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GUIDE TO THE FCC CLOSED CAPTIONING RULES FOR TELEVISION PROGRAMMING

RESPONSIBILITY FOR COMPLIANCE WITH CAPTIONING REQUIREMENTS FOR VIDEO ON TELEVISION

The Federal Communications Commission (FCC or Commission) imposed responsibility for compliance with its television closed captioning rules directly on video programming "distributors," defined as entities that provide video programming directly to customers' homes, regardless of the technology used (e.g., broadcasters, LPTV stations, cable operators, wireless cable operators, EBS or LMDS, SMATV and OVS operators, and DBS, DTH and HSD providers). For multichannel video programming distributors (MVPDs), compliance with the rules will be measured on the basis of each *channel* of video programming provided to consumers – not on a system-wide basis. In reality, the FCC understood that MVPDs would pass their captioning obligations on contractually to program networks.

The TV captioning rules, 47 C.F.R. § 79.1, provide that distributors may demonstrate compliance by relying on quarterly certifications from program sources (e.g., networks, producers or syndicators) stating that the programming is either captioned or exempt. For example, cable operators may rely on certification from programming networks that the channel is in compliance with the captioning rules. Similarly, broadcast stations and programming networks may rely on program producers, syndicators or owners to certify that acquired programming is either captioned or exempt from the rules. Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets the requirements, unless the distributor is aware that the certification is false.

Program distributors typically have incorporated provisions for demonstration of compliance with the rules into carriage agreements, and require program networks to certify on a quarterly basis that their programming is in compliance with the FCC's captioning requirements.

Similarly, broadcast stations and programming networks have incorporated such provisions into program supply contracts with producers, syndicators or program owners.

NEW PROGRAMMING VERSUS “PRE-RULE” PROGRAMMING

47 C.F.R. § 79.1(b) requires closed captioning of all "new" English or Spanish language programming, i.e., that first published or exhibited after January 1, 1998 – and more specifically, analog programming first published or exhibited on or after January 1, 1998, and digital programming first published or exhibited on or after July 1, 2002 – unless it is subject to an exemption (discussed below). Section 79.1(b)(2) requires that **75 percent** of non-exempt pre-rule English or Spanish language programming be captioned. "Pre-rule" analog programming is defined as programming first published or exhibited by any distribution method before these dates. Programming that is exempt, but is captioned nonetheless, can be "counted" toward satisfaction of the 75 percent requirement for pre-rule programming, unless that programming is exempt because it is "late night" programming (i.e., aired between 2:00 a.m. and 6:00 a.m.), as discussed below.

As to digital television (DTV) programming, note that the FCC distinguished this class of programming from programming transmitted digitally for display on conventional analog receivers. The captions for programming prepared or formatted for display on digital television receivers must be able to be decoded by a closed caption decoder manufactured in accordance with the requirements for digital television (708 standard) as well as decoders in analog sets. In other words, viewers with either analog or digital receivers must be able to view the captions.

EMERGENCY INFORMATION

Section 79.2 of the FCC rules requires that emergency information be presented visually whenever such information is provided in the audio portion of a program. “Emergency information” is defined as “information, about a current emergency, that is intended to further the protection of life, health, safety and property, i.e., critical details regarding the emergency and how to respond to the emergency.” Examples of emergency information include weather-related emergencies, fires, widespread power failures, discharge of toxic gases, industrial explosions, civil disorders, school closings, and changes in school bus schedules. The critical

details that must be made available in an accessible form include, for example, specific details about the geographic areas that are or will be affected, evacuation orders, detailed descriptions of areas to be evacuated, specific evacuation routes, approved shelters or ways to take shelter in one's home, instructions on how to secure personal property, road closures, and how to obtain relief assistance. This requirement is relevant only to broadcasters and program networks that actually transmit programming containing emergency information.

The FCC has released multiple public notices reminding the public and video programming distributors of the distributor's obligation to provide the critical details of emergency information in a format accessible to persons with hearing disabilities, and the FCC thus is not likely to be sympathetic in the event of a distributor's non-compliance. In addition, it has issued a number of five-figure fines for failures to make emergency information accessible to persons with disabilities in a timely manner in exigencies ranging from wildfires to hurricanes to thunderstorms and tornadoes.

MEASURING COMPLIANCE WITH THE RULES

As noted above, compliance will be measured on a quarterly basis for all program distributors, on a per-channel basis. The Commission has specified that subtitles that are available to all viewers count towards compliance if they are in the language of the target audience and that, where a program includes a second language soundtrack on its SAP signal, the second audio signal need not be captioned. The rules also provide that video programming distributors must pass through any captioning they receive from the program owner or other source containing closed captions unless the captions must be reformatted by the distributor or the programming must be recaptioned.¹ Beyond this requirement, however, the Commission declined to adopt additional technical standards, or non-technical captioning standards (e.g., standards for grammar, spelling, punctuation, etc.).

Live programming or repeats of programming originally transmitted live that are captioned using the electronic news room (ENR) captioning technique, in which the captions come from

¹ Captions often must be reformatted when programming is rebroadcast or distributed by a subsequent video provider. For a secondary use, a program may be edited to fit a time period that is different from the original one and commercials may need to be inserted. This editing can change synchronization of the captions and make reformatting necessary. Moreover, if parts of a program are removed or rearranged, the captions must be removed or rearranged accordingly.

the text in a station's news script computers, is an acceptable captioning technique. However, the following entities, considered Large Programming Providers, may *not* count ENR captioned programming towards compliance with FCC rules:

- National nonbroadcast networks serving at least 50 percent of all MVPD homes;
- Major television broadcast networks (i.e., ABC, CBS, NBC and Fox); and
- Affiliates of these networks in the top 25 markets (as defined by Nielson's Designated Market Areas).

In 2001, the FCC clarified that even Large Programming Providers may use ENR to caption programming to the extent that captioning is for programming that exceeds the provider's quarterly obligations, but nevertheless is required to prevent the provider from falling below levels achieved during the first six months of 1997. The FCC rules require distributors to maintain the same level of captioning that was available during the first six months of 1997.

The Commission recognized that there are situations in which an MVPD is prohibited by federal law from exercising editorial control over the programming it offers. These include the following:

- PEG programming;
- leased access programming;
- must-carry stations;
- programming involving candidates for public office;
- noncommercial, educational and informational programming carried by DBS operators;
- local noncommercial educational programming carried by cable operators; and
- a satellite provider that secondarily transmits broadcast signals pursuant to the compulsory cable copyright provisions of the Copyright Act.

In these situations, MVPDs will not be penalized for transmitting such programming without captions and consequently may not refuse to carry such programming due to a lack of captions or insufficient captioning. The rules provide that, for programming that is nonexempt, "the entity that contracts for its distribution shall be required to comply with the closed captioning requirements." Thus, the legal responsibility is on the broadcast station, leased access programmer, etc., not the MVPD, to ensure that the captioning requirements are fulfilled.

MVPDs must, however, pass through captions when such programming is received containing closed captions.

In 2002, the FCC released two orders finding violations of the captioning rules. In one, the FCC found that a cable operator and Courtroom Television Network (“Court TV”) had failed to comply with the FCC’s closed captioning requirements during the first half of 2000. The FCC found that, during that time, Court TV had not captioned a minimum of 450 hours per quarter of new programming, and that the cable operator had not satisfied its responsibility under the Commission’s regulations, of ensuring that Court TV’s programming complied with the FCC’s captioning requirements. While Court TV had stated in a letter to the cable operator that it was in compliance with the captioning requirements, the FCC ruled that the cable operator should have known that the amount of captioning stated in the letter, three hours per day, fell short of the FCC’s requirements. The complaint, filed by a subscriber to the cable system, sought the imposition of penalties, in the form of a fine, increased captioning requirements, or a plan to ensure future compliance. While the FCC found the cable operator to be in violation of the rules, it declined to impose any penalties largely because Court TV began captioning more than the required amount subsequent to the filing of the complaint but before the Commission’s decision. However, the FCC reminded operators that more severe penalties could be imposed in future complaint cases.

In another decision, the FCC found that Shop At Home Network had failed to caption the requisite amount of programming. The FCC rejected an argument made by Shop At Home that it was exempt from the captioning requirements because it came within the exemption for new networks. To have qualified for new network status in the year in question, 2000, Shop At Home could not have been in operation until 1996, at the earliest. At the time of the decision, Shop At Home had been in operation, producing programming, garnering revenue and employing staff for 15 years. Moreover, Shop At Home was providing 24 hours of programming, 7 days a week, simultaneously to more than one interconnected broadcast station as early as 1995. Shop At Home had argued that it really did not evolve into a network until 1996. Rejecting this position, the FCC ordered Shop At Home to begin captioning at the levels established by the FCC’s rules and to file quarterly reports with the FCC certifying its compliance for a two-year period, but did not issue penalties.

In 2008, the FCC adopted rules establishing that all video programming distributors must make personnel available to address immediate captioning concerns raised by viewers while they are watching a program (as well as revised rules for responding to non-immediate captioning complaints, via a revised, streamlined complaint process, described below). To effectuate this requirement, the FCC's rules now require distributors to designate a phone number, fax number and e-mail address to enable customers to contact such personnel. In addition, distributors also must separately designate a contact person for the receipt of written (non-immediate) captioning complaints. All captioning contact information must appear on invoices, in telephone directories and on websites. The FCC also maintains a list of video programming distributors' contacts for closed captioning. Distributors, therefore, were (and are) required to file contact information with the FCC.

Under the rules, customers using this dedicated contact information must be able to reach someone, either directly or indirectly, who can address captioning concerns. Distributors are not required to alter the hours when they have staff available, but if calls are placed when staff is not available, such calls and inquiries must be returned or addressed within 24 hours. In addition, for captioning problems not residing with the distributor, the staff person receiving the inquiry should refer the matter appropriately for resolution; and although the rules provide some flexibility for how distributors must resolve viewers' immediate captioning concerns, the FCC clearly expects distributors to address such issues on a priority basis. In addition, for these purposes, the FCC expects distributors to take measures to accommodate calls placed through a Telecommunications Relay Service operator.

EXEMPTIONS

The Commission set forth a number of exemptions for certain types of programming or video programming providers, as follows.

NEW PROGRAMMING NETWORKS

The rules provide that a new programming network will be exempt from mandatory closed captioning for **four years** after it begins operation (i.e., four years from launch). This exemption applies to any new network, whether it is broadcast or nonbroadcast, national or regional. The rule refers specifically to "video programming networks," not video programming providers or

distributors. Thus, it appears that this exemption does not apply to new broadcast stations or LPTVs, but only to new programming networks of some sort, though it is an open question whether a new multicast broadcast stream qualifies, and if so, how.

VIDEO PROGRAM PROVIDERS WITH LESS THAN \$3 MILLION IN GROSS REVENUES

Video program providers with less than \$3 million in annual gross revenues during the previous calendar year are exempt from mandatory closed captioning, except that such providers must pass through captions delivered with video programming. Specifically, this rule applies to a "video programming provider," which is defined as "any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households." Thus, it can encompass programming networks, broadcasters, LPTVs, etc. The Commission intended this exemption "to address the problem of small providers who cannot devote significant resources towards captioning" and it appears most likely to benefit LPTV stations and local origination channels on cable systems.

Annual gross revenues are calculated from each channel individually (i.e., not the revenues of any affiliate or parent company) based on revenues received in the preceding calendar year "from all sources related to the programming on that channel." Compliance with respect to a broadcast station or network service distributed by an MVPD, such as a cable network, is calculated based on the revenues received by the station or cable network itself. However, if a station broadcasts more than one stream of programming it is an open question whether each multicast stream constitutes a separate "channel," or if this exemption is applied to the station as a whole. For cable operators that produce local origination programming, the annual gross revenues received for each channel are used to measure compliance, but revenues will not include subscriber revenues, only revenues from advertising and ancillary sources from the local origination channel. For broadcasters, advertising revenues from station-controlled inventory is included. Finally, revenues for channels supported by direct product sales will include only the revenues from the product sales activity (e.g., sales commissions), not the revenues from the actual sales of products offered to subscribers.

TWO PERCENT OF GROSS REVENUES EXPENSE LIMIT

The Commission also adopted a rule providing that video programming providers are not required to spend on closed captioning more than two percent of their annual gross revenues received from that channel during the previous calendar year. Thus, where a station or network has spent two percent of its revenues, but does not reach the relevant captioning benchmark, it need not spend more money on captioning in order to meet the benchmark.

Gross revenues are measured in the same manner as described above. Revenues for channels shared between network and local programming are separately calculated for each, with neither the network nor the local programmer being required to spend in excess of two percent on captioning. Captioning expenses include direct expenditures for captioning and reformatting of captions, as well as costs specifically allocated by a program supplier through the price of the video programming to the network. A station or network may employ any commercially reasonable cost allocation method, but a supplier may not allocate more than 100 percent of the cost of captioning to individual video programming providers. Broadcasters and programming networks should consider including provisions for such captioning cost allocation in any contract with program suppliers that extends beyond 1999.

LATE NIGHT PROGRAMMING

Programs that are distributed between 2:00 a.m. and 6:00 a.m. local time are fully exempt. Moreover, video programming providers distributing a service that is exhibited for viewing in more than one time zone will be exempt from captioning that service for any continuous four-hour time period they select, commencing no earlier than midnight and ending no later than 7:00 a.m. It should be emphasized that, unlike the other exemptions, any captioned programming shown during the overnight hours will *not* count toward the 75 percent benchmark for pre-rule programming.

LOCALLY PRODUCED AND DISTRIBUTED NON-NEWS PROGRAMMING WITH LIMITED REPEAT VALUE

Programming that meets all of the following conditions is exempt:

- (1) it is locally produced by the video programming distributor;

- (2) it has very limited or no repeat value;
- (3) it is of local public interest only;
- (4) is *not* news programming; and
- (5) the ENR technique of captioning is unavailable for captioning it.

The Commission cited the following as examples of this "narrow" class of programming: local parades, local high school and other nonprofessional sports, local talk shows, and community theater productions.

ADVERTISEMENTS

Commercials of five minutes duration or less are not included in the definition of programming and thus are not required to be captioned. Infomercials (i.e., program length commercials) are subject to the same captioning requirements as all other nonexempt programming.

INTERSTITIALS, PROMOTIONAL ANNOUNCEMENTS, AND PUBLIC SERVICE ANNOUNCEMENTS

Any interstitial announcements (i.e., programming of brief duration that is used as a bridge between two longer programs), promotional announcements, and public service announcements of ten minutes duration or less are exempt.

NON-VOCAL MUSICAL PROGRAMMING

In the area of music programming, the Commission decided to exempt only programming that is "primarily non-vocal music." In so doing, it explained that a program consisting of at least 80 percent non-vocal music would be entirely exempt.

PRIMARILY TEXTUAL PROGRAMMING

Programming for which the content of the soundtrack is substantially and materially displayed visually through text or graphics and any programming service comprised of alpha-numeric text, with or without video or graphic elements, is exempt. The Commission cited program schedule channels and community bulletin boards as examples of this type of programming.

FOREIGN LANGUAGE PROGRAMMING (OTHER THAN SPANISH)

All programming for which the audio is in a language other than English or Spanish is exempt. However, scripted non-English and non-Spanish programming that can be captioned using the ENR technique is not exempt.

EBS PROGRAMMING

Video programming transmitted by an Educational Broadband Service licensee pursuant to 47 C.F.R. part 27 (formerly instructional television fixed service (ITFS)) is fully exempt.

WAIVERS

The Commission established a mechanism whereby it will consider petitions for full or partial waivers of the closed captioning requirements. A petition may be filed by any party in the programming distribution chain, and waivers may be granted for a channel, a category of programming, an individual video service, a specific program or a video programming provider. In order to be successful, the petitioner must demonstrate how the mandatory captioning of the programming would result in an undue burden (i.e., a "significant difficulty or expense").²

The Commission considers the following factors to determine whether the requirements for closed captioning impose an undue burden:

- (1) the nature and cost of captions;
- (2) the impact on the operation of the provider or program owner;
- (3) the financial resources of the provider or program owner; and
- (4) the type of operations of the provider or program owner.

The Commission considers the financial resources of and impact on the individual outlet, not its affiliates or parent corporations, when deciding whether to grant a petition. At the same time, petitioners must provide documentation regarding financial status, the costs of captioning, and that they have sought captioning assistance from video programming

² The Commission has interpreted on a provisional basis that the term "undue burden" is synonymous with the newer term "economically burdensome," as used in section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), and has proposed revising its closed captioning rules to substitute "economically burdensome" for the term "undue burden."

distributors. Petitions seeking undue burden waivers are placed on public notice and are subject to oppositions or comment.

In general, the Commission decisions set a fairly high evidentiary standard for parties seeking waivers of the FCC's closed captioning rules. It appears that large program networks with substantial revenues are unlikely to garner much sympathy from the Commission. In contrast, smaller networks with smaller revenue streams that can also show that captioning costs are disproportionately high in comparison to their overall programming budgets, and that satisfy the FCC's other criteria, may have a chance of obtaining a waiver. The decisions are helpful in that they provide some details about the type of information the Commission would find persuasive in a waiver petition. Specifically, the Commission would like to see: (1) a range of quotes for closed captioning services from captioning service providers; (2) significant details concerning a petitioner's financial resources, including revenues; (3) information regarding attempts to recover closed captioning costs (e.g., through grants/scholarships, or arrangements with program distributors such as cable operators); and (4) details concerning the impact of closed captioning on the petitioner's operations as a whole and the overall budget and revenues of the petitioner.

ENFORCEMENT MECHANISMS

The Commission enforces the captioning rules through a complaint process. In other words, the FCC does not actively monitor compliance with the rules. Nonetheless, distributors and programmers must be prepared to respond to complaints within the timeframes established by the Commission. For MVPDs and cable networks, the most efficient system may be one whereby networks provide a quarterly certification of compliance to their affiliates. Broadcasters and cable networks should maintain records that demonstrate compliance with the rules, as should cable operators that provide local origination programming.

Complaints regarding alleged violations may be filed by individual consumers, organizations or government agencies. The rules allow complaints to be filed first with the video programming distributor, or with the FCC, no later than 60 days after the alleged violation occurred. A complaint must "state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation." If a complaint is filed with the distributor, it is required to respond to the consumer within 30 days. If the complainant is unsatisfied with the

response, the consumer may file a complaint with the FCC within 30 days. For complaints filed with the FCC, distributors are required to respond to the FCC within 30 days. If a cable or satellite provider receives a complaint for a broadcast station or programming over which the provider lacks editorial control (i.e., broadcast, PEG or leased access programming), it will be required to forward the complaint to the appropriate entity within seven days and inform the complainant.

Penalties for noncompliance include the imposition of FCC forfeitures, i.e., fines. However, the statute expressly provides that the Commission has exclusive jurisdiction with respect to any complaint under the captioning rules. Thus, no party has a private right of action to enforce the statute or the FCC rules through the courts.

Please contact us with any additional questions you might have concerning the closed captioning rules.