

DC. 20036, (202) 857-3800, facsimile (202) 857-3805.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alaska, is amended by removing Channel 293C and adding Channel 293C1 at Anchorage, and by removing Channel 280A and adding Channel 280C3 at College.

3. Section 73.202(b), the Table of FM Allotments under Arizona, is amended by removing Channel 295C2 and adding Channel 295A at Buckeye.

4. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by removing Channel 278A and adding Channel 278C3 at Lake Village.

5. Section 73.202(b), the Table of FM Allotments under California is amended by removing Grover City and Channel 297B and adding Grover Beach and Channel 297B.

6. Section 73.202(b), the Table of FM Allotments under Hawaii, is amended by removing Channel 240A and adding Channel 240C1 at Poipu.

7. Section 73.202(b), the Table of FM Allotments under Louisiana, is amended by removing Channel 244A and adding Channel 244C3 at Morgan City.

8. Section 73.202(b), the Table of FM Allotments under Mississippi, is amended by removing Channel 268C3 and adding Channel 268A at Clarksdale.

9. Section 73.202(b), the Table of FM Allotments under Ohio, is amended by removing Channel 292A and adding Channel 290A at New Lexington.

10. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by removing Channel 231A and adding Channel 231C3 at Tillamook.

11. Section 73.202(b), the Table of FM Allotments under Texas, is amended by removing Channel 221A and adding Channel 223C2 at Devine and by removing Channel 295A and adding Channel 295C2 at Stamford.¹

12. Section 73.202(b), the Table of FM Allotments under Utah, is amended by removing Channel 230A and adding Channel 232C1 at Roosevelt.

13. Section 73.202(b), the Table of FM Allotments under the Virgin Islands, is amended by removing Channel 297B1 and adding Channel 297A at Charlotte Amalie.

14. Section 73.202(b), the Table of FM Allotments under Wyoming, is amended by removing Channel 273A and adding Channel 273C at Casper.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MM Docket No. 95-176; FCC 98-236]

Closed Captioning of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition on reconsideration.

SUMMARY: The Commission amends its closed captioning rules in response to nine petitions for reconsideration of the rules adopted in August 1997. Generally the rules require the closed captioning of video programming and is intended to ensure the accessibility of video programming to persons with hearing disabilities. On reconsideration, the Commission amends its closed captioning rules in order to better comply with the statutory mandate to provide accessibility to persons with hearing disabilities.

EFFECTIVE DATE: November 19, 1998.

FOR FURTHER INFORMATION, CONTACT:

John Adams or Marcia Glauber, Cable Services Bureau, (202) 418-7200, TTY (202) 418-7172.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Order on Reconsideration* in MM Docket No. 95-176, FCC 98-236, adopted September 17, 1998 and released October 2, 1998. The complete text of this *Order on Reconsideration* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc. ("ITS") at (202) 857-3800, TTY (202) 293-8810, 1919 M Street, NW, Suite 246, Washington, DC 20554. For copies in alternative formats, such

as braille, audio cassette or large print, please contact Sheila Ray at ITS.

Paperwork Reduction Act

This *Order on Reconsideration* has been analyzed with respect to the Paperwork Reduction Act of 1995 and has been found to contain no new or modified information collection requirements on the public.

Synopsis of Order on Reconsideration

1. On August 7, 1997, the Commission adopted a Report and Order ("R&O"), summarized at 62 FR 48487 (September 16, 1997), implementing section 713 of the Communications Act of 1934, as amended, 47 U.S.C. 613. Section 713 required the Commission to prescribe rules and implementation schedules for the closed captioning of video programming and to establish appropriate exemptions. The *Order on Reconsideration* ("Order") addresses nine petitions for reconsideration of the *Report and Order*. By this *Order*, the Commission amends its closed captioning rules, in part, in response to the petitions for reconsideration in order to better ensure the accessibility of video programming to persons with hearing disabilities.

2. Section 713 generally required the Commission to ensure that "video programming first published or exhibited after the effective date of such rules is fully accessible through the provision of closed caption * * *". In the *R&O*, the Commission adopted an eight year transition period for the captioning of new nonexempt programming (i.e., that first published or exhibited on or after January 1, 1998, the effective date of the rules). The Commission established interim benchmarks for required amounts of closed captioning during the transition period. Effective January 1, 2006, the end of the transition period, 95% of all new nonexempt video programming provided on each channel during each calendar quarter was required to be captioned.

3. On reconsideration, we conclude that our decision to consider the captioning of 95% of each channel's new nonexempt video programming to be fully accessible is not consistent with Congress' objective when it enacted Section 713. Therefore, we define full accessibility to be the captioning of 100% of all new nonexempt video programming and will require all such programming to be captioned at the end of the eight year transition period. Accordingly, after January 1, 2006, 100% of the programming of each channel's new nonexempt video

¹ The Report and Order in MM docket 97-145 substituted Channel 295A for Channel 221C2 at Stamford, Texas. See 62 FR 66826, December 22, 1997.

programming must be provided with captions.

4. Section 713 required the Commission to maximize the accessibility of video programming first published or exhibited prior to the effective date of our rules the provision of closed captioning. Programming published or exhibited prior to January 1, 1998, is defined as pre-rule. In the *R&O*, the Commission adopted a ten year transition period with no interim benchmarks. Under the rules, effective January 1, 2008, the end of the transition period, 75% of all pre-rule nonexempt programming on each channel during each calendar must include closed captioning.

5. On reconsideration, the Commission clarifies that for purposes of defining pre-rule programming, the relevant date of first exhibition or publication is its first exhibition or publication by any distribution method, including theatrical and home video release as well as television distribution.

6. The Commission also clarifies the application of the rules to digital television ("DTV") programming. In the *R&O*, we defined certain types of digital programming as "pre-rule programming" until standards relating to the preparation of digital programming for display on digital receivers are complete. We clarify that this determination is narrow in scope and does not apply to programming that is transmitted in a digital format for display on conventional analog television receivers. This narrow exemption means only that the version of the program prepared or formatted "for display on television receivers equipped for display of digital transmission" prior to the applicable date will fall within the pre-rule category and be subject to captioning in accordance with the pre-rule schedule. With this clarification, we believe the existing rule properly accounts for the brief period of time during which the standards process can be completed.

7. In the *R&O*, the Commission did not establish interim benchmarks for the captioning of pre-rule programming. However, we stated that we would monitor the implementation of closed captioning for pre-rule programming and conduct a review of the industry's progress in four years. On reconsideration, we reiterate our intent to conduct such a review. We also conclude that, in order to comply with the statutory mandate to ensure that video programming providers or owners maximize the accessibility of pre-rule programming it is necessary to establish at least one benchmark for pre-rule programming. Thus, we amend the rules

to require at least 30% of a channel's pre-rule programming be provided with captions beginning on January 1, 2003. To the extent that the amount of pre-rule programming captioned to comply with the requirement that a video programming distributor provide captions at substantially the same level as the average level of captioning that it provided during the first six months of 1997 exceeds this 30% benchmark, a distributor must continue to caption such programming at the existing level consistent with our prior decision.

8. In the *R&O*, we determined that we would allow video programmers to count, as part of compliance with the closed captioning rules, any captions using the electronic newsroom ("ENR") methodology. ENR captioning can only be used to convert the dialogue included on a teleprompter script into captions and does not caption live interviews, field reports or late-breaking weather and sports that are not scripted. As a result, persons with hearing disabilities do not have full access when ENR is used. After review of the record, on reconsideration, we are persuaded that we should limit the circumstances where we will count ENR captioning as a substitute for real-time captioning. We recognize that, without findings on an individual basis, it is difficult to determine precisely which video programming providers have sufficient resources such that real-time captioning would not be an economic burden. Nonetheless, in order to ensure full accessibility, we have made our best effort to identify a class of video programmers for whom a real-time captioning requirement would not be economically burdensome. Accordingly, beginning January 1, 2000, at the first benchmark, the four major national broadcast networks (i.e., ABC, CBS, Fox and NBC), broadcast stations affiliated with these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas ("DMAs"), and nonbroadcast networks serving 50% or more of the total number of multichannel video programming distributor ("MVPD") households will not be allowed to count ENR captioned programming toward compliance with captioning requirements. Whenever a broadcast television station, a broadcast television network or a nonbroadcast network satisfies one of these criteria, it becomes subject to the limitations we are placing on the use of ENR for compliance with the rules.

9. Section 713 authorized the Commission to adopt exemptions for programs, classes of programs, or services for which we determine that the provision of closed captioning

would be economically burdensome. In the Order, we adopt several amendments to the exemptions established in the *R&O*.

10. In the *R&O*, we exempted new networks from our captioning obligations during their first four years of operations. On reconsideration, we will allow new networks launched prior to the effective date of the rules that have not yet reached their fourth anniversary by that date to be exempt for a four year period beginning on January 1, 1998. This limited expansion of the new network exemption will assist numerous nascent networks that continue to experience growing difficulties.

11. In the *R&O*, we exempted programming produced and distributed by ITFS licensees. We conclude that the current rules unintentionally limit the scope of the ITFS exemption. Therefore, we amend § 79.1(d)(7) to exempt video programming transmitted by ITFS licensee pursuant to its permitted educational operations.

12. We amend the rules to exempt instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools. In adopting this exemption we remain confident that other Federal requirements will ensure that adequate efforts will be taken to make this programming accessible on a case by case basis.

13. In the *R&O*, we exempted non-English language programming other than that which can be captioned using ENR. We generally reaffirm this decision. However, on reconsideration, we find it appropriate to narrow this exemption and distinguish Spanish language programming from other non-English language programming. Accordingly, we will adopt a 12 year transition for new nonexempt Spanish language programming and a 14 year transition period for pre-rule nonexempt Spanish language programming. We will establish three benchmarks for new programming and one benchmark for pre-rule programming similar to those adopted for nonexempt English programming.

14. We reassert our previous conclusion that short-form advertising is not covered by Section 713. As we stated in the *R&O*, while programming and advertising may be treated the same in some contexts, here we conclude that it is reasonable to define short-form advertising as separate from programming and thus not subject it to the captioning obligations.

15. In the *R&O*, we decided to adopt an enforcement mechanism based on consumer complaints initially directed

to the video programming distributors (e.g., the broadcast station, cable operator). We generally retain the enforcement procedures adopted in the *R&O* and will continue to rely primarily on the complaint process to enforce our captioning requirements. We will not adopt recordkeeping or reporting requirements as they would impose unnecessary administrative burdens on video programming distributors and the Commission. On reconsideration, however, we believe it is important to establish a means to further ensure compliance with our rules and we plan to conduct random audits of captioning. In conducting such audits, we may request the records of broadcasters or MVPDs or monitor the captioning provided by individual networks. We believe that the information gathered through these audits will be an important factor in monitoring the implementation of the captioning requirements, assist consumers should they find it necessary to file a complaint, and assist video programming providers to comply with our rules.

16. We also clarify several rules in the *Order* in response to issues raised in the petitions for reconsideration. We reiterated the requirement that, during the transition period, video programming providers must, at least, maintain substantially the same level of captioning that they provided during the first six months of 1997. We noted that this requirement was tempered by the word "substantially" to ensure flexibility in its enforcement. We explain that locally produced non-news programming is exempt only if it has no repeat value. We also clarify that network compensation and value of barter transactions should be included in revenue calculations for exemptions based on revenue.

Regulatory Flexibility Act Certification

17. As required by the Regulatory Flexibility Act ("RFA"), an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the *Notice of Proposed Rulemaking* ("NPRM") in this proceeding. The Commission sought written public comment on the expected impact of the proposed policies and rules on small entities in the *NPRM*, including comments on the IRFA. Based on the comments in response to the *NPRM*, the Commission included a Final Regulatory Flexibility Analysis ("FRFA") into the *R&O*. While no petitioners seeking reconsideration of the *R&O* raised issues directly related to the FRFA, the Commission is amending the rules in a manner that may affect

small entities. Accordingly, this Supplemental Final Regulatory Flexibility Analysis ("Supplemental FRFA") addresses those amendments and conforms to the RFA.

18. *Need for Action and Objectives of the Rule*: The 1996 Act added a new Section 713 to the Communications Act of 1934 that *inter alia* requires the Commission to develop rules to increase the availability of video programming with closed captioning. The statutory objective of the closed captioning provisions is to promote the increased accessibility of video programming for persons with hearing disabilities. The Commission adopted the *R&O* in this proceeding on August 7, 1997, promulgating rules to implement this mandate. The *Order* clarifies and refines these rules in conformance with Section 713.

19. *Summary of Significant Issues Raised by the Public Comments in Response to the FRFA*: No parties address the FRFA in their petitions for reconsideration, or any subsequent filings. We have, however, addressed, on our own motion, steps taken to further minimize the effect of these requirements on small entities.

20. *Description and Estimate of the Number of Small Entities to Which the Rules Will Apply*: The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act. Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

21. As noted, an FRFA was incorporated into the *R&O*. In that analysis, the Commission described in detail the various kinds of small business entities that may be affected by these rules. Those entities consist of program producers and distributors, broadcast stations and small multichannel video programming distributors including cable system operators, multipoint distribution systems, direct broadcast satellite services and home satellite dishes, open video systems and satellite master antenna systems. In the *Order*, we address petitions for reconsideration filed in response to the *R&O*. In this Supplemental FRFA, we incorporate by reference the description and estimate

of the number of small entities from the previous FRFA in this proceeding, subject to the following amendments.

22. *Open Video Systems ("OVS")*: As noted in the *R&O* the definition of a small entity in the context of cable or other pay television service includes all such companies generating \$ 11 million or less in annual receipts. As of this date, the Commission has approved five additional applications for OVS operators, bringing the total number of certified operators to 14. Two more applications are pending. Of the entities authorized to provide OVS service, several are only recently approved and are not actually providing service and generating revenue. Little financial information is available for the many of entities authorized to provide OVS that are not yet operational. Given that some of these entities have not yet begun to generate revenues, we believe that our original conclusion that at least some OVS operators qualify as small entities remains sound.

23. *Local Multipoint Distribution Service ("LMDS")*: As noted in the *R&O*, the SBA has developed a definition of small entity for cable and other pay television services which includes all such companies generating \$11 million or less in annual receipts. The Commission concluded its LMDS spectrum auction on March 25, 1998. Of the 139 successful bidders, 93 qualified as small businesses. We are unable to determine how many of these small businesses will use the available spectrum to provide video programming services. We believe, however, that our original determination that at least some of these licensees will provide video programming services and will thus qualify as small entities affected by our closed captioning requirements is correct.

24. *Description of Reporting, Recordkeeping and Other Compliance Requirements*: We did not prescribe reporting requirements in the *R&O* and have declined to do so in the *Order*. While parties representing persons with hearing disabilities petitioned for the adoption of such requirements on reconsideration, we believe that our enforcement process alleviates the need for reporting and its associated burdens. Thus, we will not impose recordkeeping requirements for video programming distributors. Rather, we shall allow video programming distributors to exercise their own discretion and only require that they retain records sufficient to demonstrate compliance with our rules. In order to further relieve small video programming distributors of any unnecessary recordkeeping burden, we also permit

video programming distributors to rely on certifications from the producers or owners of the programming to demonstrate compliance with our closed captioning rules. At the same time we recognize the concerns that the hearing disabled community has raised regarding the need to monitor and ensure compliance with our closed captioning requirements. Accordingly, on reconsideration we stated that the Commission intends to conduct random audits of video programming as needed to ensure compliance with the captioning requirements.

25. *Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered:* In R&O, we sought to minimize the effect on small entities while making video programming more accessible to persons with hearing disabilities. These efforts are consistent with the Congressional goal of increasing the availability of closed captioned programming while preserving the diversity of available programming. The actions we are taking on reconsideration further refine the closed captioning rules so as to advance the Congressional goal and further minimize unnecessary burdens on small entities. For example, we clarify the rules to exempt all programming distributed by ITFS licensees pursuant to its permitted educational operations regardless of whether the programming is produced by the ITFS licensee or a third party. We establish an exemption for instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools. We also expand the existing new network exemption to provide the full four year exemption to networks that commenced operations within four years of the effective date of the closed captioning rules. This expansion of the new network exemption provides relief to recently launched emerging networks without profoundly affecting the overall availability of captioned programming.

Ordering Clauses

26. Accordingly, it is ordered that the Petitions for Reconsideration in MM Docket No. 95-176 which pertain to the closed captioning of video programming are granted in part and denied in part, as provided herein.

27. It is further ordered that, pursuant to authority found in sections 4(i), 303(r), and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 613, Part 79 of the Commission's rules is hereby amended. The amendments to 47 CFR 79.1 shall be effective November 19, 1998.

28. It is further ordered that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Order on Reconsideration*, including the Supplemental Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Public Law 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

List of Subjects in 47 CFR Part 79

Cable television, Closed captioning, Television.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Changes

Part 79 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 79—CLOSED CAPTIONING OF VIDEO PROGRAMMING

1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 613.

2. Section 79.1 is amended by revising paragraphs (b), (d)(3), (d)(7), (d)(8) and (d)(9), adding a new paragraph (d)(13), revising (e)(3) and adding a new paragraph (e)(10) to read as follows:

§ 79.1 Closed captioning of video programming.

* * * * *

(b) *Requirements for closed captioning of video programming.*—(1) *Requirements for new English language programming.* Video programming distributors must provide closed captioning for nonexempt video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2000, and December 31, 2001, a video programming distributor shall provide at least 450 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2002, and December 31, 2003, a video programming distributor shall provide at least 900 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2004, and December 31, 2005, a video programming distributor shall provide

at least an average of 1350 hours of captioned video programming or all of its new nonexempt video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2006, and thereafter, 100% of the programming distributor's new nonexempt video programming must be provided with captions.

(2) *Requirements for pre-rule English language programming.* (i) After January 1, 2003, 30% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(ii) As of January 1, 2008, and thereafter, 75% of the programming distributor's pre-rule nonexempt video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(3) *Requirements for new Spanish language programming.* Video programming distributors must provide closed captioning for nonexempt Spanish language video programming that is being distributed and exhibited on each channel during each calendar quarter in accordance with the following requirements:

(i) Between January 1, 2001, and December 31, 2003, a video programming distributor shall provide at least 450 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(ii) Between January 1, 2004, and December 31, 2006, a video programming distributor shall provide at least 900 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less;

(iii) Between January 1, 2007, and December 31, 2009, a video programming distributor shall provide at least an average of 1350 hours of captioned Spanish language video programming or all of its new nonexempt Spanish language video programming must be provided with captions, whichever is less; and

(iv) As of January 1, 2010, and thereafter, 100% of the programming distributor's new nonexempt Spanish language video programming must be provided with captions.

(4) *Requirements for Spanish language pre-rule programming.* (i) After January 1, 2005, 30% of the programming distributor's pre-rule nonexempt Spanish language video

programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(ii) As of January 1, 2012, and thereafter, 75% of the programming distributor's pre-rule nonexempt Spanish language video programming being distributed and exhibited on each channel during each calendar quarter must be provided with closed captioning.

(5) Video programming distributors shall continue to provide captioned video programming at substantially the same level as the average level of captioning that they provided during the first six (6) months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.

* * * * *

(d) * * *

(3) *Programming other than English or Spanish language.* All programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the "electronic news room" technique is not exempt.

* * * * *

(7) *ITFS programming.* Video programming transmitted by an

Instructional Television Fixed Service licensee pursuant to §§ 74.931 (a), (b) or (c) of the rules.

(8) *Locally produced and distributed non-news programming with no repeat value.* Programming that is locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the "electronic news room" technique of captioning is unavailable.

(9) *Programming on new networks.* Programming on a video programming network for the first four years after it begins operation, except that programming on a video programming network that was in operation less than four (4) years on January 1, 1998 is exempt until January 1, 2002.

* * * * *

(13) *Locally produced educational programming.* Instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools.

(e) * * *

(3) Live programming or repeats of programming originally transmitted live that are captioned using the so-called "electronic news room" or ENR technique will be considered captioned,

except that effective January 1, 2000, and thereafter, the major national broadcast television networks (i.e., ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs) and national nonbroadcast networks serving at least 50% of all homes subscribing to multichannel video programming services shall not count ENR captioned programming towards compliance with these rules. The live portions of noncommercial broadcasters' fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

* * * * *

(10) In evaluating whether a video programming provider has complied with the requirement that all new nonexempt video programming must include closed captioning, the Commission will consider showings that any lack of captioning was de minimis and reasonable under the circumstances.

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