we deem appropriate.<sup>710</sup>

221. A few commenters supporting the adoption of non-technical standards assert that, if we do not adopt their proposals, we should establish a process and timetable for revisiting the issue.<sup>711</sup> For example, NAD and the Council of Organizational Representatives proposes that this review take place two years after the rules go into effect.<sup>712</sup> CAN suggests that we plan to adopt specific rules to address quality and accuracy issues in two years.<sup>713</sup> ALDA and NVRC state that, at a minimum, there should be monitoring for the first year of implementation and, if warranted, standards established that would become effective no later than two years after the effective date of the rules.<sup>714</sup> In addition, WGBH and LHH recommend that a joint consumer and industry panel be established to formulate a means for examining

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<sup>706</sup> Council of Organizational Representatives Reply Comments at 9.

<sup>707</sup> NAD Comments at 23-24. NAD adds that the Commission could be lenient with respect to its enforcement of such quality standards for live captioning for the first year or two of regulation. *Id.* at 26-27. *See also* Council of Organizational Representatives Reply Comments at 10; Stavros Reply Comments at 3.

<sup>708</sup> VITAC Comments at 11.

<sup>709</sup> NCI Comments at 14.

<sup>710</sup> *Id.* at 15.

<sup>711</sup> *See, e.g.*, LHH Comments at 10.

<sup>712</sup> NAD Comments at 23; Council of Organizational Representatives Reply Comments at 11-12.

<sup>713</sup> CAN Comments at 17-18.

<sup>714</sup> ALDA Comments at 10; NVRC Comments at 8.

quality issues and that the findings of this panel be reported at the end of each year of implementation.<sup>715</sup>

## 2. Discussion

222. We will not adopt standards for the quality and accuracy of closed captioning at this time. We are not persuaded that our initial assessment of the difficulty in establishing standards at this time was incorrect. There are vast amounts of programming that will need to be captioned and those responsible for captioning under our rules will need to undertake significant efforts to ensure that the programming they distribute is in compliance with our rules. By leaving the development of quality standards to the marketplace, we are allowing video programming providers to establish quality standards and quality controls for the non-technical aspects of captioning through their arrangements with captioning suppliers or as part of the requirements of their programming contracts and licensing agreements.<sup>716</sup> We expect that this approach will result in high quality captions comparable to the level of quality of other aspects of programming such as the audio and video. We will, however, consider revisiting this issue if, after some period of implementation of our transition rules, it becomes apparent that our assumptions regarding the marketplace incentives for quality captioning are incorrect.

223. We continue to believe that video programming providers have an incentive to ensure that the programming they deliver to consumers is of a high overall quality. Because captioning will now be mandatory, it will become an integral part of programming. As with other aspects of programming (e.g., the audio and video), programming providers have a strong incentive to maintain the overall quality of the programs they deliver to consumers, including captions of comparable quality. We also reject the claim that without specific quality standards program producers will not contract for high quality captions because they are not the actual consumers of the captions. We believe that, as with any aspect of television programming (e.g., the audio and video), consumers can demonstrate their satisfaction or lack of satisfaction with what is shown through their purchase of advertised products, subscriptions to programming services, or contacts with the video programming providers or video programmers. Programming providers and producers further will be aware that we will be monitoring the implementation of all aspects of captioning, including the quality.

224. We further find that the record provides evidence that it would be difficult to establish standards in this area. While we requested specifics regarding any proposed standards in the *Notice*, including means for monitoring and enforcement, commenters provide only general guidelines without the details we requested. For example, CAN directs us to adopt standards for proper spelling and to ensure that grammar, timing, accuracy and placement of captions are appropriate without providing any suggestions regarding how to define "proper" or "appropriate" in this context.<sup>717</sup> We also are concerned about the administrative burden that would be imposed on video programming providers and the Commission if millions of hours of television programming must be monitored to make sure that no more

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<sup>715</sup> WGBH Comments at 17; LHH Comments at 10.

<sup>716</sup> As they already are in some cases, we expect that quality standards will be an added requirement in programming agreements. See MPAA Reply Comments at 16.

<sup>717</sup> As previously noted, persons with hearing disabilities are not always in agreement with respect to what is acceptable in terms of the non-technical and stylistic aspects of captioning. *Report*, 11 FCC Rcd at 19251 ¶ 88.

than a specified percentage of the words are wrong, misspelled or missing at the same time that mandatory captioning is being implemented.<sup>718</sup> On balance, we believe that it is not appropriate to impose such an administrative burden without knowing whether market forces are sufficient to ensure quality captioning and our assumption regarding marketplace incentives is correct. For these reasons, we continue to believe that it is better to allow the competitive market forces to establish standards of acceptable captioning quality. In this context, we encourage industry participants to develop voluntary industry guidelines, as have been proposed in this proceeding.<sup>719</sup>

225. Our transition schedule is intended to allow us the flexibility to revisit issues, such as the quality of captioning, as it is implemented, if necessary. We conclude, however, that it is not appropriate to establish a date certain for revisiting the issue of non-technical standards at this time, as requested by some commenters. We will consider any information we receive regarding any problems related to the non-technical aspects of closed captioning once our requirements take effect and use this information when determining whether to further consider the adoption of standards for quality and accuracy. While the proposed joint consumer and industry panel<sup>720</sup> designed to formulate a means for examining quality issues and to report to the Commission at the end of each year of implementation may be one means for information to be directed to us, we will not establish any forum outside the Commission to monitor the effectiveness of our regulations. We also will not adopt any reporting requirements regarding the non-technical aspects of captioning because such requirements would impose an administrative burden on video programming providers and the Commission at a time when resources are best used to ensure the captioning of programming.

### C. Certification of Stenocaptioners

#### 1. Background

226. In the *Notice*, we did not propose to establish minimum credentials for those employed to provide closed captioning for video programming.<sup>721</sup> We stated that imposition of such a standard would unnecessarily delay implementation of any closed captioning requirements without any evidence that only those passing a specific test are the best qualified to provide this service. We also expected that the quality of closed captioning would improve as the amount of captioning increases and that the marketplace will establish standards for those employed to prepare captions.

227. The limited comments on this issue support our conclusion.<sup>722</sup> HBO, MCS, and Primestar point out that there are existing methods of professional certification through the National Court Reporters

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<sup>718</sup> VITAC Comments at 11.

<sup>719</sup> See paras. 216 and 218 *supra*. See also *Notice*, 12 FCC Rcd at 1088 ¶ 106.

<sup>720</sup> WGBH Comments at 17; LHH Comments at 10.

<sup>721</sup> *Notice*, 12 FCC Rcd at 1093 ¶ 120.

<sup>722</sup> See, e.g., Captivision Comments at 10; VITAC Comments at 13.

Association ("NCRA") and DOE guidelines.<sup>723</sup> MCS states that establishing a credential process would hinder our intent to see an economically based competitive marketplace for captioning.<sup>724</sup> Moreover, MCS asserts that as the demand for captioning increases, it would expect further efforts by professional court reporting organizations to incorporate real time writing techniques as part of the credential process.<sup>725</sup> Primestar also contends that additional requirements for professional certification would put captioning out of reach for some producers, thus diminishing the diversity of programming available.<sup>726</sup> As an alternative to government regulation of stenocaptioners, SHHH and California recommend that we request the NCRA to develop standards for training, testing, and certification.<sup>727</sup> Para Technologies proposes that, rather than accrediting captioners, we require the name and address of the caption provider to appear at the beginning and end of each program as a means of accountability.<sup>728</sup> Kaleidoscope suggests that a private sector initiative be undertaken to develop a style manual for captioning similar to the "Chicago Manual of Style" used by the print media.<sup>729</sup>

## 2. Discussion

228. The record demonstrates concurrence with our tentative conclusion not to establish any certification or professional accreditation requirements for stenocaptioners. There appear to be a number of professional credentials in the court reporting profession that indicate the level of skills required for closed captioning. In addition, there is no clear evidence that a specific method of training captioners or a specific test would be the only predictors of successful achievement in this field.<sup>730</sup>

229. We do, however, believe that the commenters provide several useful suggestions regarding voluntary industry efforts that can be undertaken to ensure that captioners have the skills needed to provide quality captions. We encourage any joint efforts of captioning organizations, video industry representatives and consumers of captioning that will help increase the number of trained stenocaptioners and improve the skills of those developing captions. Such a group may be an appropriate forum for developing a style manual, such as one suggested by Kaleidoscope, which can be used to promote consistent standards.

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<sup>723</sup> HBO Comments at 27; MCS Comments at 7-8; Primestar Comments at 16.

<sup>724</sup> MCS Comments at 8.

<sup>725</sup> *Id.*

<sup>726</sup> Primestar Comments at 16.

<sup>727</sup> SHHH Comments at 10; California Comments at 2.

<sup>728</sup> Para Technologies Comments at 9.

<sup>729</sup> Kaleidoscope Comments at 20. The "Chicago Manual of Style" is a reference book published by the University of Chicago Press that provides guidelines for style, such as spelling, punctuation, capitalization, abbreviations and the use of illustrations and tables, in addition to guidelines for the production of print publications.

<sup>730</sup> MCS Comments at 7-8.

230. We also will not require that captioning organizations be identified at any point in the programming that they caption. We note that captioning agencies or captioners may find it useful to provide this information in order to receive direct feedback from consumers.

## VIII. ENFORCEMENT AND COMPLIANCE REVIEW MECHANISM

### I. Background

231. In the *Notice*, we tentatively concluded that we should enforce our closed captioning requirements through existing complaint procedures.<sup>731</sup> We proposed to permit private parties and government agencies to file complaints with the Commission. We also proposed that complaints first be directed to the video programming distributor in order to encourage resolution at the local level. If the parties are unable to resolve the complaint, then the complaint could be filed with the Commission. We further proposed to require that all complaints be accompanied by the best available documentation. Upon receipt at the Commission level, if we determined that the complaint complied with all the technical requirements, we would notify the video programming provider of this determination. The video programming provider would then be permitted to respond to the complaint. We solicited comment on these proposals and requested that commenters address the potential effectiveness of the proposed process. We also encouraged commenters to suggest modifications to this process which would improve its effectiveness and efficiency. Finally, we requested comments on what elements we should require for a valid complaint.

232. Many commenters generally support our proposal to enforce captioning requirements through a complaint mechanism.<sup>732</sup> Several commenters, while generally approving, offer suggestions to make the process more "user-friendly," more efficient and less burdensome for both the programming industry and consumers.<sup>733</sup> Several commenters express concern that the proposed procedures may be unnecessarily complex and flawed.<sup>734</sup> Other commenters question the effectiveness of the procedures we have proposed.<sup>735</sup> CAN asserts that the complaint driven enforcement mechanism proposed in the *Notice* is too inconvenient for consumers.<sup>736</sup> Accordingly, CAN proposes that we establish a consumer council

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<sup>731</sup> *Notice*, 12 FCC Rcd at 1094 ¶ 122.

<sup>732</sup> *See, e.g.*, AIM Comments at 5; Captivision Comments at 11; CBS Comments at 25.

<sup>733</sup> *See, e.g.*, Ameritech Comments at 25; NCD Comments at 7; MCS Comments at 17; WCA Comments at 25.

<sup>734</sup> *See, e.g.*, CAN Comments at 18; Jordan Comments at 4; ALDA Comments at 10-11.

<sup>735</sup> *See, e.g.*, NVRC Comments at 8-9 (expressing concern with the Commission's proposal to require complainants to contact the video program provider before filing a complaint with the Commission and asserting that in the past providers have been unresponsive to consumer complaints).

<sup>736</sup> CAN Comments at 18 (citing factors such as providers' lack of TTY, and the failure to identify the provider of the programming). *See also* NAD Comments at 28-29; ALDA Comments at 11.

or coordination point to resolve these disputes.<sup>737</sup> Several commenters representing persons with hearing disabilities suggest that requiring documentation may be unduly burdensome.<sup>738</sup> Other commenters support CAN's proposal that we establish a consumer council to alleviate these difficulties.<sup>739</sup> MPAA argues that Section 713(h) gives us exclusive jurisdiction with respect to any complaint under this section and that such an industry funded council would create a confusing, inefficient system for dispute resolution.<sup>740</sup>

233. NCD proposes modifications to our proposal, suggesting that we consider the adequacy of captioning (i.e., complaints alleging that the quality of the captioning is so poor as to negate its value or use).<sup>741</sup> NCD also expresses concern that we are creating an excessive burden of proof for consumers. NCD maintains that few, if any, complainants will be in a position to produce program logs, transcripts, video tapes or other documentary evidence of alleged violations.<sup>742</sup>

234. Several commenters suggest specific steps or requirements to ensure that the complaint mechanism is readily accessible to persons with hearing disabilities. MCS recommends that we adopt electronic filing procedures.<sup>743</sup> It also suggests that we provide a checklist on our World Wide Web page to assist the public in identifying problems and in filing complaints.<sup>744</sup> SHHH recommends that video program distributors be required to provide well publicized contacts for complaints including a TTY number and an e-mail address.<sup>745</sup> SHHH also states that we should set limits on the amount of time video

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<sup>737</sup> CAN Comments at 19; CAN Reply Comments at 12. *See also* NAD Comments at 28; LHH Comments at 11; NVRC Comments at 9; ALDA Comments at 11.

<sup>738</sup> *See, e.g.*, Jordan Comments at 4. NAD Comments at 29-30. NCD suggests, without shifting the burden of proof to respondents, we should require the program provider to make available the necessary documentation. NCD Comments at 7. *But see* AIM Comments at 5.

<sup>739</sup> *See, e.g.*, CAN Comments at 18; ALDA Comments at 11; LHH Comments at 11. LHH notes that similar boards have been established with industry funding. LHH Comments at 11; NAD Comments at 29-30; NCD Comments at 7; Council of Organizational Representatives Reply Comments at 13.

<sup>740</sup> MPAA Reply Comments at 17. Section 713(h) provides:

(h) PRIVATE RIGHTS OF ACTIONS PROHIBITED.-Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

*See also* NCTA Reply Comments at 16; Ameritech Reply Comments at 6-7.

<sup>741</sup> NCD Comments at 7.

<sup>742</sup> *Id.* at 8.

<sup>743</sup> MCS Comments at 17.

<sup>744</sup> *Id.* *See also* NAD Reply Comments at 24.

<sup>745</sup> SHHH Comments at 8. *See also* Thompson and D'Angelo Comments at 6.

program distributors could have to resolve complaints before the complaints are forwarded to the Commission.<sup>746</sup>

235. Commenters representing several different interests support our proposal to require complaints to be directed to the programming distributor before they are submitted to the Commission.<sup>747</sup> Some commenters, while substantially supporting the proposed procedures, raise specific concerns or offer suggestions to ensure that the process is less burdensome to video programming distributors or programmers.<sup>748</sup> Ameritech, for example, urges us to clarify that there is no decisional significance to a determination that a complaint is valid on its face.<sup>749</sup> Ameritech also seeks clarification that the complaint process cannot be used to re-litigate exemptions provided under Sections 713(d)(1) or 713(d)(3).<sup>750</sup> C-SPAN recommends that no enforcement action should be initiated on the basis of a single complaint.<sup>751</sup> WCA suggests that we allow 60 days for program distributors to resolve complaints before the complainant could file with the Commission.<sup>752</sup> WCA also suggests that we clarify that complaints regarding broadcast licensees should go to the licensees and not to an MVPD that happens carry them.<sup>753</sup>

236. Several commenters cite potential problems with our proposals. For instance, Cox argues that our proposed enforcement procedures could lead to anomalous results, particularly when a widely distributed programming service violates the rules. According to Cox, because we have proposed placing responsibility for compliance on the video program providers, we could be inundated with complaints against numerous MVPDs, even though only one party (i.e. the program producer) is at fault.<sup>754</sup> Cox asserts that such a procedure is inherently inefficient and cumbersome. NCTA notes that, because of the system of proposed exemptions and phase ins, we should limit complaints to those which allege a violation of the implementation schedule and not permit complaints that merely allege that a particular program (or programs) was not captioned.<sup>755</sup>

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<sup>746</sup> SHHH Comments at 8-9.

<sup>747</sup> See, e.g., AIM Comments at 5; California Comments at 2; Captivision Comments at 11; CBS Comments at 25; C-SPAN Comments at 11; US West Comments at 17; WCA Reply Comments at 12-13; California Comments at 2.

<sup>748</sup> See, e.g., Ameritech at Comments at 25.

<sup>749</sup> Ameritech Comments at 25.

<sup>750</sup> *Id.* at 26.

<sup>751</sup> C-SPAN Comments at 11.

<sup>752</sup> WCA Reply Comments at 12.

<sup>753</sup> *Id.* at 3

<sup>754</sup> Cox Comments at 10. See also BellSouth Reply Comments at 6.

<sup>755</sup> NCTA Comments at 36.

237. In the *Notice*, we sought comment on whether we should adopt any recordkeeping requirements as part of our enforcement procedures.<sup>756</sup> Commenters representing the video programming industry generally oppose any new or increased recordkeeping requirements.<sup>757</sup> Encore states that, instead of imposing additional recordkeeping requirements, we should permit MVPDs to rely on certifications from the networks they carry. Encore contends that certification of compliance has been successfully relied upon in the past.<sup>758</sup> GTE also suggests that a compliance mechanism similar to the one adopted in the Children's Programming rules might be appropriate and balance the need for compliance verification with burdensome monitoring or recordkeeping requirements.<sup>759</sup>

238. Other video programming industry commenters suggest that our closed captioning rules and the need to demonstrate compliance in response to possible enforcement actions will ensure that video providers will keep adequate records and they oppose additional public file or recordkeeping requirements.<sup>760</sup> According to ALTV, stations will have every incentive to maintain adequate records in order to demonstrate compliance in response to a possible complaint.<sup>761</sup> USSB concurs and suggests that this issue can be revisited after we gain further experience.<sup>762</sup>

239. Alternatively, groups representing persons with hearing disabilities commenting on this issue support a recordkeeping requirement.<sup>763</sup> CAN supports the proposal to require that video program

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<sup>756</sup> *Notice*, 12 FCC Rcd at 1094 ¶ 124.

<sup>757</sup> *See, e.g.*, CBS Comments at 26; WCA Comments at 15; Allnewsco Comments at 8.

<sup>758</sup> Encore Comments at 18. SCBA also suggests that such a procedure be adopted for small systems even if the Commission adopts more rigorous procedures for other distributors. SCBA Reply Comments at 9. NCTA also suggests that the Commission permit video programming distributors to rely on certifications from the networks and video program owners. NCTA does not, however, believe the Commission should increase the record keeping burden on video program distributors. NCTA Comments at 36. Ameritech asserts that the MVPDs should be able to rely on certifications from producers as proof of compliance. Ameritech Reply Comments at 4. *But see* Viacom Reply Comments at 5-6 (suggesting that as part of the certification process, MVPDs and broadcasters should be required to include the certifications of compliance in a public file).

<sup>759</sup> GTE Comments at 4; Viacom Reply Comments at 4-6; Primestar Reply Comments at 7-8. *See also* 47 C.F.R. § 76.225(c) (requiring cable operators to maintain records sufficient to demonstrate compliance with the children's programming requirements); *Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television*, MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 2111 at 2124 n. 52 (noting that cable operators may comply with the recordkeeping requirement by arranging with cable networks to provide records for the children's programming the cable networks provide).

<sup>760</sup> *See, e.g.*, GTE Comments at 4; BellSouth Comments at 18 Allnewsco Comments at 8; ALTV Comments at 16; Ameritech Comments at 25; USSB Comments at 15; USSB Reply Comments at 8; C-SPAN Comments at 11.

<sup>761</sup> ALTV Comments at 16.

<sup>762</sup> USSB Comments at 16.

<sup>763</sup> *See, e.g.*, AIM Comments at 5; NAD Comments at 30-31; NVRC Comments at 10.

providers retain records sufficient to verify compliance with the closed captioning rules. According to CAN, such recordkeeping is reasonable given that providers generally have adequate documentation as part of the process of having material captioned.<sup>764</sup> The Council of Organizational Representatives recommends that these records be retained by the Commission or the proposed consumer council.<sup>765</sup>

## 2. Discussion

240. We conclude that our initial proposal to use a simplified complaint mechanism modeled after existing complaint procedures is appropriate and supported by the record.<sup>766</sup> Accordingly, we will adopt the rules appended to this *Report and Order* at Appendix B. We believe that our original proposal to require that complaints first be directed to video programming distributors is an effective and efficient way to streamline the process. We expect this process will result in a large number of complaints being resolved at the distributor level. We believe that this approach will lead to quicker action to resolve a complaint than if the complaint were filed directly with the Commission, eliminating any unnecessary administrative burdens for consumers and video programming distributors. In order to further minimize the administrative burden on individual video programming distributors, we will not prescribe specific recordkeeping requirements but will simply require video programming distributors to maintain records sufficient to demonstrate compliance in response to any complaint.

241. Because the information necessary to demonstrate compliance will be in the hands of distributors and because it would not be feasible for potential complainants in the first instance to document all the factors necessary to establish a violation, e.g., to identify the exempt or nonexempt status of each program, we will not require them to do so. On the other hand, it is appropriate for the complainants to have some basis for believing that a violation has taken place and not simply allege that an individual program lacks captions. Thus, any complaint filed should, at a minimum, state with specificity the Commission rule violated and should provide some information which supports the alleged rule violation. Thus, for example, complainants could review a reasonable sampling of programming or published program schedules to determine whether sufficient captioned programming exists on a daily basis to meet the requirements of the rules if extrapolated to a full calendar quarter. Further, if a distributor's response to a complaint demonstrates compliance, such complaint should not be forwarded to the Commission pursuant to the procedures set forth below unless there is some reason to believe that the response is inaccurate. Limiting the process in this fashion is important because it will serve to focus the resources devoted to achieving compliance with the rules on those situations where there is most likely to be a violation and not on those where ready explanations for the absence of captions exist.

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<sup>764</sup> CAN Comments at 19. See also ALDA Comments at 11; Captivision Comments at 11-12; ALDA Comments at 11.

<sup>765</sup> Council of Organizational Representatives Reply Comments at 12.

<sup>766</sup> See, e.g., 47 C.F.R. § 1.42. These generally applicable complaint procedures are very formal and do not address the special circumstances related to a closed captioning complaint. Accordingly, we find it appropriate to adopt simplified procedures which are tailored to address the specific factors and issues related to closed captioning complaints.

242. Complaints regarding alleged violations may be filed by individual consumers, organizations or government agencies.<sup>767</sup> Violations may include failure to meet the benchmarks we have established or failure to pass existing captions through to the consumer intact.<sup>768</sup> A complaint cannot be used to challenge a previously approved exemption. A complaint may, however, allege that a provider is inappropriately relying on an economic burden categorical exemption under Section 713(d)(1). Prior to filing a complaint with the Commission, the complainant must file a written complaint with the video programming distributor.<sup>769</sup> The complaint filed with the video programming distributor may be in the form of a letter. It must state the alleged violations and should include (as discussed above) any available evidence. In the case of an alleged violation by a broadcast television licensee, the complaint should be directed to the broadcast licensee. In the case of programming over which the video programming distributor may not exercise editorial control,<sup>770</sup> the complaint should be directed to the entity responsible for the programming rather than the video programming distributor. A video programming distributor receiving a complaint regarding programming of a broadcast television licensee, or programming over which the distributor does not exercise editorial control (as described in paragraph 29), must return the complaint to the complainant, within seven days of receipt, with written instructions informing the complainant of the name and address of the appropriate party, as described above, to whom the complaint should be sent. Alternatively, the distributor may forward the complaint itself within seven days to that party and inform the complainant that the complaint has been forwarded. A complaint will not be considered if it is filed with the video programming distributor later than the end of the calendar quarter following the calendar quarter in which the alleged violation has occurred. We encourage parties to wait to file complaints addressing the amount of captioned programming until after the relevant quarter has ended.

243. A video programming distributor will have a limited amount of time to initiate discussions to try to resolve the complaint. In order to ensure that all available information is available, the video programming distributor shall respond in writing to the complaint no later than 45 days after the end of the quarter in which the violation is alleged to have occurred or 45 days after receipt of the written complaint, whichever is later. Thus, a complaint received on February 28 alleging violations in

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<sup>767</sup> We reject the argument that we should require more than one complaint before this process is initiated.

<sup>768</sup> Given that we have declined to adopt non-technical quality standards at this time, we will only consider complaints that demonstrate that captioning counted towards compliance with our rules provides an inadequate representation of the audio track.

<sup>769</sup> A number of commenters indicate that they have had difficulty contacting video programming distributors in the past due to a lack of TTY equipment, toll free telephone numbers and e-mail addresses. We note, however, that Telephone Relay Services are available. See 47 C.F.R. § 64.603. Furthermore, the local broadcast station or the MVPD with which the consumer already has a contractual relationship will usually be responsible for compliance. These video programming distributors' addresses will often be readily available on the bill or in the local telephone directory. Thus, the entity most conveniently accessible by the consumer is, in most instances, the party consumers should contact.

<sup>770</sup> Such programming includes political campaign advertising; commercial leased access programming; programming distributed by direct broadcast satellite (DBS) services in compliance with the noncommercial programming requirement to the extent such video programming is exempt from the editorial control of the video programming distributor; and video programming distributed by a common carrier or that is distributed on an open video system by an entity other than the open video system operator.

the first quarter of the year need not be addressed until May 15, while a complaint filed on April 15 alleging violations in the first quarter requires the video programming distributor to reply by May 30. This requirement should resolve the concerns of commenters who indicate that video service providers have been unresponsive to complaints in the past. If the video programming distributor fails to respond to a complaint or a dispute remains after the initial attempt at resolution by the video programming distributor and the complainant, the complaint may be filed with the Commission within 30 days after the time allotted for the video programming provider to respond. A complaint filed with the Commission must include an original and two copies and must that the complaint was first served on the video programming distributor. The complaint must include evidence that demonstrates the alleged violation of the closed captioning requirements and must certify that a copy of the complaint and the supporting evidence was first directed to the video programming distributor. The video programming distributor shall have 15 days to respond to the complaint and shall provide the complainant with a copy of the response. In its response to a complaint, a video programming distributor is obligated to provide the Commission with sufficient records and documentation to demonstrate compliance with the Commission's rules. After reviewing the complaint and the supporting documentation, we will determine whether a violation of the closed captioning requirements has occurred. If the Commission determines that a violation has occurred, we may impose appropriate penalties, including for example, forfeitures, or in instances of a flagrant rule violation, we may require that the video programming distributor deliver captioned programming in excess of the established benchmarks.<sup>771</sup> We believe that these procedures will provide consumers with an effective and easily accessible complaint resolution mechanism, while freeing the programming industry of any unnecessary burdens.

244. In the *Notice*, we discussed the possibility of enforcing these requirements through a reporting requirement.<sup>772</sup> We recognize that good business practices will necessitate that video programming distributors maintain records in order to ensure compliance with our rules, as well as to defend against possible consumer complaints. We also recognize that the availability of such records could facilitate some consumer complaints and perhaps avoid others. At the same time, we recognize the additional burdens that recordkeeping requirements can pose for video programming distributors, particularly for small businesses. Accordingly, we will not adopt specific recordkeeping requirements nor will we require video programming distributors to file periodic reports or maintain public files recording their compliance. We believe that specific recordkeeping or filing requirements would be unnecessarily burdensome and administratively cumbersome. Thus, we will only require that video programming distributors maintain records sufficient to demonstrate compliance and will leave the specifics of recordkeeping to their discretion. Finally, we will permit MVPDs to rely upon certifications of compliance from the various networks they carry.

245. We recognize that our complaint procedures must accommodate the special needs of persons with hearing disabilities. Accordingly, we will generally incorporate the recommendations of groups, such as MCS and SHHH, to use the Internet as a mechanism for providing information on our rules and complaint procedures. Furthermore, the Commission is currently exploring the possibility of

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<sup>771</sup> We note that the Conference Report states that the "remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of Section 713." Conference Report at 184.

<sup>772</sup> *Notice*, 12 FCC Rcd at 1094 ¶ 124.

electronic filing.<sup>773</sup> As we previously noted, we expect this procedure will be especially useful for persons with hearing disabilities and will facilitate their participation in the complaint process.

246. Finally, several commenters propose that we establish a consumer council that could provide information regarding our rules and their implementation to consumers and the video programming industry and could serve as a clearinghouse to combine related complaints or prevent unfounded complaints from being filed.<sup>774</sup> Section 713(h), however, vests exclusive jurisdiction over enforcement of these provisions with the Commission. Accordingly, we will not establish a consumer council as such an organization could only serve an ancillary or advisory role.

## IX. OTHER ISSUES

247. New Technologies. We solicited comment on what steps we should take, if any, to ensure that our closed captioning rules do not impede the development of new technologies such as digital television ("DTV"). With respect to future technological advances and their effects on closed captioning, commenters are not optimistic about the future of technologies that create captions directly from speech (i.e., voice recognition technology). WGBH states that there is no real possibility in the near or long-term future that will allow automatic captioning through voice recognition.<sup>775</sup> VITAC observes that no adequate voice recognition system exists or is likely to exist in the near future, and "certainly not in a size and at a price to be built into television receivers."<sup>776</sup> Most commenters also agree that there is no need to establish rules governing DTV closed captioning at this time,<sup>777</sup> and some recommend that our rules be sufficiently flexible so as not to impede the development of DTV.<sup>778</sup>

248. A few commenters observe that we did not mention video programming delivered over the Internet or other emerging technologies<sup>779</sup> among the distribution technologies cited in the *Notice*.<sup>780</sup> In this regard, the commenters contend that high-resolution video downloaded through such media should be required to contain closed captions that can be viewed by means of decoder-equipped televisions.<sup>781</sup> On the other hand, BellSouth contends that there is no legal or public policy basis for us to address video

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<sup>773</sup> *Electronic Filing of Documents in Rulemaking Proceedings*, Notice of Proposed Rulemaking, GC Docket No. 97-113, 12 FCC Rcd 5150 (1997). See also para. 203 *supra*.

<sup>774</sup> See, e.g., CAN Comments at 19; CAN Reply Comments at 12; NAD Comments at 28; LHH Comments at 11; NVRC Comments at 9; ALDA Comments at 11.

<sup>775</sup> WGBH Comments at 7.

<sup>776</sup> VITAC Comments at 5-6.

<sup>777</sup> ALTV Comments at 5-6; NAB Comments at 9; WGBH Comments at 7.

<sup>778</sup> HBO Comments at 15; Primestar Comments at 9; Stavros Reply Comments at 3.

<sup>779</sup> See, e.g., NAD Comments at 3; LHH Comments at 2; Kaleidoscope Comments at 5.

<sup>780</sup> *Notice*, 12 FCC Rcd at 1048 ¶ 5.

<sup>781</sup> *Id.*

delivered by the Internet in this proceeding.<sup>782</sup> BellSouth argues that such services are not comparable to the programming over which we have authority, and that a closed captioning requirement for Internet programming could derail the development of high-speed Internet access services that the cable industry is preparing to offer the public.<sup>783</sup> A&E argues that Section 713 does not grant us authority to regulate programming provided by the Internet,<sup>784</sup> and that any closed captioning obligations imposed on Internet programming at this time will forestall the development of such programming and could contribute to the demise of emerging Internet services.<sup>785</sup>

249. At this time, we do not believe it would be appropriate to adopt additional or different captioning requirements specific to DTV technology that rely on the extended capacities and potential inherent in the digital transmission process. We note that the Commission has considered the technical requirements that would allow closed captioning information to be carried by DTV stations.<sup>786</sup> We expect that programming entities involved in the development of DTV technology and the conversion of video programming to digital formats are taking into account the need to transmit captions in the DTV signal. We expect that DTV receiver decoder standards will be available for consideration in the relatively near future and that a standard captioning process can then proceed with relatively little difficulty. Nevertheless, we believe the additional captioning potentials this technology may make available warrant review in the future to make sure that full advantage is taken of this and associated technological improvements. Similarly, we recognize that there are issues that need to be addressed relating to the convergence of television receivers and computers and the growth of Internet video like programming that may need to be addressed in the future.<sup>787</sup>

250. We received limited information in response to our request for comment regarding technologies that may change the manner in which captions are created and delivered. We believe that as a result of our requirements and the increased demand for captioning, new technologies may develop that facilitate captioning. For example, the captioning marketplace may find new ways to use telephone lines for remote captioning or the Internet may provide mechanisms for the preparation and transmission

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<sup>782</sup> BellSouth Reply Comments at 18.

<sup>783</sup> *Id.* at 18-19.

<sup>784</sup> A&E Reply Comments at 5. However, A&E acknowledges that the statute does not specify what entity or entities are subject to the captioning rules. *Id.* Also, the portion of the legislative history cited by A&E in support of its argument that the statute does not contemplate Internet programming as "video programming" specifically includes "other service[s] that provide[ ] programming to the public" as providers subject to our captioning regulations, which could encompass Internet services. *Id.* at n. 8.

<sup>785</sup> A&E Reply Comments at 7.

<sup>786</sup> See *Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service*, Fourth Report and Order, MM Docket No. 87-268, 11 FCC Rcd 17771 (1996).

<sup>787</sup> We note that a number of organizations representing persons with hearing disabilities have filed a petition for rulemaking asking that the Commission revise its policies regarding captioning of television programming delivered by personal computer. See Petition for Rulemaking filed by the National Association of the Deaf, the National Center for Accessible Media, the National Center for Law and Deafness, Telecommunications for the Deaf, Inc., and VITAC, RM-8785 (Dec. 22, 1995).

of captioning data. Moreover, developments in the use of digital technology may provide new methodologies for captioning.

251. Thus, we believe that further study of these issues relating to new technologies and captioning is needed. Accordingly, we will reexamine issues relating to digital television, technological changes that affect the closed captioning process and other matters relating to technological change that may affect our captioning requirements.<sup>788</sup> We will use the information gathered in this subsequent proceeding to determine whether any modifications to the rules we adopt are necessary.

252. Emergency matters. Providing all viewers with accurate information regarding fast breaking news is of great importance, and we are concerned that viewers with hearing disabilities may not always have access to the same information that is currently available to other viewers. Examples of such news include information regarding severe weather conditions, flooding, earthquakes, and disruptions of the transportation system. These reports generally provide information that must be available to people immediately and often affect the safety and well-being of viewers. Commenters generally stress the importance of having access to this type of information, and request that captioning of this information receive priority over other types of programs.<sup>789</sup> An announcer may interrupt a program with an audio message that is not also displayed visually, or the audio portion providing this information may be longer and offer more detailed information than that displayed visually,<sup>790</sup> leaving viewers with hearing disabilities without full details on the situation. Similarly, a visually displayed message may direct the viewer to watch a later news report for details, but if the news is captioned using ENR and the information relating to an event that is occurring is unscripted, viewers with hearing disabilities will not have access to this information, which can be vital to their safety.<sup>791</sup>

253. Due to the limited comments on this issue in the record, we are not adopting specific rules for this type of programming at this time. We will initiate a proceeding to examine the captioning of information of such immediate importance that programming is often interrupted to provide it and to determine whether transitional requirements are needed for such programming to ensure that persons with hearing disabilities have full access to this important information. We believe that it is very important for emergency programming to be accessible and that there are methods to provide this vital information in some format for persons with hearing disabilities. We note that video programming providers currently can use open visual scrawls, open captioning, slides or other methods to provide this information in visual form. In the absence of closed captioning, we expect video programming providers to use these other methods to ensure that all of the details of this information is fully accessible. We note that Section 73.1250(h) of the Commission's rules already provides that information broadcast with respect to emergencies involving the safety of life and property be transmitted both aurally and visually (or only

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<sup>788</sup> This date will coincide with the expected date of first availability for digital television receivers.

<sup>789</sup> See, e.g., Kaleidoscope Comments at 3; LHH Comments at 4; SHHH Comments at 4. See also ALDA Comments at 6 and CAN Comments at 9 (noting the importance of weather information to viewers' sense of safety and well-being).

<sup>790</sup> California Comments at 3.

<sup>791</sup> See, e.g., Comments of Joan Andrews in response to *Notice of Inquiry* at 3-4.

visually). Further, the Emergency Alert System Rules also address the needs of the deaf and hard-of-hearing for access to emergency information.<sup>792</sup>

254. Matters for Future Review. As indicated in the *Report and Order*, we will monitor the implementation of closed captioning of pre-rule programming to determine whether the amount of such programming containing captions during the transition period is increasing incrementally without specified benchmarks. We also believe that it will be appropriate to reevaluate our decision to define maximum accessibility as the captioning of 75% of pre-rule programming. Thus, we will undertake a review of our rules relating to pre-rule programming after four years to consider whether specific percentage benchmarks are needed to ensure sufficient progress towards the captioning of this programming and whether we should require a different percentage of such programming to be captioned to ensure maximum accessibility to persons with hearing disabilities without economically burdening programming providers.

255. At the time of our review, we will also consider the appropriateness of certain of the specific exemptions we have adopted, e.g., exemptions for non-English language and locally produced programming.

256. We also believe that our decision to permit the captioning of programming using ENR should be reevaluated during the transition period. Our decision to permit the use of this method of captioning initially is based on our concern regarding the current availability of real time captioners and the potential costs of captioning this live programming at this time. However, ENR does not provide complete captioning for this very important information and we encourage video programming providers to script additional portions of their programming, especially weather and sports reports included in newscasts, and to include introductions or short descriptions of the non-captioned segments (e.g., live remote) to ensure that persons with hearing disabilities are aware of the topic of the story. The use of ENR may not be appropriate once the marketplace adapts to the demand for captioning as a result of Section 713. At that time, the availability of captioners or technology to facilitate the captioning of news programming may make the use of real time captioning more feasible. Thus, we intend to revisit this issue and to consider whether to amend the rules to require real time captioning of news programming.

257. In addition, we concluded that it would be best not to adopt standards relating to the non-technical quality of captioning and to allow market forces establish industry standards. As indicated above, we intend to monitor the quality of the captions that are provided during the transition period. Based information we gather or receive from the public, we may revisit the need for standards for non-technical quality during the transition period. The review during the transition period will allow us to consider whether we have taken the appropriate actions necessary to further the important goal of accessibility of video programming as directed by Congress.

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<sup>792</sup> Sections 1.111s *et seq.*

## X. FINAL REGULATORY FLEXIBILITY ANALYSIS

### A. Background

258. As required by the Regulatory Flexibility Act (RFA),<sup>793</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the Notice of Proposed Rulemaking in this proceeding.<sup>794</sup> The Commission sought written public comment on the expected impact of the proposed policies and rules on small entities in the *Notice*, including comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.<sup>795</sup>

259. *Need for Action and Objectives of the Rule:* The 1996 Act added a new Section 713 to the Communications Act of 1934 that *inter alia* requires the Commission to develop rules to increase the availability of video programming with closed captioning.<sup>796</sup> The Commission is promulgating these rules in order to implement this provision of Section 713. The statutory objective of the closed captioning provisions is to promote the increased accessibility of video programming for persons with hearing disabilities.

### B. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

260. The Small Cable Business Association ("SCBA") filed the only comment specifically responsive to the IRFA. Several other commenters addressed the IRFA in their general comments. Other parties, while not specifically commenting on the IRFA, discuss the potential effect of the proposed rules on small entities.

261. SCBA concurs with our estimates regarding the number of small cable operators that may be affected by our closed captioning requirements.<sup>797</sup> SCBA offers several specific suggestions to minimize the effects of the closed captioning requirements on small cable operators. These proposals include:

- a. Allocating the burden of compliance to programming producers and owners.
- b. A class exemption for small cable operators serving 1,000 or fewer subscribers.

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<sup>793</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>794</sup> *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, Notice of Proposed Rulemaking, MM Docket No. 95-176, 12 FCC Rcd 1044, 1094 (1997) ("*Notice*").

<sup>795</sup> See 5 U.S.C. § 604.

<sup>796</sup> 47 U.S.C § 613.

<sup>797</sup> SCBA Regulatory Flexibility Comments at 2.

- c. Streamlined compliance and complaint rules for small cable systems serving 15,000 or fewer subscribers including:
  - 1. Reliance on statements of compliance from programmers to respond to establish compliance.
  - 2. The burden of proof shifts to the complainant when statements from programmers demonstrate compliance.
- d. Streamlined waiver procedures to permit qualifying small systems to access a simplified, low-cost waiver process.
- e. A class exemption for PEG programming.
- f. A class exemption for local origination programming.<sup>798</sup>

262. Cassidy asserts that our conclusions are overly inclusive and, if all small providers were exempted, Congress' intent to increase the availability of closed captioned programming would be circumvented.<sup>799</sup> Commenters representing smaller captioning agencies suggest ways to minimize the effect of the new regulations small captioners.<sup>800</sup> Para Technologies, for instance, recommends that we adopt a more "linear" phase in schedule.<sup>801</sup> Specifically, Para Technologies proposes that we adopt a phase-in schedule requiring video program providers to increase closed captioned programming 4% every three months over the eight year transition period. According to Para Technologies, such a plan would increase competition in the captioning industry, leading to lower rates and more widely available captioned programming. MCS suggests that we should require that video producers and program providers use small captioning companies for a minimum of 25% of their real time captioning requirements.<sup>802</sup>

263. Kaleidoscope indicates that its proposal to define economic burden as a situation where the cost of captioning would exceed 10% of the relative program budget should minimize the burden on small entities.<sup>803</sup> Kaleidoscope asserts that this is an objective test that would exempt small entities from closed captioning requirements that they may find economically burdensome.<sup>804</sup>

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<sup>798</sup> *Id.* at 3.

<sup>799</sup> Cassidy Comments at 4.

<sup>800</sup> *See, e.g.,* MCS Comments at 13-17.

<sup>801</sup> Para Technologies Comments at 3.

<sup>802</sup> MCS Comments at 13. MCS asserts that this requirement will expand the pool of closed captioning providers leading to increased competition and lower costs. MCS also advocates requiring a percentage of all captioning be set aside for minority and female owned captioning agencies. MCS Reply Comments at 13-14.

<sup>803</sup> Kaleidoscope Comments at 23-24.

<sup>804</sup> *Id.* at 24.

264. The Association of America's Public Television Stations ("APTS") asserts that the closed captioning requirements would be especially onerous to its smaller members. According to APTS, approximately one-third of its members have annual budgets under \$3,000,000.<sup>805</sup> APTS suggests that the \$3,000,000 benchmark is generally accepted among noncommercial stations as indicative of a small station and notes that virtually all members of the public television Small Station Association have operating budgets below \$3,000,000.<sup>806</sup> APTS urges us to adopt an economic burden exemption for local programming produced by such stations.<sup>807</sup>

265. Instructional Television Fixed Services ("ITFS") licensees argue that their programming should not be subject to the closed captioning requirements.<sup>808</sup> These parties assert that closed captioning would represent an formidable economic burden. Several commenters argue that they are already obligated to ensure that their services are accessible under both the ADA and the Rehabilitation Act of 1973.<sup>809</sup> These commenters propose excluding ITFS providers from the definition of "video programming provider" and exempting ITFS programming carried on wireless cable systems from any closed captioning requirements.<sup>810</sup>

266. Several low power television station ("LPTV") operators assert that as small businesses, LPTV operators warrant an exemption based on the economic burden that closed captioning requirements would pose.<sup>811</sup> The Community Broadcasters Association ("CBA") suggests that specific classes of programming carried by some LPTV stations should be exempt in order to relieve these providers of an economic burden.<sup>812</sup>

267. Access centers and organizations providing governmental programming assert that their operations qualify as small entities and they would face a questionable future if required to closed caption a substantial portion of their programming.<sup>813</sup> These commenters assert that, in many cases, that the

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<sup>805</sup> APTS Comments at 11.

<sup>806</sup> *Id.* at n. 16.

<sup>807</sup> APTS Comments at 11.

<sup>808</sup> *See, e.g.*, L.A. Archdiocese Comments at 3-4; Illinois Institute Reply Comments at 11-12; CTN Comments at 5-9.

<sup>809</sup> Arizona State Board Comments at 7, citing 29 U.S.C. § 794. *See also* WCA Comments at 11-14. *See also* BellSouth Comments at 15-16; BellSouth Reply Comments at 14-15.

<sup>810</sup> WCA Reply Comments at 11-15.

<sup>811</sup> *See e.g.*, Three Angels Comments at 3-7; Three Angels Reply Comments at 1-4; Greene Reply Comments at 1-4; CBA Comments at 4-6; LPTV Licensees Comments at 2-5.

<sup>812</sup> CBA Comments at 4-5. *But see* Three Angels Reply Comments at 2-4.

<sup>813</sup> *See, e.g.*, Alliance Comments at 5-6; Boulder Comments at 1. These commenters are joined by others representing various MVPDs. *See, e.g.*, Ameritech Comments at 15-19; BellSouth Comments at 17; SBC Comments at 5; US West Comments at 3-8; Time Warner Reply Comments at 5-7; TCI Reply Comments at 7-9.

financial requirements for closed captioning would exceed or substantially consume their entire annual budgets.<sup>814</sup> Several of these commenters state that mandatory captioning requirements could effectively eliminate public, educational and governmental ("PEG") programming.<sup>815</sup> Accordingly, these commenters seek an exemption based on the economic burden posed by closed captioning requirements unless an alternative funding mechanism becomes available.<sup>816</sup> The Greater Metro Telecommunications Consortium ("GMTC") suggests that PEG programmers should be allowed to weigh the costs and the benefits of providing captioning and consider alternatives.<sup>817</sup> Several commenters representing multichannel video programming distribution systems ("MVPDs") join the access centers in arguing that PEG channels should be exempt.<sup>818</sup> These commenters concur that PEG channels generally operate on very limited budgets which preclude captioning.

**C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

268. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.<sup>819</sup> Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>820</sup>

269. *Small MVPDs*: The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in annual

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<sup>814</sup> See, e.g., ICCA Comments at 1; Kansas City Comments at 3; Dayton Comments at 2; Ann Arbor Comments at 1-2; Southwestern Oakland Comments at 1; SNCT Comments at 2; Plymouth Comments at 2; District of Columbia Comments at 2; Westsound Comments at 2; Chicago Comments at 2; Solon Comments at 1; ICCA Comments at 1; Kauai Comments at 1; Fort Wayne Comments at 2; Evanston Comments at 1. According to GMTC, some of its members budget nothing for programming and rely on donated service and equipment. GMTC Comments 9.

<sup>815</sup> See, e.g., Lincoln Park Comments at 2; Pocatello Comments at 2.

<sup>816</sup> See, e.g., ICCA Comments at 1; Kansas City Comments at 3; Dayton Comments at 2.

<sup>817</sup> GMTC Comments at 10-12.

<sup>818</sup> See, e.g., NCTA Comments at 24; Ameritech Comments at 16; BellSouth Reply Comments at 15-17; TCI Comments 7-9; US West Comments at 3-8; SBC Comments at 5-6.

<sup>819</sup> 5 U.S.C. § 601(3) (1980) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes definitions in the Federal Register.

<sup>820</sup> Small Business Act, 15 U.S.C. § 632.

receipts.<sup>821</sup> This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue.<sup>822</sup> We address below each service individually to provide a more precise estimate of small entities.

270. *Cable Systems*: The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>823</sup> Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.<sup>824</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules we are adopting. We conclude that only a small percentage of these entities currently provide qualifying "telecommunications services" as required by the Communications Act and, therefore, estimate that the number of such entities are significantly fewer than noted.

271. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>825</sup> The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>826</sup> Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.<sup>827</sup> Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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<sup>821</sup> 13 C.F.R. § 121.201 (SIC 4841).

<sup>822</sup> U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

<sup>823</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995).

<sup>824</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>825</sup> 47 U.S.C. § 543(m)(2).

<sup>826</sup> 47 C.F.R. § 76.1403(b) (SIC 4833).

<sup>827</sup> Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

272. *Multipoint Multichannel Distribution Systems ("MMDS")*: The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.<sup>828</sup> This definition of a small entity in the context of MMDS auctions has been approved by the SBA.<sup>829</sup>

273. The Commission completed its MMDS auction in March 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MMDS facility generates revenue in excess of \$11 million annually. We conclude that, for purposes of this FRFA, there are approximately 1634 small MMDS providers as defined by the SBA and the Commission's auction rules.

274. *ITFS*: There are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.<sup>830</sup> However, we do not collect annual revenue data for ITFS licensees and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. No commenters address these non-educational licensees. Accordingly, we conclude that at least 1932 licensees are small businesses.

275. *Direct Broadcast Satellite ("DBS")*: Because DBS provides subscription services, DBS falls within the SBA definition of cable and other pay television services (SIC 4841). As of December 1996, there were eight DBS licensees. However, the Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be affected by these proposed rules. Although DBS service requires a great investment of capital for operation, in the *Notice*, we acknowledged that there are several new entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated. Since the publication of the *Notice*, however, more information has become available. Estimates of 1996 revenues for various DBS operators are significantly greater than \$11,000,000 and range from a low of \$31,132,000 for Alphastar<sup>831</sup> to a high of \$1,100,000,000 for Primestar.<sup>832</sup> Accordingly, we now conclude that no DBS operator qualifies as a small entity.

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<sup>828</sup> 47 C.F.R. § 21.961(b)(1).

<sup>829</sup> See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

<sup>830</sup> SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

<sup>831</sup> Alphastar Press Release (via Canada Newswire), March 20, 1997. Revenues were originally stated in Canadian Dollars (\$42,915,000 Canadian). Revenues were recalculated using an exchange rate of \$1.3785 (Can) = \$1.00 (US). Revenues stated include revenues for C-band service.

<sup>832</sup> *The SkyTrends Report: 1996-1997*.

276. *Home Satellite Dish ("HSD")*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.<sup>833</sup> HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only nonsubscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.<sup>834</sup>

277. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.<sup>835</sup> These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.<sup>836</sup> This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small multiple system operator ("MSO"). Furthermore, because this an average, it is likely that some program packagers may be substantially smaller.

278. *Open Video System ("OVS")*: The Commission has certified nine OVS operators. Of these nine, only two are providing service. On October 17, 1996, Bell Atlantic received approval for its certification to convert its Dover, New Jersey Video Dialtone ("VDT") system to OVS.<sup>837</sup> Bell Atlantic subsequently purchased the division of Futurevision which had been the only operating program package provider on the Dover system, and has begun offering programming on this system using these resources.<sup>838</sup> Metropolitan Fiber Systems was granted certifications on December 9, 1996, for the operation of OVS systems in Boston and New York, both of which are being used to provide programming.<sup>839</sup> Bell Atlantic and Metropolitan Fiber Systems have sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. In the *Notice*, we concluded that one OVS licensee qualifies as a small business concern. Given that other entities have been authorized to provide

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<sup>833</sup> *1996 Competition Report*, 12 FCC Rcd at 4385 ¶ 49.

<sup>834</sup> *Id.* at ¶ 50.

<sup>835</sup> *Id.*

<sup>836</sup> *Id.*

<sup>837</sup> *Bell Atlantic-New Jersey, Inc. (Certification to Operate an Open Video System)*, 11 FCC Rcd 13249 (CSB 1996) ("*Bell Atlantic OVS Certification*").

<sup>838</sup> Bell Atlantic, *Bell Atlantic Now Offering Video Services in Dover Township New Jersey* (news release), Nov. 1, 1996.

<sup>839</sup> See *Metropolitan Fiber Systems/New York, Inc. (Certification to Operate an Open Video System)*, Consolidated Order, 11 FCC Rcd 20896, DA 96-2075 (CSB Dec. 9, 1996).

OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

279. *Satellite Master Antenna Television ("SMATVs")*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.<sup>840</sup> Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.<sup>841</sup> The ten largest SMATV operators together pass 815,740 units.<sup>842</sup> If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we conclude that a substantial number of SMATV operators qualify as small entities.

280. *Local Multipoint Distribution System ("LMDS")*: Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. A LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA definition for cable and other pay services is defined in paragraph 269 *supra*. A small radiotelephone entity is one with 1500 employees or less.<sup>843</sup> However, for the purposes of this *Report and Order* on closed captioning, we include only an estimate of LMDS video service providers.

281. LMDS is a service that is expected to be auctioned by the FCC in 1997. The vast majority of LMDS entities providing video distribution could be small businesses under the SBA's definition of cable and pay television (SIC 4841).<sup>844</sup> However, in the *Third NPRM*,<sup>845</sup> we proposed to define a small LMDS provider as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding calendar years of less than \$40 million. We have not yet received approval by the SBA for this definition.

282. There is only one company, CellularVision, that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, we assume that

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<sup>840</sup> 1996 Competition Report, 12 FCC Rcd at 4403-4404 ¶ 81.

<sup>841</sup> *Id.*

<sup>842</sup> *Id.*

<sup>843</sup> 13 C.F.R. § 121.201.

<sup>844</sup> See para. 269 *supra* for an estimate of the number of entities under SIC 4841.

<sup>845</sup> *In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services and Suite 12 Group Petition for Pioneer's Preference, ("Third NPRM")* CC Docket No. 92-297, 11 F.C.C. Rcd. 53 (1995), ¶ 188.

CellularVision is a small business under both the SBA definition and our proposed auction rules. No commenters addressed the tentative conclusions we reached in the *Notice*. Accordingly, we affirm our tentative conclusion that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

283. *Small Broadcast Stations*: The SBA defines small television broadcasting stations as television broadcasting stations with \$10.5 million or less in annual receipts.<sup>846</sup>

284. *Estimates Based on Census and BIA Data*: According to the Bureau of the Census, in 1992, 1155 out of 1478 operating television stations reported revenues of less than \$10 million for 1992. This represents 78% of all television stations, including noncommercial stations.<sup>847</sup> The Bureau of the Census does not separate the revenue data by commercial and noncommercial stations in this report. Neither does it allow us to determine the number of stations with a maximum of \$10.5 million in annual receipts. Census data also indicate that 81% of operating firms (that owned at least one television station) had revenues of less than \$10 million.<sup>848</sup>

285. We also have performed a separate study based on the data contained in the BIA Publications, Inc. Master Access Television Analyzer Database, which lists a total of 1141 full power commercial television stations.<sup>849</sup> It should be noted that, using the SBA definition of small business concern, the percentage figures derived from the BIA database may be underinclusive because the database does not list revenue estimates for noncommercial educational stations, and these therefore are excluded from our calculations based on the database.<sup>850</sup> The BIA data indicate that, based on 1995 revenue estimates, 440 full power commercial television stations had an estimated revenue of \$10.5 million or less. That represents 54% of full power commercial television stations with revenue estimates listed in the BIA program. The database does not list estimated revenues for 331 stations. Using a worst case scenario,

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<sup>846</sup> 13 C.F.R. § 121.201.

<sup>847</sup> See *1992 Census of Transportation, Communications, and Utilities, Establishment and Firm Size*, May 1995, at 1-25.

<sup>848</sup> Alternative data supplied by the SBA Office of Advocacy indicate that 65% of television station owners (627 of 967) have less than \$10 million in annual revenue and that 39% of television stations (627 of 1591) have less than \$10 million in annual revenue. These data were prepared by the U.S. Bureau of the Census under contract to the SBA. These data show a lower percentage of small businesses than the data supplied directly to the Commission by the Bureau of the Census. Therefore, for purposes of our worst case analysis, we will use the data supplied directly to us by the Bureau of the Census.

<sup>849</sup> This figure excludes LPTV stations and translator stations from the calculations. As of May 31, 1996, there were 1880 LPTV stations and 4885 television translators in the United States. FCC News Release, *Broadcast Station Totals as of May 31, 1996*, Mimeo No. 63298, released June 6, 1996. Given the nature of LPTV stations, we will presume that all LPTVs qualify as small businesses. Because television translators pass through the signal of the parent station, we do not believe that any closed captioning requirements we may adopt will result in regulatory burden on those stations.

<sup>850</sup> APTS reports that there are 30 public television stations (out of 197 public television licensees) with annual operating budgets of less than \$1.5 million. Interview with Lonna M. Thompson, Director of Legal Affairs for APTS (December 3, 1996).