

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Closed Captioning of Video Programming |) | CG Docket No. 05-231 |
| |) | |
| Closed Captioning Requirements for Digital Television Receivers |) | ET Docket No. 99-254 |

**COMMENTS OF
TELECOMMUNICATIONS FOR THE DEAF AND HARD OF HEARING, INC.;
ASSOCIATION OF LATE-DEAFENED ADULTS, INC.;
NATIONAL ASSOCIATION OF THE DEAF;
DEAF AND HARD OF HEARING CONSUMER ADVOCACY NETWORK;
CALIFORNIA COALITION OF AGENCIES SERVING
THE DEAF AND HARD OF HEARING;
HEARING LOSS ASSOCIATION OF AMERICA;
COMMUNICATION SERVICE FOR THE DEAF; AND
AMERICAN ASSOCIATION OF THE DEAF-BLIND**

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through its undersigned counsel; Association of Late-Deafened Adults, Inc. (“ALDA”); National Association of the Deaf (“NAD”); Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”); California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”); Hearing Loss Association of America (“HLAA”); Communication Service for the Deaf (“CSD”); and American Association of the Deaf-Blind (“AADB”) (collectively, the “Consumer Groups”), hereby respectfully submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.¹

¹ *In the Matter of Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receiver, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, FCC 08-255 (November 7, 2008) (“NPRM”).*

The Commission must require closed captioning for *all* digital video programming streams, including “multicasts.” The closed captioning rules have been in place for a decade. Yet people who are deaf or hard of hearing have never had equal access to video programming. The implementation of the closed captioning rules has finally achieved a measure of access that, while not complete, is significant. At this point in time, the failure of the existing closed captioning rules to provide complete and equal television access results in viewers who are deaf and hard of hearing being treated as marginalized, second-class citizens, and calls into question whether existing exemptions are justifiable. While the Consumer Groups believe it may be time to revisit the current closed captioning rules and move closer to 100% captioning of all broadcast programming, these comments are necessarily limited to the issues raised in this NPRM related to multicast streams.

With the transition to digital, a broadcaster will have the ability and choice to multicast several streams of programming over its digital allocation, and as described herein, the Commission must ensure that a broadcaster’s choice to multicast carries with it the obligation to close caption all of its video programming. A broadcaster’s business decision to multicast must include consideration of its concomitant public interest obligations. The Consumer Groups are emphatic that the Commission’s closed captioning rules must be equally applied to digital television and rigorously enforced. Therefore, if a broadcaster chooses to multicast, the Commission should apply the existing \$3 million annual gross revenue exemption, pursuant to Section 79.1(d)(12),² to the overall operations of a broadcaster’s digital allocation, rather than its individual multicast streams of programming.

² 47 C.F.R. § 79.1(d)(12).

The Consumer Groups appreciate the Commission’s acknowledgement that “where a licensee chooses to multicast, the multicast channels do not constitute a new network.”³ The Section 79.1(d)(9) exemption is intended only for networks that are truly new to video programming,⁴ and using a digital allocation to multicast does not, and should not, qualify.

The Consumer Groups also appreciate the Commission’s affirmation that multicast programming is subject to the captioning pass through requirement and propose that the Commission similarly affirm that the pass through requirement applies to edited programming. In order to assist broadcasters in their efforts to locate programs that have been captioned in the past, the Consumer Groups recommend the creation of a national database for captioned programming. Finally, the Consumer Groups request that the FCC reaffirm the requirement for multicast programming to comply with the requirement, contained in Section 79.2 of the Commission’s rules, to provide emergency information in a visual form, without any exceptions.⁵

I. APPLY SECTION 79.1(d)(12) EXEMPTION TO BROADCASTER’S OVERALL OPERATIONS FOR ITS DIGITAL ALLOCATION

More than 10 years ago, the Commission adopted the closed captioning rules.⁶ When, a few years later, the Commission extended these rules to digital broadcasting, it declined to adopt requirements that would differ from the captioning requirements that apply to analog

³ *NPRM* at fn. 43.

⁴ 47 C.F.R. § 79.1(d)(9).

⁵ 47 C.F.R. § 79.2.

⁶ *Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272 (1997) (“Closed Captioning R&O”); *Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (“Closed Captioning Order on Reconsideration”).

broadcasters. The Commission took this action even though, at that time, both the FCC and the industry were well aware that digital broadcasting would allow secondary streams of programming⁷ and that these streams would not exist without the broadcaster's "main channel." Notwithstanding this industry practice, the FCC did not rule that each separate stream of digital multicast programming was a "channel" for purposes of the closed captioning rules because it would have been unrealistic and impractical to do so. It remains impractical to do so as the completion of the digital transition nears. Accordingly, the existing captioning rules must be applied to digital broadcast programming, and the Section 79.1(d)(12) exemption for a channel earning less than \$3 million annual gross revenue for the prior calendar year should apply to the overall operations for the broadcaster's digital allocation.

A broadcaster's authorization to distribute digital programming presents both new options, such as multicasting, that were not available when providing analog programming, and new opportunities for broadcasters to expand and improve their overall operations. For example, a broadcaster may choose to provide high-definition programming or multicast programming or both high-definition programming and multicast programming at certain times of the day. A broadcaster choosing to multicast expects to earn revenue from the additional streams of programming and/or to obtain more viewers for its main programming stream. In other words, the choice to multicast may positively impact a broadcaster's overall operations even though an individual multicast stream may not receive \$3 million in annual revenues under Section 79.1(d)(12). It therefore makes sense to apply the Commission's \$3 million exemption rule only

⁷ See e.g., *Annual Assessment of the Status of Competition in Markets for Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 95 (1998); *Annual Assessment of the Status of Competition in Markets for Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, ¶ 101 (1998).

to a broadcaster's overall operations for a digital allocation, rather than applying this exemption to individual multicast streams.⁸

Even more importantly, the Section 79.1(d)(12) exemption should apply to a broadcaster's overall operations to avoid reducing the relative amount of captioned programming that is made available to the public. The United States is entering a new television generation with the digital transition that promises many new services and programming capabilities, including opening new avenues to enhance and expand captioning access. *All* Americans must be able to access services and programming that are available as a result of the digital transition, and no segment of the population should be left behind. The Commission, as well as Congress and others, have repeatedly recognized "the important role that video programming plays in American society today as a source of information and entertainment" and have sought to maximize the accessibility of video programming to the nation's deaf and hard of hearing population.⁹ Digital broadcast technology, including multicasts, will provide opportunities and significant benefits directly to individuals with disabilities and indirectly to society as a whole by providing critical information to individuals with hearing loss, which in turn can lead to greater access in employment, education, recreation and other areas.¹⁰ Allowing a captioning exemption for individual multicast streams would adversely affect the millions of deaf and hard of hearing

⁸ Moreover, it may be difficult to confirm whether an individual multicast stream has met the \$3 million revenue threshold if a broadcaster uses consolidated financials and does not have separate financial statements for each stream.

⁹ *Closed Captioning R&O* at ¶ 11. See also, *Closed Captioning Order on Reconsideration; Chartering the Digital Broadcasting Future*, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, <http://govinfo.library.unt.edu/piac/piacreport.pdf> (1998).

¹⁰ *Chartering the Digital Broadcasting Future*, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, <http://govinfo.library.unt.edu/piac/piacreport.pdf>, pp. 61-62, 78-79 (1998).

individuals who rely on getting their information through closed captioning. The consequence of such an exemption would be to leave this segment of the population behind as the rest of America surges ahead in benefiting from the digital television revolution – certainly a consequence that is not intended by the FCC.

In making its determination about how to best apply the Section 79.1(d)(12) exemption to a multicasting broadcaster's operations, it is critical for the Commission to take into consideration the public interest obligations of all digital television broadcasters to preserve free over-the-air programming for the entire American population,¹¹ an obligation that should and must include multicast programming. Many Americans, especially those who are deaf and hard of hearing – who statistically have lower incomes than the rest of the American population – rely on free over-the-air broadcasts for television rather than pay television video services. Indeed, an even greater number are likely turning to over-the-air broadcasts in light of the current economic crisis. As the Commission is well aware, television broadcasters have obtained their spectrum licenses at no cost. In return for these licenses, these broadcasters have certain obligations to the public – one of which is to make programming accessible by providing closed captioning. It would be contrary to broadcasters' public interest obligations to allow the Section 79.1(d)(12) exemption to apply to individual multicast streams. Rather, by ensuring that the entire population has access to all of the new types of programming that multicast channels have to offer, a rule that applies the exemption to the overall operations of a parent channel will guarantee that these broadcasters are fulfilling their public interest obligations to millions of Americans who are deaf and hard of hearing and who wish to enjoy digital television services to

¹¹ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 5 (1997) (noting the Commission's desire "to promote and preserve free, universally available, local broadcast television in a digital world").

the same extent as their family members, friends, colleagues and others who hear. The Commission must continue to take steps toward maximizing such accessibility, rather than take steps backward by expanding the scope of an existing exemption.

The Consumer Groups have reason to believe that costs of captioning programming on multicast channels will be contained. First, much, if not most of the multicast programming that is now available may already have been previously captioned. Accordingly, a broadcaster's cost to caption the remaining multicast programming should be relatively small as compared to the overall multicast programming costs. In addition, over the past 10 years, there has been an increase in the availability of competition among captioners, and the cost of captioning technology has decreased, which has driven down total captioning costs. It is perhaps for these reasons that several PBS stations already caption their multicast streams – further suggesting that for-profit broadcasters should be able to afford multicast captioning costs. Thus, applying the Section 79.1(d)(12) exemption to the overall operations of a broadcaster's digital allocation, rather than the broadcaster's individual multicast programming streams will promote accessibility and should not unduly affect that broadcaster's overall costs.

II. PASS THROUGH REQUIREMENTS APPLY TO ALL PREVIOUSLY-CAPTIONED PROGRAMMING DISTRIBUTED ON MULTICASTS

The Consumer Groups appreciate the Commission's affirmation that a video distributor, including a broadcaster, is obligated to pass through *intact* any captioning it receives and that the obligation applies regardless of any potential self-implementing exemption.¹² It is expected that a majority of multicast programming presently shown on secondary streams should be captioned as a result of this pass through requirement. The Commission should acknowledge that this pass

¹² *NPRM* at ¶¶ 11, 37. *See also*, 47 C.F.R. § 79.1(c).

through requirement also applies to any edited programming. The benefits to viewers who need captions are far greater than the costs to adjust captioning time frames of edited programming.

III. ESTABLISH A NATIONAL DATABASE FOR CAPTIONED PROGRAMS

The Consumer Groups recommend that the Commission establish a national database for captioned programs or work with another agency to set up a national database. As noted above, it is anticipated that much of the programming provided on multicast channels – at least initially – will be re-runs or repeats of pre-recorded captioned programming. A national database of captioned programming will make it easier for broadcasters to locate and utilize captioned programming.

IV. MULTICAST PROGRAMMING MUST COMPLY WITH SECTION 79.2

The Commission should reaffirm that multicast programming must provide emergency information required by Section 79.2, which requires video programming distributors to make emergency information accessible to persons with hearing and visual disabilities and prohibits emergency information from blocking any closed captioning.¹³ These emergency access mandates have never allowed any exemption and, given the critical importance of ensuring access to timely and accurate emergency information by all Americans, the Commission should not permit any exemptions from these requirements now. Section 79.2 must apply to every multicast video stream to the same extent as it applies to main video streams.

V. CONCLUSION

For the reasons discussed above, the Consumer Groups urge the Commission to apply the Section 79.1(d)(12) exemption to the overall operations of a broadcaster's digital allocation, rather than its individual multicast streams, to ensure the continued availability of closed

¹³ 47 C.F.R. § 79.2.

captioned programming for all Americans, especially Americans who are deaf or hard of hearing.

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