

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Closed Captioning and Video )  
Description of Video Programming )  
 )  
Implementation of Section 305 of the )  
Telecommunications Act of 1996 )  
 )  
Video Programming Accessibility )

MM Docket No. 95-176

**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Jill Lockett  
Vice President,  
Program Network Policy

Daniel L. Brenner  
Diane B. Burstein  
1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
202-775-3664

Counsel for National Cable Television  
Association

November 28, 1997

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Daniel L. Brenner  
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**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

The National Cable Television Association (“NCTA”), pursuant to Section 1.429(f) of the Commission’s rules, hereby submits its Opposition to the Petitions for Reconsideration filed in the above-captioned proceeding by the National Association of the Deaf/Consumer Action Network (“NAD/CAN”) and Self Help for Hard of Hearing People, Inc. (“SHHH”).<sup>1</sup> NCTA is the principal trade association of the cable television industry in the United States. Its members include over 100 cable networks and owners and operators of cable television systems serving more than 80 percent of the nation’s cable television households.

NAD/CAN’s Petition proposes a significant number of changes to the FCC’s closed captioning rules. Their Petition urges the Commission to eliminate several of the

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<sup>1</sup> Public Notice of the Reconsideration Petitions appeared in the Federal Register on November 12, 1997. 62 Fed. Reg. 60712 (Nov. 12, 1997).

narrowly-crafted exemptions from the captioning requirement, including the “de minimis”, short advertising and late night exemptions. NAD/CAN also seeks reconsideration of the Commission’s decision to permit video programmers to use electronic newsroom captioning (“ENR”), urges reversal of the FCC’s conclusion not to incorporate benchmarks into its transition for “pre-rule” programming, and seeks changes to the procedures established for handling complaints and adjudicating undue burden exemptions. SHHH’s Petition urges the Commission to speed up the date of the first benchmark to require captioning of new programming to begin in 1999, rather than the year 2000, and to force new networks to caption even prior to the expiration of the four year grace period. The Commission should deny NAD/CAN’s and SHHH’s Petitions.

Congress assigned the Commission the task of evaluating the impact on the variety and quantity of programming available to the public that would result if captioning of every program shown at all times on every network were required. The Commission conducted an extensive inquiry into the existing level of voluntary captioning and the costs of additional captioning. It evaluated the voluminous comments presented by numerous cable program networks, other members of the cable and broadcast industries, organizations representing the deaf and hard of hearing and captioning agencies. Based on this detailed and comprehensive evaluation, the Commission adopted a balanced set of rules.

The new rules require a significant effort on the part of the cable industry over a variety of phase-in periods to meet the requirements of the rules, while providing limited

exemptions from the captioning obligation where economically justified. We believe that the rules, on the whole, reflect a fair approach to captioning that the FCC should maintain. While in certain limited respects that we discuss below, minor adjustments to the rules proposed in the Petitions of Outdoor Life Network et al., The Game Show Network, and Encore should be made to more fully effectuate the relief intended by the rules, the FCC should deny the NAD/CAN and SHHH Petitions.

### **DISCUSSION**

#### **I. THE FCC SHOULD NOT ELIMINATE ITS “DE MINIMIS” EXEMPTION**

As part of its requirements for captioning new programming, the Commission’s rules provide for a “de minimis” allowance of 5 percent of new programming (that is not otherwise exempt) that does not have to be captioned. The Commission “recognize[d] that there are unforeseen difficulties that could arise that might unintentionally result in video programming providers being unable to provide such new programming captioned....”<sup>2</sup> The FCC thus defined “full accessibility at the end of the transition period as slightly less than 100% of all new nonexempt programming.”<sup>3</sup>

NAD/CAN claims that the “Commission lacks authority to grant a blanket five percent exemption for all video programming” and that “had Congress intended to legislate an exemption of this type, it could have and would have done so.”<sup>4</sup> But

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<sup>2</sup> Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility, MM Docket No. 95-176 (rel. Aug. 22, 1997) (hereinafter “Report and Order”) at ¶43.

<sup>3</sup> Id.

<sup>4</sup> NAD/CAN Petition at 3.

NAD/CAN misread the statute in arguing that the “de minimis” exemption is impermissible, and ignore the practical realities of television scheduling in arguing as a policy matter that such an exemption is not warranted.

**A. The Commission Has Authority To Adopt A “De Minimis” Exemption**

NAD/CAN’s Petition essentially claims that all new video programming must be closed captioned. Under their reading, the “plain language of the statute require[s] *full* access to video programming; the statute does not merely direct that ‘a significant increase’ in captioning take place.”<sup>5</sup> But the Act clearly permits the FCC to adopt categorical exemptions where appropriate, and to grant individual “undue burden” exemptions where captioning would cause significant burden or expense. The Act cannot be read to mandate that every program must be captioned, and the Commission correctly determined that providing video programmers a modicum of flexibility for new programming was warranted.

A de minimis allowance is entirely consistent with Congress’ intent in providing for exemptions from the Act -- either through categorical exemptions or individual case-by-case determinations.<sup>6</sup> The fact that Congress did not expressly provide in the Act for a de minimis exemption does not undermine the appropriateness of the FCC’s action here, as NAD/CAN claims.<sup>7</sup> Petitioners’ argument ignores that all enactments (absent

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<sup>5</sup> Id. at 4.

<sup>6</sup> Id.

<sup>7</sup> Id. at 3.

contrary intent) may be interpreted to accept de minimis exemptions from coverage.<sup>8</sup>

And it also ignores that the FCC has adopted de minimis exemptions from explicit statutory requirements in other contexts. For example, with respect to the statutory ban on cross-ownership found in Section 613 of the Act<sup>9</sup>, the FCC has historically carved out an exception from the blanket prohibition for de minimis ownership interests of less than a prescribed percentage.<sup>10</sup> The FCC action here is wholly consistent with this precedent, and permissible under the Act.

**B. The “De Minimis” Exemption Serves the Public Interest**

The FCC explained that it adopted the five percent allowance for non-captioned new programming for two reasons: to “ease the burden on distributors that receive programming without captions shortly before their scheduled air times, allowing distributors to air such programs without having to seek last-minute waivers,” and (2) to “accommodate occasional technical lapses which may occur due to circumstances beyond a distributor’s control.”<sup>11</sup> NAD/CAN take issue with these findings, arguing that they “can not provide sufficient basis to grant a five percent, across-the-board, allowance for

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<sup>8</sup> Wisconsin Dept. of Revenue v. William Wrigley, Jr., 112 S. Ct. 2447, 2458 (1992) (“the venerable maxim *de minimis non curat lex* (‘the law cares not for trifles’) is part of the established background of legal principles against which all enactments (absent contrary indication) are deemed to accept.”).

<sup>9</sup> 47 U.S.C. §533.

<sup>10</sup> See 47 C.F.R. §76.501 (establishing threshold below which interest is not “cognizable” for purposes of ownership prohibitions).

<sup>11</sup> Report and Order at ¶43.

all programming.”<sup>12</sup> But the administrative difficulties in obtaining an undue burden waiver for each program and the practical difficulties of captioning uncaptioned materials at the last minute in order to avoid scheduling changes cannot be ignored.

The Commission had ample reason to adopt an across-the-board allowance. Numerous commenters demonstrated the necessity for a “catch-all” category so that a mandatory captioning obligation would not unduly interfere with their ability to program the thousands of hours of programs shown daily on the hundreds of cable and over-the-air television networks.<sup>13</sup> NCTA’s comments urged the Commission to craft a de minimis exemption to provide programmers sufficient flexibility and discretion to determine those unusual cases where captioning is not feasible.<sup>14</sup> The Commission properly weighed these considerations in reaching its determination.

Moreover, adopting the de minimis exemption in practical effect enables the Commission to avoid creating an even longer list of specific exemptions from the captioning requirement that would be necessary to encompass in advance virtually every potential reason why a program legitimately might not be shown with captions. The de minimis exemption avoids the difficulties attendant to such an undertaking and the problems with determining those categories at the outset, particularly given the newness of this obligation and the inexperience of many of the less established cable networks in

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<sup>12</sup> NAD/CAN Petition at 4.

<sup>13</sup> See e.g., Comments of TV Food Network at 6; Comments of Encore Media at 8.

<sup>14</sup> NCTA Comments at 12 (filed Feb. 28, 1997).

captioning. At the same time, the rules achieve an exceedingly high degree of captioning over-all.

Finally, NAD/CAN argue that five percent of all new video programming “can hardly be defined as *de minimis*.”<sup>15</sup> They argue that “a truly *de minimis* exemption for the occasional difficulty or technical lapse might be .05%, rather than 5% of all new programming.”<sup>16</sup> But even CAN, in its earlier comments to the FCC, “[r]ecommend[ed] that the Commission allow for *de minimis* exemptions for unavoidable or unanticipated occurrences.”<sup>17</sup> And while it cautioned the Commission to “act conservatively”, it endorsed application of such an exemption “to no more than three percent of otherwise non-exempt programming.”<sup>18</sup>

Defining de minimis as more than .05% was entirely reasonable. Moreover, five percent is well within the accepted range of de minimis.<sup>19</sup> For example, the FCC in its program access rules adopted an equivalent amount -- five percent -- for judging de minimis price differentials.<sup>20</sup> Similarly, the FCC allows ownership interests of up to five

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<sup>15</sup> NAD/CAN Petition at 5.

<sup>16</sup> Id. at 5 n.4.

<sup>17</sup> Reply Comments of the Consumer Action Network on the Notice of Proposed Rulemaking, MM Docket No. 95-176 (filed Mar. 31, 1997) at 7.

<sup>18</sup> Id. at 8 (emphasis added).

<sup>19</sup> See, e.g., *Burton v. Sheheen*, 793 F. Supp. 1329, 1345 (D.S.C. 1992) (“*de minimis*” standard between 10 percent presumption and mathematical preciseness).

<sup>20</sup> 47 C.F.R. §76.1003(d)(6)(i) (de minimis price differential of five percent or five cents per subscriber, whichever is greater).

percent prior to considering an interest “cognizable” for purposes of its attribution rules for program access and cross-ownership.<sup>21</sup>

In sum, the de minimis exemption is well justified as a means of easing burdens on programmers and the Commission alike. It should be maintained.

## **II. THE COMMISSION SHOULD NOT ELIMINATE ITS ADVERTISING AND LATE NIGHT EXEMPTIONS**

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### **A. Advertising Should Be Exempt**

NAD/CAN object to the exemption from the captioning obligation for advertising of five minutes’ duration or less. The Commission adopted this exemption based on its determination that “the logistics of distribution of commercials may also impose an economic burden that outweighs the benefits of requiring captions.”<sup>22</sup> The Report and Order recognized that “video programming distributors receive large numbers of advertisements, often close to air time, and to monitor whether each individual commercial is captioned could be burdensome.”<sup>23</sup>

Nonetheless, NAD/CAN claim that captioning advertising would not impose an economic burden. But ample evidence has been presented of the burdens -- logistical and economic -- that an obligation to ensure that advertising is captioned would impose on all

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<sup>21</sup> 47 C.F.R. §76.1000(b) (definition of “attributable interest” for program access purposes); 47 C.F.R. §76.501 note 2 (allowing up to 5%, and in some cases 49.9%, voting interest before interest is cognizable.)

<sup>22</sup> Report and Order at ¶152.

<sup>23</sup> Id.

video programming providers. The Commission correctly found that these burdens could be significant, and exempted short form advertising from the captioning mandate.<sup>24</sup>

The Commission also relied on the finding that short form advertising is separate from programming.<sup>25</sup> While the Act expressly covers “video programming”, Congress did not specifically require captioning of advertising. NAD/CAN do not point to anything in the Act or its legislative history that evidences a different view. Instead, they rely on several cases that, upon examination, fail to support their view that advertisers should be required by the government to caption. All of the advertising cases cited by Petitioners concerned a court striking down *government restrictions* on commercial speech. Here, the government is not restricting commercial speech -- or affecting the content of advertisements -- at all. The approach that the FCC has taken is, in fact, much more consistent with the cited case law than the contrary approach urged by Petitioners in which the Commission would be *dictating* the content of advertising.

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<sup>24</sup> Report and Order at ¶52. NAD/CAN apparently urge the Commission to narrowly construe “economic” burden so as to exclude logistical burdens as a legitimate reason to exempt advertising. But a logistical burden can translate into an economic burden -- by requiring, for example, the hiring of numerous additional people to monitor compliance. Congress was not solely concerned, moreover, with the cost of captioning *per se*. It also directed the FCC to take into account the impact on the operations of the program provider or distributor in crafting exemptions. H. Rep No. 104-204, 104th Cong. 1st Sess. 115. And it also expressed concern with whether captioning would impose “significant difficulty.” *See* §713(e) (defining “undue burden.”).

<sup>25</sup> Report and Order at ¶52.

**B. Petitioners Misconstrue The Late Night Exemption**

NAD/CAN also take issue with the Commission's decision to exempt late night programming aired between 2:00 a.m. and 6:00 a.m.<sup>26</sup>, and urge the Commission to reduce the length of the exemption. The Commission properly concluded, however, that "the costs of captioning late night programs outweigh the benefits to be derived from captioning such programming at this time. Programming distributed in the middle of the night typically has a very limited audience and receives limited revenues."<sup>27</sup> The FCC also noted that "for most of the history of television broadcasting, the late night hours were not occupied with programming at all due to the costs of producing and distributing programming for such a limited audience."<sup>28</sup> Petitioners present nothing to refute the finding of economic burden.

Petitioners also argue that the Commission erred in permitting program producers "to exempt programming service for any continuous four hour time period, beginning not earlier than 12 a.m. and ending not later than 7 a.m."<sup>29</sup> But in this respect the Petitioners appear to misread the FCC's rules. This particular aspect of the late night exemption applies only to networks that serve the United States with a single satellite feed crossing several time zones -- so-called "single-feed networks". These networks are limited in

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<sup>26</sup> NAD/CAN Petition at 10.

<sup>27</sup> Report and Order at ¶155.

<sup>28</sup> Id.

<sup>29</sup> NAD/CAN Petition at 11.

their choices to a continuous 4 hour block of time beginning no earlier than 12:00 a.m. local time and ending no later than 7:00 a.m. local time in any area where that service is intended for viewing. This rule essentially limits most single feed networks to an exemption between 3:00 a.m. and 7:00 a.m. Eastern Time. The FCC adopted a common sense approach that ensures that relatively larger audiences will still receive captioned materials while preserving the ability of single feed networks to take advantage of the exemption for hours when appropriate.

### **III. THE COMMISSION SHOULD NOT INCORPORATE A REVENUE TEST INTO ITS NEW NETWORK EXEMPTION, BUT SHOULD MODIFY ITS TREATMENT OF NEW NETWORKS**

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The Commission found that the “record supports the conclusion that new programming networks face significant start-up costs and that the additional costs of captioning could pose an economic burden that might deter entry by some networks.”<sup>30</sup> The FCC “did not intend [its closed captioning requirements] to inhibit new sources of video programming due to [its] interest in fostering diversity in video programming.”<sup>31</sup> Therefore, it gave new networks an exemption from the closed captioning rules for the first four years from the network’s launch date.

SHHH’s Petition urges the FCC to incorporate a revenue test into its new network exemption and require a new network that reaches a \$75 million gross revenues threshold

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<sup>30</sup> Report and Order at ¶154.

<sup>31</sup> Id.

to begin captioning.<sup>32</sup> But as the Petition for Partial Reconsideration of the Outdoor Life Network et al. demonstrates, new networks incur significant start-up costs. Even those with gross revenues in the range proposed by SHHH may not be breaking even.<sup>33</sup> Imposing captioning costs on top of these other significant costs may further imperil a new service's viability.

Moreover, as the Petitions of Outdoor Life Network et al. and Game Show Network demonstrate, the four year exemption in several aspects fails to provide meaningful relief to some new networks. As their Petitions make clear (and as SHHH's Petition also appears to acknowledge), the Commission erred in failing to grant new networks the benefit of a full transition period after their new network exemption expires.<sup>34</sup> Thus, we agree that new networks should be entitled to the same transition as their more established counterparts in order to more fairly ease their ramp-up to a full captioning load.

In addition, Outdoor Life Network et al. and Game Show Network demonstrate that even four years is insufficient time for some new networks to develop. This is particularly true for new networks that were recently launched. Many of these networks will never obtain the relief that the exemption intended, since those networks that

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<sup>32</sup> SHHH Petition at 6.

<sup>33</sup> See NCTA Comments at 19 (launching a new network can cost \$100 million or more, and take at least five years to break even).

<sup>34</sup> Outdoor Life Network et al. Petition at 6-9; Petition of Game Show Network, L.P. at 10-13.

launched within the last four years or so will gain no additional transition. But as the networks' Petitions point out, these networks are still on precarious financial footing and continue to need relief.

**IV. THE COMMISSION'S RULES STRIKE THE PROPER BALANCE REGARDING  
USE OF ELECTRONIC NEWSROOM CAPTIONING**

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Petitioners NAD/CAN urge the Commission to modify its rules regarding electronic newsroom ("ENR") captioning. Specifically, the Petition argues that "ENR does not fulfill the Congressional intent to provide *full access* to news programming for the deaf and hard of hearing."<sup>35</sup> Therefore, NAD/CAN urge that the FCC reverse itself and require real-time captioning of live news and public affairs programming after January 1, 2000.<sup>36</sup> Petitioners also propose that in the absence of a real-time captioning obligation, the FCC mandate that 90 percent of each live news program must contain captions in order to comply with the law.<sup>37</sup>

The Commission has already thoroughly considered the proposal to restrict ENR and the countervailing reasons why ENR should be permitted as a method of captioning.<sup>38</sup> The Petition raises nothing new and fails to provide reasons why the Commission should reopen this question. The Report and Order recognizes that ENR is a cost-effective means of achieving a high degree of captioning -- and may enable additional

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<sup>35</sup> Id. at 15.

<sup>36</sup> Id. at 16.

<sup>37</sup> Id.

<sup>38</sup> Report and Order at ¶84.

programming to be made accessible at a faster pace.<sup>39</sup> It should continue to be permitted. Otherwise, the costs of real-time captioning would overwhelm budgets for cable network news programming -- particularly for 24 hour cable news services -- and less captioning, not more, would result.

**V. THE COMMISSION SHOULD NOT MODIFY ITS UNDUE BURDEN PROCEDURES**

**A. The Petition Fails To Show A Practical Alternative For Those For Whom Captioning Poses An Undue Burden**

The NAD/CAN Petition attacks the FCC's rule that excuses a program from any captioning obligation during the pendency of an FCC determination on an undue burden petition.<sup>40</sup> The Petition instead proposes that the FCC require compliance with the captioning rules pending an affirmative finding that captioning would be an undue burden, and that the agency establish an outer time limit by which it must resolve the request.

We agree with NAD/CAN that undue burden requests should be resolved expeditiously. But NAD/CAN's suggestion that programs must be captioned pending a determination of an undue burden petition is unrealistic. Those filing an undue burden petition must make the case that captioning cannot be accomplished in their particular circumstances, even though the program or service would otherwise not fall within any of the exemptions already established under the rules. Requiring captioning in advance of

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<sup>39</sup> Id.

<sup>40</sup> NAD/CAN Petition at 17.

an undue burden finding essentially would make this provision of the Act a nullity, since a favorable ruling would have no effect. The Commission's rule provides an avenue for relief from captioning requirements that Congress intended in establishing the undue burden procedure. The rule should be maintained.

**B. No Time Limits Should Be Automatically Imposed On Undue Burden Exemptions**

For similar reasons, the rules should not require those who have obtained an undue burden waiver to continually seek extensions of that waiver, as the NAD/CAN Petition proposes.<sup>41</sup> The Commission struck the right balance in finding it “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” rather than adopting an across-the-board rule.<sup>42</sup> The approach advocated by NAD/CAN, by contrast, would strain Commission and programmer resources for no apparent reason. And it would unfairly force those least able to afford it -- those who have already demonstrated the economic burden that captioning would impose -- to bear the costs of unnecessary government paperwork.

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<sup>41</sup> Id.

<sup>42</sup> Report and Order at ¶205.

**VI. THE EXISTING COMPLAINT PROCEDURES STRIKE THE APPROPRIATE BALANCE**

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The NAD/CAN Petition proposes a complete overhaul of the complaint procedures adopted by the FCC. Those procedures, however, appropriately recognize the significant burdens that recordkeeping would impose on cable operators and program networks, and seek to ensure efficient compliance. They allow programmers and operators to maintain whatever records they deem appropriate in order to show compliance, upon complaint, with the captioning rules.<sup>43</sup> The approach adopted by the Commission is entirely justified, particularly because cable operators carry dozens of program services, virtually all of which transmit 24 hours per day. The recordkeeping proposed by Petitioners would impose significant costs and burdens on operators and programmers. It should not be adopted by the Commission.

The FCC's action here is entirely consistent with its approach in other areas. Where, as here, compliance with a particular rule or policy is complaint-driven, FCC rules typically do not require a regulated entity to demonstrate compliance in advance of a complaint through documentation in a public inspection file.<sup>44</sup> The Commission wisely has decided to put the onus on programmers and distributors to maintain records

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<sup>43</sup> Id.

<sup>44</sup> For example, a cable operator must justify its rate for a cable programming service tier after a complaint has been filed. 47 C.F.R. § 76.956 (cable operator response to rate complaint due 30 days after filing.) It is not required to include a form in its public inspection file demonstrating compliance with the FCC's rate formula. Similarly, no records need be kept for public inspection regarding compliance with the program access rules. Rather, an operator or programmer must submit an answer to the complaint that demonstrates compliance. 47 C.F.R. §76.1003.

sufficient to demonstrate compliance without imposing the additional paperwork and recordkeeping requirements that a public inspection file or reporting obligation would impose. This approach minimizes unnecessary government intrusion into the programming marketplace while ensuring that incentives remain to keep accurate records of their captioning efforts.

Second, the Commission adopted a complaint resolution procedure designed to facilitate informal resolution of captioning grievances. This approach will help preserve scarce Commission resources, and will lead to a speedier end to legitimate complaints. Petitioners nonetheless argue that requiring a complainant to first notify a video programming distributor about programming prior to complaining to the Commission is too time consuming and unduly burdensome on the public.<sup>45</sup> The Commission, however, often has successfully relied on this approach in other complaint contexts, recognizing the benefits of parties informally solving potential problems in the absence of formal government intervention. For example, in the program access arena, any aggrieved competitor prior to complaining to the FCC must notify the potential defendant.<sup>46</sup> Must carry complaints must first be sent by a broadcaster to a cable operator prior to filing with the FCC.<sup>47</sup> A complaint regarding cable signal quality must first be directed to the local

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<sup>45</sup> NAD/CAN Petition at 20.

<sup>46</sup> 47 C.F.R. §76.1003(a). See also 47 C.F.R. §76.1302(a) (notice required prior to filing complaint alleging violation of carriage agreement rules).

<sup>47</sup> 47 C.F.R. §§76.7(4)(i) and 76.61(a).

level.<sup>48</sup> And the Commission just this week announced changes to its complaint procedure in the common carrier area to “encourage[] parties to resolve their disputes informally before formal complaints are filed.”<sup>49</sup> In sum, the Commission correctly decided to apply this precedent to its captioning rules to facilitate resolution of complaints by the parties prior to FCC involvement.

Finally, the Commission should not adopt Petitioners’ suggestion to expedite the timetable for responding to complaints. The FCC already has imposed a 45 day response time for complaints. A cable operator will not always have the records necessary to show compliance by certain programmers that it carries and may need to contact the network or broadcaster in order for an appropriate response to a complaint.<sup>50</sup> Adopting a 20 day requirement, as Petitioners propose, is an unrealistically short period of time in which to prepare an accurate response and attempt to resolve any legitimate issues.

## **VII. PRE-RULE PROGRAMMING**

The rules require that 75 percent of “pre-rule” programming must be captioned at the end of a ten-year transition period. Unlike its requirements for “new” programming, the rules do not incorporate compliance benchmarks that dictate that a particular amount of pre-rule programming must be captioned prior to the end of the ten-year transition.

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<sup>48</sup> 47 C.F.R. §76.607.

<sup>49</sup> News Release, “Commission Adopts Streamlined Process for Resolution of Formal Complaints; Revised Process will Promote Competition By Enhancing Enforcement Efforts”, Report No. CC 95-57 (Nov. 25, 1997).

<sup>50</sup> Report and Order at ¶242 (complaint may be forwarded to responsible entity).

Petitioners argue that the Commission should adopt mandatory compliance benchmarks during the pre-rule transition period. The Commission carefully considered -- and rejected -- the suggestion to do so at this time. Instead, the FCC pledged to monitor distributors' efforts to increase the amount of captioned pre-rule programming.<sup>51</sup> It also warned that "if sufficient progress is not evident, [the FCC] may institute specific percentage requirements for the remaining years of the transition period."<sup>52</sup>

The Commission is right to rely on market forces to increase the captioning of pre-rule programming over time and not to impose benchmarks at this juncture. Congress was concerned that captioning requirements for pre-rule programming might interfere with the ability to air that programming. It instructed the FCC to adopt rules that avoided such a result.<sup>53</sup> The FCC appropriately took a cautious approach in this area. Providing more flexibility for achieving the required level of captioning pre-rule programming -- in particular by not including compliance benchmarks -- helps alleviate the legitimate concern that captioning otherwise would adversely affect the overall mix of older programs shown on television.<sup>54</sup>

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<sup>51</sup> Report and Order at ¶64.

<sup>52</sup> Id.

<sup>53</sup> H. Rep. No. 104-204, 104th Cong. 1st Sess. 114.

<sup>54</sup> In particular, as Encore Media Group's Petition points out, pre-rule programming produced before 1970 is most in jeopardy of being adversely affected by the captioning obligation. Petition for Reconsideration of Encore Media Group LLC (filed Oct. 16, 1997). Encore persuasively demonstrates that requiring captioning of pre-rule programming would impose costs that will make airing older, lesser known titles prohibitively expensive. According to Encore, "the result will be a severe cultural loss, not just the loss of a few cable channels and the resultant loss in diversity to viewers." Id. at 6.

NAD/CAN expresses skepticism that market forces, absent Commission benchmarks, will lead to an increasing amount of captioned pre-rule programming.<sup>55</sup> However, experience indicates that programmers over time reduce the amount of programming aired that is more than a decade old.<sup>56</sup> The record also shows that the amount of classic programming that is captioned has increased even in the absence of captioning mandates.<sup>57</sup> The Commission correctly chose to rely on these market forces instead of mandatory benchmarks, while exercising oversight to ensure that the marketplace develops as it anticipates.

#### **VIII. NEW PROGRAMMING**

The FCC established a transition period for captioning new programming that begins in the year 2000. SHHH's Petition seeks modification of this schedule, and urges the Commission to require captioning to begin on January 1, 1999.<sup>58</sup>

As our comments in this proceeding explained previously, the high level of captioning that the rules will require cannot be achieved overnight. The Commission recognized that "some time is needed to permit video programming distributors sufficient time to determine the availability of programming with closed captioning and to make whatever arrangements are necessary to ensure that they are able to provide programming

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<sup>55</sup> NAD/CAN Petition at 23.

<sup>56</sup> See, e.g., Comments of Home Box Office, MM Docket No. 95-176 (filed Feb. 28, 1997) at 17.

<sup>57</sup> Id.

<sup>58</sup> SHHH Petition at 3.

with closed captioning to viewers in compliance with our requirements.”<sup>59</sup> Significant efforts must be undertaken well before the initial compliance date to ensure that the benchmarks required to be met in 2000 will be attained. Pushing the start date up by a year will simply fail to afford those cable networks that have not captioned previously with sufficient time to ensure compliance.

While we strongly urge the Commission not to accelerate the first benchmark, we agree with the Petition of Outdoor Life Network et al. that the *measurement* of the amount of programming needed to achieve compliance with the initial and remaining new programming benchmarks should be modified. The Commission’s rules require captioning of an absolute amount of new programming, rather than a percentage of the new programming shown on a particular network. This method of calculating the number of hours of required captioning results in much higher benchmarks for many networks than the Commission’s Notice of Proposed Rulemaking in this proceeding suggested would be the case. This, in turn, significantly increases the costs of captioning for many networks, and denies them the benefit of the eight year transition. We urge the Commission to reconsider this aspect of its rules to ensure a more equitable result.

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<sup>59</sup> Report and Order at ¶44.

**CONCLUSION**

For the foregoing reasons, the Commission should deny the Petitions of  
NAD/CAN and SHHH.

Jill Lockett  
Vice President,  
Program Network Policy

Respectfully submitted,



Daniel L. Brenner  
Diane B. Burstein

1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
202-775-3664

Counsel for National Cable Television  
Association

November 28, 1997

## CERTIFICATE OF SERVICE

I, Tonya K. Bartley, certify that the foregoing OPPOSITION TO PETITIONS FOR RECONSIDERATION was served by first-class mail this 28th day of November 1997 to the following:

Karen Peltz Strauss, Esquire  
Legal Counsel for Telecommunications  
Policy  
National Association of the Deaf  
814 Thayer Avenue  
Silver Spring, MD 20910-4500

Lori Dolquiest, Esquire  
Angela Campbell, Esquire  
Institute for Public Representation  
Georgetown University Law Center  
600 New Jersey Avenue, N.W., Suite 312  
Washington, D.C. 20001-2022

Ms. Donna Sorkin  
Executive Director  
Self Help for Hard of Hearing People, Inc.  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814

Ms. Kim Cunningham  
Vice President Business Affairs  
Game Show Network, L.P.  
10202 West Washington Boulevard  
Culver City, CA 90232-3195

Stanley M. Gorinson, Esquire  
Martin L. Stern, Esquire  
William H. Davenport, Esquire  
Preston Gates Ellis & Rouvelas Meeds, LLP  
1735 New York Avenue, N.W., Suite 500  
Washington, D.C. 20006-4759

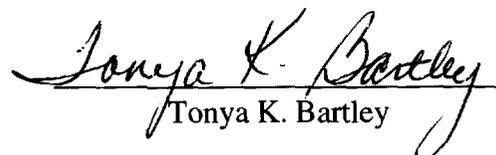
Burt A. Braverman, Esquire  
James W. Tomlinson, Esquire  
Cole, Raywid & Braverman, L.L.P.  
1919 Pennsylvania Avenue, N.W., Suite 200  
Washington, D.C. 20006

James J. Popham, Esquire  
Vice President, General Counsel  
Association of Local Television Stations, Inc.  
1320 Nineteenth Street, N.W., Suite 300  
Washington, D.C. 20036

Jeffrey D. Knowles, Esquire  
Ian D. Volner, Esquire  
Heather L. McDowell, Esquire  
Venable, Baetjer, Howard & Civiletti, L.L.P.  
1201 New York Avenue, N.W., Suite 1000  
Washington, D.C. 20005

Paul J. Sinderbrand, Esquire  
Wilkinson, Barker, Knauer & Quinn, L.L.P.  
2300 N Street, N.W.  
Washington, D.C. 20037-1128

Marilyn Mohrman-Gillis, Esquire  
Lonna M. Thompson, Esquire  
Association of America's Public Television  
Stations  
1350 Connecticut Avenue, N.W.  
Washington, D.C. 20036

  
Tonya K. Bartley