

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

In the Matter of)
)
Closed Captioning of Video Programming) CG Docket No. 05-231
)
Telecommunications for the Deaf, Inc.)
Petition for Rulemaking)

To: The Commission

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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TABLE OF CONTENTS

Executive Summary	i
I. Introduction.....	1
II. Marketplace Incentives Are Sufficient To Ensure Quality Captioning	2
III. The Commission Should Refrain From Establishing Accuracy Standards And Instead Should Focus On Constructive Solutions To Improving Captioning	5
IV. Because The Record Demonstrates Both A Shortage Of Real-Time Stenocaptioners And Significant Costs For Captioning News Programming, The FCC Should Not Alter Its Electronic Newsroom Technique Regulations.....	11
V. The Commission’s Regulations Should Foster The Development Of New Caption Technologies.....	16
VI. Conclusion	17

Executive Summary

The National Association of Broadcasters hereby submits these reply comments in response to the *Notice of Proposed Rulemaking* in the closed captioning of video programming proceeding. When the FCC adopted closed captioning rules to implement Section 713 of the Communications Act, it sought to provide “a fair balance between the interests of persons with hearing disabilities and video programming interests.”

Many of the comments responding to the Commission’s *Notice of Proposed Rulemaking* demonstrate that (1) the current regulatory regime and the competitive video marketplace maintain this carefully crafted “balance” and (2) the proposed caption standards would do little to improve captioning quality, cannot alleviate the shortage of real-time stenocaptioners and do not benefit the overall public interest.

Of particular concern is the FCC’s proposal to prohibit the use of Electronic Newsroom Technique (“ENT”) beyond the Top 25 markets. Faced with declining news revenues, and the capital expenditures of the digital television transition, the comments demonstrate that the proposed prohibition would significantly impede broadcasters’ ability to serve their local communities, especially for small and medium market stations. The likely result would be a loss in local news coverage. The proposed regulations are also likely to have counter-productive consequences, such as deterring the development of more cost-effective captioning technology.

Finally, while NAB supports streamlining the captioning complaint process, we urge the Commission to refrain from imposing additional regulations on television broadcast stations at this time. In lieu of onerous standards, the Commission would more

effectively improve caption quality standards by working with captioners to establish “best practices” for the captioning community.

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I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these reply comments in the above-captioned proceeding. In implementing Section 713 of the Communications Act, 47 U.S.C. § 613, dealing with Video Programming Accessibility,² the Commission sought to provide “a fair balance between the interests of persons with hearing disabilities and video programming interests.”³ As discussed below, many of the

¹ NAB is a nonprofit, incorporated association of radio and television stations and networks that serves and represents the American broadcasting industry.

² In the Matter of Closed Captioning and Video Description of Video Programming *Report and Order*, MM Docket No. 95-176, 13 FCC Rcd 3292-93 (1997) (“*Report and Order*”); In the Matter of Closed Captioning and Video Description of Video Programming, *Order On Reconsideration*, MM Docket No. 95-176, 13 FCC Rcd 19973 (1998) (“*Reconsideration Order*”).

³ *Reconsideration Order* at ¶ 15. Section 713 of the Communications Act recognized the need to balance the goal of achieving full accessibility with the economic and technical constraints broadcasters and other program producers face. The statute empowers the FCC to exempt programs and classes of programs or services where “the provision of closed captioning would be economically burdensome to the provider or owner of such

comments filed responding to the Commission’s *Notice of Proposed Rulemaking*⁴ demonstrate that (1) the current regulatory regime and the competitive video marketplace maintain this carefully crafted “balance” and (2) the proposed caption standards would do little to improve captioning quality, cannot alleviate the shortage of real-time stenocaptioners and do not benefit the overall public interest, particularly for those broadcasters who rely on Electronic Newsroom Technique to serve their local communities. While NAB supports streamlining the captioning complaint process, we urge the Commission to refrain from adopting at this time additional costly regulations that will clearly burden television broadcast stations, especially ones in smaller markets.

II. Marketplace Incentives Are Sufficient To Ensure Quality Captioning.

The Commission seeks comment on a number of captioning requirements, including technical and non-technical quality standards ranging from spelling, grammar and punctuation to verbatim or edited for reading speed, incomplete or unsynchronized captions. *Notice* at ¶¶ 10-18. Previously, the Commission declined to impose standards governing the quality of closed captioning, noting the difficulty of establishing standards, the administrative burden that would be imposed on video programming providers and

programming.” 47 U.S.C. § 613(d)(1). The statute also permits providers and program owners to seek an exemption on a case-by-case basis where captioning requirements would create an undue burden. 47 U.S.C. § 613(d)(3). As the Conference Report explained, Congress specifically contemplated under this latter provision that the Commission “shall balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.” H.R. Report 104-458, 104th Cong. 2nd Sess. (1995) at 183.

⁴ In the Matter of Closed Captioning of Video Programming, *Notice of Proposed Rulemaking*, CG Docket No. 05-231, rel. July 21, 2005 (“*Notice*”).

the Commission if such standards were adopted, and the marketplace incentives for programming providers to ensure the high quality of captioned programs.⁵

Given the intense level of competition in today's video marketplace, broadcasters have a compelling economic incentive to ensure that their programming is accessible to all Americans. NAB agrees with Caption Colorado that the Commission's rules have already been "demonstrated to be effective and efficient."⁶ In fact, as Cosmos Broadcasting, *et al.* points out, the Nielsen rating system does not exclude hard of hearing viewers from its diary panels. Comments of Cosmos Broadcasting, *et al.* at 10. Thus, broadcasters have a built-in economic incentive to ensure quality captioning. And as captioning becomes ubiquitous, beginning with the 100% new programming benchmark in January, 2006, there are additional market incentives for "video programming providers and distributors to differentiate their programming on the basis of the quality of captioning, rather than just the existence of captioning." Comments of United States Telecom Association at 6. Simply stated, the marketplace provides the appropriate incentive to ensure that captioning is, and will remain, a top priority for video programming providers.

Before the Commission imposes significant and burdensome regulatory measures, it must first demonstrate that its decision is supported by a sufficient factual record.⁷ While other parties have cited examples of captioning errors, the record does not

⁵ *Report and Order* at ¶¶ 222-224.

⁶ Comments of Caption Colorado at 4. *See also* Comments of KJLA, LLC at 4; Comments of the National Cable & Telecommunications Association ("NCTA") at 3; Comments of Echostar, L.L.C. at 8.

⁷ *See, e.g., Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (court rejected restrictions on cellular providers' participation in certain auctions as arbitrary because Commission failed to factually support the rules).

evidence a widespread marketplace failure of broadcasters' delivery of high-quality captioning that warrants a change in the agency's course at this time. As Caption Colorado points out, the examples raised by the *Telecommunications for the Deaf Petition*⁸ "may not reflect the current status of the industry. Our company actually logs the amount of downtime it experiences on each of its station or network customers and the percentage or minutes of missed captioning is negligible." Comments of Caption Colorado at 29.⁹ Broadcasters, who collectively caption hundreds of thousands of hours of broadcast programming, have not received a large number of complaints, either directly by consumers or via the Commission, to alert them to serious inadequacies in the overall quality of captioning. Also, viewers may naturally notice and focus on the few errors that appear in closed captioning, rather than on the high percentage of captioning that is error-free.¹⁰ Thus, captioning that has an outstanding accuracy rate may still trigger complaints.

Although the comments in this proceeding do not evidence any widespread marketplace failure that warrants regulatory change, NAB nevertheless agrees that the Commission should streamline its complaint process to ensure that, for the few occasions where viewers experience glitches with their captioned programming, there is an effective method for contacting programming providers. *See* Comments of NAB at 4-6. We agree that it should be clear to consumers where captioning complaints should be directed. However, any requirement to post specific phone numbers or e-mail addresses

⁸ In the Matter of Closed Captioning of Video Programming, *Petition for Rulemaking*, Telecommunications for the Deaf, *et al.*, RM Docket No. 11065, filed on June 23, 2004.

⁹ *See also* Comments of DIRECTV, Inc. at 2 (stating that there is insufficient evidence that significant captioning problems exist to warrant regulatory change).

¹⁰ *See* Comments of Caption Colorado at 29-30.

on the Internet must be limited to those stations that have already established Internet websites.¹¹ Along with the NCTA, NAB also supports a shortening of the complaint process to 30 days from receipt of a complaint. *See* Comments of NCTA at 8. NAB recognizes that timely responses to captioning complaints best serve American consumers.

III. The Commission Should Refrain From Establishing Accuracy Standards And Instead Should Focus On Constructive Solutions To Improving Captioning.

Although NAB supports streamlining the complaint process, further revisions to the Commission's captioning rules are unwarranted and highly unlikely to lead to an improvement in captioning quality. Governmental regulation simply cannot eliminate the human error component associated with creating and encoding captions. Despite broadcasters' very best efforts, captions will have both technical and non-technical errors. The captioning community clearly recognizes these inherent limitations. For example, technical glitches can cause captions to "display to the viewer on her or his television at a lower quality due to a variety of circumstances between the creation and the viewing." Comments of National Captioning Institute at 2. And "since the caption data is inserted directly into the television transmission signal, anything blocking the signal path will cause the captions to become garbled or disappear all together." Comments of NCRA at 7. Technical glitches also include problems associated with viewers' reception, problems that are wholly outside the control of the broadcaster.

¹¹ The FCC adopted this approach in its EEO proceeding. There, the Commission specifically limited its requirement that broadcasters post the EEO public file report to those stations that already had a station web site. *See* In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, *Second Report and Order and Third Notice of Proposed Rulemaking*, MM Docket No. 98-204, 17 FCC Rcd 24018 at ¶ 141 (2002).

Indeed, the Commission has specifically noted that “[t]here are a variety of circumstances where captioning may be problematic. Such situations include, but are not limited to, equipment failures, the inability to obtain captioning resources on short notice or the receipt of programming without the expected captions.” *Reconsideration Order* at ¶ 10. The Commission further emphasized that it would not consider “*de minimis*” amounts of uncaptioned programming a violation of the rules. *Id.* NAB thus urges the Commission to refrain from defining technical standards and establishing forfeitures for failure to reach captioning standards that are unattainable.

NAB also concurs with Media Captioning Services that establishing “standards” will not yield benefits, but rather will place “a huge administrative compliance burden on the FCC, video programmers and caption companies.” Comments of Media Captioning Services at 21.¹² This is especially true for non-technical standards, which are defined, controlled by, and may vary by, the person who creates the captions.¹³ Particularly problematic is establishing accuracy rates for real-time captioners.

Despite some commenters’ calls for establishing accuracy standards of 99 percent or near 100 percent for real-time captioning,¹⁴ the record does not demonstrate that such rates are feasible. For example, Caption Colorado notes that the Commission’s proposed

¹² See also Comments of Caption Colorado at 3 (“adoption of standards for realtime captioning could result in one of several potential adverse consequences to the television industry”).

¹³ See Comments of the National Court Reporters Association (“NCRA”) at 3 (“Nontechnical standards go the skill, knowledge and the ability of the realtime captioner, and is the one area where the realtime captioner has control over the actual quality of the captions”).

¹⁴ See Comments of American Society for Deaf Children at 1 (“consumers should be able to expect 100 percent or near 100 percent accuracy of captions”); Comments of WGBH at 8 (“accuracy rates should be 99% or above”).

three percent error rate would be “absurdly low” if the Commission’s standards did not take into account the inherent limitations of real-time captioning, such as the necessity to paraphrase, to drop non-essential words, problems with unclear speech, speech that is articulated at a pace faster than 180 words per minute, etc. Comments of Caption Colorado at 23. The Accessible Media Industry Coalition (“AMIC”) indicates that its average error rate is higher than the Commission’s proposal, at about 5 percent. *See* Comments of AMIC at 12. Similarly, Media Captioning estimates that a 95 percent accuracy rate is the functional equivalence of accurate, although there are variations due to pace of speech, number of speakers during a program, etc. *See* Comments of Media Captioning Services at 7. Other estimates as to the accuracy of real-time captioning performed by captioning services is significantly lower. For instance, NBC Telemundo’s own analysis shows accuracy rates “of no better than 84 percent according to a straightforward word-error metric.” Comments of NBC Telemundo, Inc. at 7.¹⁵

Beyond showing the Commission’s proposed error rate to be unrealistic, these variations in the accuracy estimates between commenters underscore an inherent problem in defining specific error rates. Because there are necessary omissions and choices involved in providing real-time captioning,¹⁶ it is nearly impossible to establish benchmarks for determining whether a program has been accurately captioned. For example, how could accuracy rates for non-verbatim captions or for captioning for unspoken dialogue be established? Should there be a separate accuracy rates associated with different speeds of dialogues or number of simultaneous speakers? And as AMIC

¹⁵ *See also* Comments of NCRA at 10 (Some proponents of a near 100 % captioning 100% accuracy rate for captioning may be under the impression that “captions are automatically created via specialized equipment”).

¹⁶ *See, e.g.*, Comments of National Captioning Institute at 3; Comments of the Motion Picture Association of America at 7.

points out, caption placement (which must take into account reducing screen obstruction and identifying speakers) is often a matter of stylistic difference. *See* Comments of AMIC at 5 and 10. A delay in rollout or pop-up, which may be inappropriate for some programming, is appropriate in other contexts. How would such issues affect accuracy standards for caption placement? Especially for breaking news or unscheduled programming, there can be a delay in securing stenocaptioning services. *See* Comments of NBC Telemundo, Inc. at 7. In short, calculating appropriate error percentages for the editing choices that captioners make, and the delays that may occur with breaking or unscheduled programming, is extremely difficult, if not impossible.

Just as regulation cannot improve the accuracy of real-time captioners, it also cannot eliminate occasional captioning errors associated with pre-produced programming. NAB respectfully disagrees with Media Captioning Services that errors in pre-produced programming are “the result of deficiencies in the production process, pressure to meet production deadlines, and/or ineffective quality control procedures.” Comments of Media Captioning Services at 10. As with captioned live programming, pre-recorded programming is susceptible to technical glitches along various points of the distribution chains, including glitches with viewers’ own equipment. *See* Comments of the Motion Picture Association of America at 4 (“MPAA”). And as articulated by AZN Television, *et al.*, offline captioning can take several days to complete; in some cases, due to production schedules, the only viable captioning method available to programming producers and distributors is real-time captioning. *See* Comments of AZN Television, *et al.* at 20. Thus, while NAB agrees with the New Jersey Division on Civil Rights that there needs to be flexibility to allow private industry to serve the public, we do not concur that there should be no allowable errors for pre-produced programs. *See*

Comments of the New Jersey Division of Civil Rights at 2-3. Nor should the Commission adopt its proposed 0.2% allowable error rate for pre-produced programs. *Notice* at ¶ 15. As Caption Colorado notes, the reality of strict schedules and other financial considerations do not always allow time for multiple reviews of captions to guarantee that each word and phrase is captioned verbatim. Comments of Caption Colorado at 9. Therefore, for a variety of reasons, captioning for both live and pre-produced programming is susceptible to occasional technical and non-technical errors.

In addition to the difficulty in establishing accuracy rates for captioned programming, the costs associated with imposing standards far outweigh any commensurate benefit. Notably absent from the record is any indication that imposing both technical and non-technical standards, and imposing forfeitures for failure to comply, can, by any significant measure, improve the quality of closed captioning. To the contrary, fines to encourage captioning compliance are unnecessary and “would likely even be counter-productive to the objectives of the FCC’s Captioning Regulations in several respects.” Comments of Caption Colorado at 32.¹⁷ Were, for instance, the Commission to adopt non-technical standards, there could be a significant increase in the per hour cost of captioning.¹⁸ The potential consumer harm in imposing unreasonable qualitative standards, with associated increased costs, for closed captioning is very real.

¹⁷ *See also* Comments of Home Box Office, Inc. at 7 (stating that additional regulation would stifle flexibility and innovation and would do little to improving the amount and quality of closed captioning).

¹⁸ *See* Comments of Media Captioning Services at 17-18 (stating that rise in costs “may very well be the intended objective of certain companies actively pursuing federally mandated closed captioning ‘standards’”); Comments of Caption Colorado at 17 (requirements could result in “doubling of the current cost of realtime captioning”).

Faced with task of delivering “perfect” captioning or risking significant forfeitures, local stations may err on the side of caution and refrain from airing live, local programming, including breaking news and emergency weather information.¹⁹ Such a result would be contrary to the Commission’s efforts to promote localism. NAB agrees with Cosmos Broadcasting, *et al.*, that the proposed regulations would “shift the focus from serving local viewers to meeting artificial appearance standards.” Comments of Cosmos Broadcasting, *et al.*, at 8. This clearly does not benefit the public interest.

Indeed, Congress did not intend for the Commission’s captioning rules to result in the loss of programming choices.²⁰ The Commission therefore should not impose regulatory benchmarks so onerous that they act as a deterrent to delivering local programming. As AMIC points out, it is far preferable that the Commission refrain from imposing forfeitures for “occasional problems that are likely to occur due to the complex nature of creating accurate captions and preserving their integrity through the entire delivery process.” Comments of AMIC at 4.

In lieu of additional regulation, NAB urges the Commission to retain Congress’ balance, as it has done during the past eight years. As NCTA notes, the Commission’s

¹⁹ In addition, NAB agrees with the Florida Association of Broadcasters (“FAB”) that the FCC should avoid enforcement standards “that would impair the ability of journalists and licensees to make the needed good faith judgment calls required during chaotic and dynamic conditions.” Comments of FAB at 4. Similarly, the Radio and Television News Directors Association (“RTNDA”) notes that the Commission’s “no exceptions” policy of “requiring ‘simultaneous or nearly simultaneous’ presentation of aural and visual critical emergency information ... places broadcasters in untenable situation of withholding information until real-time captioning can be activated or appropriate personnel are in place to prepare visuals”). Comments of RTNDA at 10-11. NAB thus urges the Commission not to deter through forfeitures the dissemination of emergency information.

²⁰ See H.R. Rep. No. 458, 104th Cong., 2d Sess. (1996) at 183 (House Report provided that “the Commission shall balance the need for closed captioned programming against the potential for hindering the development and distribution of programming”).

Reconsideration Order clearly demonstrated sensitivity for technical and inadvertent captioning mistakes. *See* Comments of NCTA at 11. NAB urges the Commission to retain this necessary sensitivity. Additionally, the Commission should focus on encouraging cooperative, non-adversarial relationships between captioners and programming distributors. NAB shares the concerns raised by Caption Colorado that imposing standards for captioning quality may have the unintended consequence of disrupting established business relationships and ultimately diminishing the overall quality of captioned programming. *See* Comments of Caption Colorado at 32-35. NAB therefore agrees with NCRA that the Commission would more effectively improve caption quality standards by working with captioners to establish “best practices” for the captioning community. *See* Comments of NCRA at 4. Because broadcasters and other programming distributors are reliant upon the skills of outside caption companies to create captions, the Commission can best ensure continued improvements in the quality of captioning by focusing on “best practices” and similar voluntary measures by those that create and have control over the accuracy of captions.

IV. Because The Record Demonstrates Both A Shortage Of Real-Time Stenocaptioners And Significant Costs For Captioning News Programming, The FCC Should Not Alter Its Electronic Newsroom Technique Regulations.

In addition encouraging the establishment of “best practices,” NAB also urges the Commission to work with the captioning community to explore ways to reduce the shortage of qualified captioners. Commenters generally agree that there is currently a shortage in the number of real-time stenocaptioners.²¹ And due to competing demands

²¹ *See, e.g.*, Comments of Cosmos Broadcasting Corporation, *et al.* at 4 (estimating the number of stenocaptioners at 500); Comments of NCTA at 14 (citing S. Rep. No. 109-93, 109th Cong. 1st Sess. (June 25, 2005)) (estimating there are currently 300 English language and 6 Spanish language trained real-time captioners); Comments of Media

for captioners' skills, primarily from real-time court and deposition reporting, the number of real-time captioners for video programming may actually be decreasing.²² One commenter even described today's captioning marketplace as "dysfunctional, predatory, and non-competitive." Comments of Media Captioning Services at 3. Additionally, the shortage of real-time captioners (and the costs associated with captioning) may be exacerbated by the advent of digital over-the-air multicasting. See Comments of NBC Telemundo License, Inc. at 2.

Because real-time captioning is a skill that requires at least two to four years of training, immediate relief from the shortage is unlikely. NCRA has stated that, although the current federal funding of captioning training has had a positive impact, "it is far from adequate to achieve the graduation rates of reporters that are necessary to meet the demands of the 1996 Telecommunications Act." Comments of NCRA at 10.²³ Indeed, Congress recognizes the pervasiveness of the captioning shortage – in 2005 the Senate proposed legislation, S. 268 - Training For Realtime Writers Act, to remedy this problem through the granting of competitive training grants. NAB thus encourages the Commission to work with the captioning community to explore how additional resources can be directed towards the training of stenocaptioners.

Captioning Services at 6 (estimating there are 625-650 real-time captioners, with 450 captioners working for top 4 firms); Comments of Caption Colorado at 19 (stating that approximately 400 real-time captioners currently provide all real-time captioning in the United States). See also *The Captioning Crisis: A Case for Swift and Decisive Action*, National Court Reporters Association, at 1 (rel. Aug. 22, 2005), found at http://www.ncraonline.org/infonews/press/media_homepage.html.

²² See Comments of Caption Colorado at 20; Comments of Media Captioning Services at 17; Comments of National Captioning Institute at 5.

²³ Media Captioning Services notes that passage rates for the California State Certified Shorthand Reporter exam rates has been only 11-22%. Comments of Media Captioning Services at 16.

Given this serious shortage real-time captioners, the Commission should not consider extending the prohibition on the use of Electronic Newsroom Technique (“ENT”) for captioning news beyond the top 25 markets. At this time (and for the foreseeable future), there are simply not sufficient numbers of stenocaptioners available to provide real-time captioning services for every local television station in the United States. *See* Comments of WGBH at 24; Comments of Dana Mulvany, MSW at 5. In fact, given that the number of available captioners is estimated to be between 300 to 650, it is doubtful whether any stations beyond the top 25 markets could even secure real-time stenocaptioning services.

In addition to the stenocaptioner shortage, extending the prohibition on the use of ENT would be extremely burdensome, particularly for broadcasters in small and medium-sized markets who are already struggling to finance the digital transition and suffering declining news revenues. As detailed in our initial comments,²⁴ imposing such burdens may also have the unintended consequence of creating disincentives for local broadcasters to air local news. Many of the broadcast commenters detailed that costs associated with real-time captions for news would be prohibitive. For example, Hubbard Broadcasting explains that for its station WDIO-TV, the annual costs of real-time captioning would exceed \$178,350, representing over 15% of their annual news budget, or the equivalent of seven fulltime news reporters’ salaries. Comments of Hubbard Broadcasting, Inc. at 2-5. And as the RTNDA points out, in small and medium markets “each \$20,000 spent on real-time closed captioning means we lose one news staffer, and

²⁴ *See* Comments of NAB at 6-10.

our coverage suffers.” Comments of RTNDA at 5.²⁵ Extending the ENT prohibition beyond the top 25 markets therefore would likely force small and medium market broadcasters, who lack the resources to provide real-time captioning for news programming, to reduce or even remove local news programming from their schedules. *Id.* at 7.²⁶ This is clearly contrary to the public interest. As Hubbard Broadcasting aptly states: “[d]estroying the economic ability of small market television stations to serve their communities with local programming would harm hearing impaired and all other viewers.” Comments of Hubbard Broadcasting, Inc. at 2.²⁷

The Commission itself has recognized that caption costs could deter local programming. In imposing the ENT prohibition only on the top 25 markets, the Commission specifically stated that a “real-time captioning requirement could impose an economic burden on smaller entities since resources are likely to be limited, costs for real-time captioning remain high and methods for remote real-time captioning are still being developed.” *Reconsideration Order* at ¶ 37. Those economic realities still exist today, exacerbated by declining news revenues and the costs associated with the digital television transition. *See* Comments of NAB at 6-10. And while it recognized that

²⁵ RTNDA estimates that captioning costs on average about \$150 per hour, but can cost a station as much as \$500,000 per year. *See* Comments of RTNDA at 4.

²⁶ NBC Telemundo states that costs of local news may be proving unsustainable. *See* Comments of NBC Telemundo, Inc. at 8 (*citing* Special Factual Submission in Support of Multicast Carriage by the NBC television Affiliates Association, CS Docket Nos. 98-120, 00-96 & 00-2, at 16 (Jan. 8, 2004); Special Factual Submission in Support of Multicast Carriage by the CBS Television Network Affiliates Association, CS Docket Nos. 98-120, 00-96 & 00-2, at 14 & n. 33 (Jan. 13, 2004)).

²⁷ Additionally, NAB concurs with Lincoln Broadcasting Co. that the Commission should retain 47 C.F.R. § 79.1(d)(3) of its rules to ensure that foreign language programming can utilize ENT as a cost-effective means to caption programming. *See* Comments of Lincoln Broadcasting Co. at 4-5 (noting that real-time captions costs for Chinese-language news could exceed \$5700 per hour).

stations using ENT may have some unscripted portions of their newscasts uncaptioned, the Commission balanced this against the cost of live captioning and the absence of a large pool of trained stenocaptioners. It chose to urge stations to script (and therefore caption) additional portions of their news programs, and it committed itself to reexamining this issue in light of station experience and the availability of live captioning services or other new captioning technologies, including voice-recognition software.²⁸ In the intervening years, however, there have not been substantial developments in either captioning technologies or the number of stenocaptioners that justify an altering of this regulatory balance.

Today, many stations outside the top 25 markets rely on ENT to provide captions for local programs. This technology permits them to feed teleprompter or other scripted material into the captioning encoder, substantially reducing the cost of captioning. ENT allows many stations the ability to deliver timely and relevant news programming to the local communities they serve. Much of the programming in local news and public affairs is prepared in advance of airing. Television talent generally adheres to these scripts as they are read through a teleprompter. Thus, the ENT conveys the primary substance of the news broadcast. Additionally, some stations that cannot afford real-time captioning for all the news they produce supplement ENT with live captioning of weather, traffic and late-breaking news.

The effect of extending the prohibition on the use of ENT would be a reduction in the amount of locally produced news and other programming. The detriment to the public of such a result is evident. Given the substantial costs and practical difficulties, as

²⁸ The Commission also opined that during the phase-in of its captioning rules “video programming providers will have sufficient leeway to experiment and use new captioning techniques.” *Id.* at ¶ 42.

well as the limited benefits, NAB urges the Commission to refrain from extending the prohibition on the use of ENT. In this instance, a properly conducted cost/benefit analysis of the proposed regulation, an integral part of agency decision making, would clearly demonstrate that expansion on the prohibition on the use of ENT is imprudent.²⁹

V. The Commission’s Regulations Should Foster The Development Of New Caption Technologies.

In lieu of new costly and burdensome regulatory measures, NAB urges the Commission to work with industry to develop feasible solutions for improved and cost-effective methods of news captioning, including the development of voice-recognition and other technologies. NAB agrees with ENCO Systems that, if technical solutions are to evolve and improve, there must be flexibility within the Commission’s regulations to foster such development. Comments of ENCO Systems, Inc. at 2. Similarly, MPAA echoes the concern that imposing new quality standards could short-circuit technological developments, such as voice-recognition software. Comments of MPAA at 2. NAB also agrees with United States Telecommunications Association (“USTA”) that programming providers have made “tremendous strides” in captioning and that both technological and market developments will continue to improve captioning, without the need for government intrusion. Comments of USTA at 4. Ultimately, technology may offer an

²⁹ The Commission is required to reasonably assess the costs of the agency’s actions. See, e.g., *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins.*, 463 U.S. 29, 54 (1983) (agency needs to “look at the costs as well as the benefits” of a regulatory standard); *People of the State of California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990) (reviewing court “must be satisfied that the Commission’s assessment of the various costs and benefits is reasonable in light of the administrative record,” and “if the FCC’s evaluation of any significant element in the cost/benefit analysis lacks record support,” then the court “cannot uphold the agency action” under the Administrative Procedure Act): *United States Telecom Association v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (finding that FCC’s failure to explain how it implemented provisions of the Communications Assistance for Law Enforcement Act in a “cost-effective” manner was “a classic case of arbitrary and capricious agency action”).

automated, and in-house, closed captioning solution. *See* Comments of Cosmos Broadcasting, *et al.* at 11.

The Commission should ensure that its regulations leave broadcasters with sufficient flexibility to avoid a loss of valuable programming for the public at large while meeting the needs of the hearing-impaired. Establishing specific accuracy benchmarks and onerous monitoring requirements will frustrate the development of such new technologies because broadcasters and other programming providers will be deterred from utilizing new technologies that do not, at the outset, meet such benchmarks. The inevitable result would be delays in improving these new captioning technologies because captioning companies will be less willing to invest in research and development. Moreover, companies that develop other technologies, which, in the future, could be applied to captioning, would be discouraged from entering the captioning market because these new technologies might not initially meet certain accuracy benchmarks. Thus, adopting specific accuracy requirements could have the unintended consequence of stifling captioning innovation entirely.

VI. Conclusion.

For the above-described reasons, NAB supports measures to streamline the captioning complaint process, and encourages the captioning communities' development of "best practices" and ways to alleviate the shortage of real-time stenocaptioners. As many commenters noted, many of the proposed rules governing quality, monitoring and reporting requirements will not lead to improvements in captioning quality. Rather, they impose undue burdens on television broadcasters, particularly in medium and small markets, and could even discourage stations from providing local news and other

programming. Finally, the imposition at this time of extensive accuracy and other captioning standards would likely have counter-productive consequences, such as deterring the development of more cost-effective captioning technology. NAB respectfully submits that the record here does not warrant such a change in agency course.

Respectfully submitted,

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