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

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
	)	

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction and Summary

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] The *Notice* inquires about the treatment of broadcast stations' multicast channels under the Commission's closed captioning rules. NAB supports the Commission's efforts to ensure that television programming is accessible by all Americans, including those with disabilities. NAB requests, however, that the Commission carefully consider how any new rules could affect the future development of multicast broadcasting. In particular, NAB is concerned that new obligations could be a disincentive for the digital multicasting of original local or regional programming, such as news, sports and

[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

[2] *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* in CG Docket No. 05-231, ET Docket No. 99-254 (rel. Nov. 7, 2008) ("*Notice*").

weather, or even discourage stations from multicasting at all. NAB encourages the Commission to consider in this proceeding the public's interest in the development of viable, free over-the-air multicast services that include local programming.

II. The Premature Imposition of New Regulations Would Adversely Affect the Development of Multicasting

As the Commission observes, the "broadcasting landscape will change substantially" as television stations transition to all-digital broadcasting. *Notice* at ¶ 35. Significant questions remain about the potential of multicast broadcasting in the digital age. For example, because broadcasters have no assurance that any multicast channels they offer will reach audiences viewing their signals via cable and satellite, incentives for developing additional digital programming for multicast channels are already diminished.[3] There is also the still unresolved question of whether advertiser supported multicasting might tend to divide (rather than increase) a station's audience, thus providing little if any additional revenues.

Multicasting remains a nascent service. While hundreds of stations currently offer multicast services, more do not.[4] And until it proves itself in the marketplace, multicasting is likely to develop slowly as broadcasters and programmers deal with the

[3] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2554 (2006) (citing survey of commercial television stations, which found that 79% of responding stations said if multicast channels are not carried by cable operators, stations will not provide these services).

[4] According to BIAfn Media Access Pro 2007, approximately 27 percent of full-power television stations are currently multicasting (*i.e.*, airing programming on a multicast channel that is different from the programming airing on the station's primary channel).

effects of a diminished advertising market and an economic recession.[5] In light of these uncertainties, the Commission should consider policies to promote multicasting, which, if successful, would significantly increase the amount and diversity of free, over-the-air programming available to local audiences.

At the very least, the Commission should refrain from adopting regulatory obligations that discourage multicasting by substantially increasing its cost. As NAB and others have documented in past filings, the cost of captioning video programming can be substantial.[6] If new closed captioning rules are implemented, many television broadcasters, especially those operating in small and medium-sized markets, may conclude that the cost of producing or acquiring programming for exclusive use on

---

[5] *See* Allison Romano, "Cutting Bait on Subchannels," Broadcasting and Cable, Jan. 19, 2009 at p. 14-15 ("[A]t a time when broadcasters' financials are grim, most are weighing how much attention to give emerging businesses like digital multicasting."). *See also, e.g.,* TV Newsday, *BIA: 2008 TV Growth Pegged at -7%* (Dec. 18, 2008); Advertising Age, *Local TV Stations Anticipate Severe Downturn in '09* (Nov. 11, 2008); Meg James, *Telemundo to Cut 5% of Jobs*, Los Angeles Times (Oct. 17, 2008); Price Colman, *Small Texas Broadcaster Goes Chapter 11*, TV Newsday (Oct. 16, 2008).

[6] *See* NAB Comments in CG Docket No. 05-231 at 7-9 (filed Nov. 10, 2005) ("The cost of contracting for real-time captioning varies greatly, ranging from $100 to approximately $500 per hour. Moreover, the cost to stations is inversely proportional to a station's 'buying power' – small and medium market broadcasters who are not part of a station group typically receive less discounts than stations that are contracting with captioning companies for a 'bulk discount.'"). Technological advances have not yet materially reduced these costs to stations. Other commenters have explained that the cost of "off-line" captions (*i.e*., captions that are created and added after a program has been recorded and before it is aired) is even higher. *See Ex Parte* Written Presentation of AZN Television, *et al*., in CG Docket No. 05-231 at 3-5 (filed Feb. 10, 2006) (program network estimated that off-line captions cost almost six times as much to produce as real-time captions). The higher cost of "off-line" captions is generally due to the fact that such captioning is more time-consuming. Because "off-line" captioning is not live, the captioner has more time to caption and to edit those captions to ensure greater accuracy. "Off-line" captioning is also often done by third-party caption services because many programmers and stations lack sufficient resources to maintain in-house captioning departments. Utilizing third-party caption services can add extra time and expense to the captioning of "off-line" programming because program tapes must be shipped to and from the captioning service.

multicast channels is not financially feasible, especially in today's economic climate. The Commission has previously refrained from applying various regulatory requirements to new services to promote the development of those services.[7] The imposition today of new regulations on nascent and financially uncertain multicast services will unduly affect how much and what type of programming is aired on multicast channels. In particular, the cost of captioning video programming on multicast channels at this stage in the development of multicasting could lead broadcasters to limit programming (especially programming that does not already include captions) to avoid costs, or could become yet another factor militating against the airing of multicast programming at all. Neither of these scenarios serves the public interest.

Multicast channels can provide broadcasters a new opportunity to provide programming that serves the needs of local communities, including news, sports and weather programming and programming targeted to niche audiences. A number of broadcasters across the country have already developed locally-oriented multicast channels that air such original programming.[8] Local programming can, however, be

---

[7] *See, e.g., TRAC v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986) (court upheld FCC's determination not to apply certain broadcast public interest requirements to new telecast services offered by television broadcasters on grounds that the "burden of applying" such obligations "might well impede the development of the new technology"); Report and Order, MM Docket No. 93-25, 13 FCC Rcd 23254, 23280 (because further public interest obligations would be "burdensome at this time and could prevent [DBS] from realizing its potential," FCC declined to impose these obligations on "young" DBS industry, but determined to wait and "see how DBS serves the public" as it "matures").

[8] Examples include: WRAL in Raleigh, NC, which on one of its subchannels airs local news and public affairs programming 24 hours per day with shows like "Focal Point" and "WRAL Listens"; KTVB in Boise, ID, which airs its "24/7" local news channel on a multicast channel; KFSN in Fresno, CA, which uses one of its subchannels to air local news, sports programming and shows like "Hispanic Today"; and WFSB in Hartford, CT, which is airing a local news and weather channel – Eyewitness News Now – and has, in conjunction with Connecticut Public Television, started Connecticut Television Sports

expensive, and local programming that a broadcaster must caption is even more expensive. If the Commission in this proceeding declines to apply the currently available exemptions to multicast channels – including, most importantly, the $3 million gross revenue exemption discussed below – it will also likely impede the development of local programming for multicast channels.[9] NAB encourages the Commission to consider the effects of any new closed captioning rules on the development of local programming on multicast channels, and we note that current Commission rules ensure that substantial programming on multicast channels will be captioned, given the operation of the "pass through" rule. *See Notice* at ¶ 37 (programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact).

III. Multicast Streams Should Be Considered Separate Channels For Purposes of the Closed Captioning Exemptions

In the *Notice* (at ¶¶ 36-38), the Commission asks whether the current rule that exempts all channels with gross revenue of less than $3 million per year should apply to each multicast channel separately, or whether the $3 million threshold should apply to a

---

Network, an all-local sports channel that covers local high school and college sports. In addition, niche programming, especially programming for Spanish-speaking audiences, has found a home on digital subchannels. LATV, based in Los Angeles, is a bilingual network channel distributed on digital multicast streams that offers music and entertainment programming for young Latino audiences. Likewise, Mexicanal Network, which features Spanish-language news, sports, and entertainment programs, is operating on multiple broadcast digital subchannels across the United States. MHz Network, based in northern Virginia, programs seven digital multicast channels to the Washington D.C. market, including channels that air Chinese, Nigerian, French and Polish news and information in both English and foreign languages.

[9] NAB notes that the exemption from the captioning rules for "locally produced and distributed non-news programming with no repeat value" has been narrowly interpreted by the Commission, and may not be applicable to substantial amounts of programming on multicast channels. *See* 47 C.F.R. § 79.1(d)(8).

broadcaster's digital channel as a whole (including any and all multicast channels).[10] To be consistent with Congressional intent and to avoid disincentives for multicasting, the Commission should apply the exemption to each channel separately.

When adopting this exemption in 1997, the Commission said that gross revenues should "be calculated for *each channel individually*."[11] This and other exemptions were designed to prevent closed captioning requirements from being "economically burdensome" for video providers. *Id*. at ¶ 144. The Commission implemented these exemptions under the clear guidance of Congress in Section 713 of the Communications Act. Section 713(d)(1) directs the Commission to exempt "programs, classes of programs or services" that would be "economically burdensome" for programmers to caption.[12] When the Commission first adopted rules to implement this section, it carved out both programming-specific exemptions and a more general catchall revenue exemption. *See Closed Captioning Report and Order* at ¶ 145. To be consistent with both prior Commission rulings and the spirit of the 1996 Telecommunication Act, the Commission should not eliminate multicast channels from the gross revenue exemption.

---

[10] *See* 47 C.F.R. § 79.1(d)(12). Under this exemption, "[n]o video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received . . . ."

[11] *See* Report and Order, *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, 13 FCC Rcd 3272 at ¶ 165 (1997) (emphasis added) ("*Closed Captioning Report and Order*"). *See also id*. at ¶ 79 (compliance with "closed captioning requirements will be measured on a channel-by-channel basis").

[12] 47 U.S.C. § 613(d)(1). Section 713 was added to the Communications Act by Section 305 of the Telecommunications Act of 1996.

For the reasons discussed above about the financial difficulties facing multicasting (including the lack of certainty about reaching cable and satellite subscribers), it is clear that the "economic support" for multicast programming services is "fragile," especially in the current economic environment. *Id*. In such cases, the Commission has found that "the benefits of captioning will not offset the economic burden that would be imposed by a captioning requirement." *Id*.[13]

In determining what qualifies as economically burdensome under the statute, the Commission has also looked to the "undue burden" standard set forth in Section 713(e) for guidance.[14] According to that standard, the Commission should consider several factors when determining whether a particular video programmer should be exempted from the closed captioning rules, including the nature and cost of the closed captions for the programming; the impact on the operation of the provider or program owner; the financial resources of the provider or program owner; and the type of operations of the provider or program owner. 47 U.S.C. § 613(e).

As discussed above, the cost of captioning video programming can be substantial. *See supra* page 3 and footnote 6. With regard to the type of operations and impact on those operations, there are, as explained above, sound reasons to consider exemptions for developing multicast services that have yet to prove their economic

[13] The Commission previously requested comment on other factors, including the degree of distribution, audience ratings/share, and programming budgets or revenue base, in considering how to formulate appropriate exemptions from its captioning rules. *Closed Captioning Report and Order* at ¶ 144. These factors additionally support the application of existing exemptions, such as the $3 million gross revenue standard, to multicast channels that may not be distributed on cable and satellite systems, reach limited numbers of viewers, earn low ratings, and/or are targeted to niche audiences.

[14] *See Closed Captioning Report and Order* at ¶ 143 ("These criteria also provide useful guidance in considering more general class exemptions.").

viability. Especially for broadcasters in small and medium-sized markets with fewer financial resources, it is more likely that the extra costs associated with providing captions for all programming on multicast channels could discourage the offering of multicast channels, particularly those airing weather, sports, news and other local programming. Thus, the factors previously identified by Congress and the Commission support the treatment of multicast channels as separate channels eligible for the exemption if they earn less than $3 million per year.

Regarding the gross revenue exemption, the Commission also asks in the *Notice* (at ¶ 39) whether $3 million is the appropriate threshold and whether it should consider other benchmarks for the imposition of closed captioning requirements. NAB initially notes that the $3 million threshold was set more than a decade ago and has not been adjusted for inflation. As a result, the exemption likely does not cover some stations today that were intended to be covered when the exemption was first created. Accordingly, there does not appear to be any justification for lowering the long-standing $3 million benchmark.[15]

NAB further does not believe that a different threshold measure, especially a new non-revenue approach, should be adopted. The Commission suggests in the *Notice* (at ¶ 40) that captioning requirements might be tied to a formula that considers the number

---

[15] The Commission's original rationale for adopting the $3 million threshold is still valid. The Commission expressly found that no programming provider should be required to expend on captioning a channel more than 2% of the annual gross revenues that the provider receives from that channel. *See* 47 C.F.R. § 79.1(d)(11) (exemption for "captioning expense in excess of 2% of gross revenues"). Given this conclusion, the Commission also found it reasonable to adopt a complete exemption for channels producing annual revenues of less than $3 million because 2% of such annual revenues would provide only "a minimal amount of captioned programming" (approximately two hours per week). *Closed Captioning Report and Order* at ¶ 164.

of programming channels being offered. Such an approach would appear to provide substantial disincentives for multicasting. For example, if a broadcaster aired three or four multicast channels, would a formula based on the number of channels result in the tripling or quadrupling of captioning obligations? Moreover, such a formula based purely on the number of multicast channels would not appear to be consistent with the existing captioning requirements, which are based in large part on the type of programming being offered.[16] NAB agrees with the Commission's determination in 1997 that a revenue exemption "has a number of conceptual advantages" over other approaches, and should not now be replaced with a new approach. *Closed Captioning Report and Order* at ¶ 163.

Rather than changing its approach, NAB urges the Commission to continue to apply the gross revenue exemption to all channels, including multicast. The gross revenue exemption was based on a simple principle: regulatory burdens should be proportionate to the ability of regulated entities to bear them without detrimental effects on the programming offered. Imposing new regulatory burdens on a nascent service that has not demonstrated its financial viability is premature. As the Commission noted in 1997 when it developed the gross revenue exemption, "there are certain kinds of services where the addition of extensive captioning obligations would either make the service nonviable or adversely impact the content of the service provided." *Id*. at ¶ 145. Programming for multicast channels falls within this parameter. NAB therefore

[16] For example, Spanish language programming has different captioning requirements than English programming and programming in other languages is exempt from captioning requirements. Also, "pre-rule" programming (*i.e*., programming first exhibited before January 1, 1998) is subject to different captioning requirements than "new" programming.

encourages the Commission to apply the $3 million gross revenue exemption to each channel separately for those broadcasters that choose to serve the public by offering additional channels of free, over-the-air programming. Multicast channels will of course become subject to all captioning requirements if and when they become established in the marketplace and increase their gross revenues past the $3 million threshold.

IV. Conclusion

NAB supports the Commission's effort to ensure access to quality television programming for all Americans. In working toward this goal, NAB asks the Commission to consider carefully the impact of new closed captioning rules on the development of free, over-the-air multicast channels that serve local communities.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429 5430

____
Jane E. Mago
Jerianne Timmerman
Scott A. Goodwin

February 12, 2009