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PART 79—CLOSED CAPTIONING OF VIDEO PROGRAMMING

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§79.1 Closed captioning of video programming.

(a) *Definitions.* For purposes of this section the following definitions shall apply:

(1) *Video programming.* Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use. Video programming includes advertisements of more than five minutes in duration but does not include advertisements of five minutes' duration or less.

(2) *Video programming distributor.* Any television broadcast station licensed by the Commission and any multi-channel video programming distributor as defined in §76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the

jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section shall itself be treated as a video programming distributor for purposes of this section. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(3) *Video programming provider.* Any video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.

(4) *Closed captioning.* The visual display of the audio portion of video programming contained in line 21 of the vertical blanking interval (VBI) pursuant to the technical specifications set forth in §15.119 of this chapter or the equivalent thereof.

(5) *New programming.* Video programming that is first published or exhibited on or after January 1, 1998.

(6) *Pre-rule programming.* (i) Video programming that was first published or exhibited before January 1, 1998.

(ii) Video programming first published or exhibited for display on television receivers equipped for display of digital transmissions or formatted for such transmission and exhibition prior to the date on which such television receivers must, by Commission rule, be equipped with built-in decoder circuitry designed to display closed-captioned digital television transmissions.

(7) *Nonexempt programming.* Video programming that is not exempt under paragraph (d) of this section and, accordingly, is subject to closed captioning requirements set forth in this section.

(b) *Requirements for closed captioning of video programming—(1) Requirements for new 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, video programming distributors shall provide at least 450 hours of captioned video programming, or if the video programming distributor provides less than 450 hours of new nonexempt video programming, then 95 percent of its new nonexempt video programming must be provided with captions;

(ii) Between January 1, 2002, and December 31, 2003, video programming distributors shall provide at least 900 hours of captioned video programming, or if the video programming distributor provides less than 900 hours of new nonexempt video programming, then 95 percent of its new nonexempt video programming must be provided with captions;

(iii) Between January 1, 2004, and December 31, 2005, video programming distributors shall provide at least an average of 1350 hours of captioned video programming, or if the video programming distributor provides less than 1350 hours of new nonexempt video programming, then 95 percent of its new nonexempt video programming must be provided with captions; and

(iv) As of January 1, 2006, and thereafter, 95 percent of the programming distributor's new nonexempt video programming must be provided with captions.

(2) *Requirements for pre-rule programming.* As of January 1, 2008, and thereafter, 75 percent 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) 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 6 months of 1997 even if that amount of captioning exceeds the requirements otherwise set forth in this section.

(c) *Obligation to pass through captions of already captioned programs.* All video programming distributors shall deliver all programming received from the video programming owner or other

origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of § 15.119 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.

(d) *Exempt programs and providers.* For purposes of determining compliance with this section, any video programming or video programming provider that meets one or more of the following criteria shall be exempt to the extent specified in this paragraph.

(1) *Programming subject to contractual captioning restrictions.* Video programming that is subject to a contract in effect on or before February 8, 1996, but not any extension or renewal of such contract, for which an obligation to provide closed captioning would constitute a breach of contract.

(2) *Video programming or video programming provider for which the captioning requirement has been waived.* Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning imposes an undue burden on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

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

(4) *Primarily textual programming.* Video programming or portions of video programming for which the content of the soundtrack is displayed visually through text or graphics (e.g., program schedule channels or community bulletin boards).

(5) *Programming distributed in the late night hours.* Programming that is being distributed to residential households between 2 a.m. and 6 a.m. local time. Video programming distributors providing a channel that consists of a service that is distributed and exhibited for viewing in more than a single time zone shall be exempt from closed captioning that service for any contin-

uous 4 hour time period they may select, commencing not earlier than 12 a.m. local time and ending not later than 7 a.m. local time in any location where that service is intended for viewing. This exemption is to be determined based on the primary reception locations and remains applicable even if the transmission is accessible and distributed or exhibited in other time zones on a secondary basis. Video programming distributors providing service outside of the 48 contiguous states may treat as exempt programming that is exempt under this paragraph when distributed in the contiguous states.

(6) *Interstitials, promotional announcements and public service announcements.* Interstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.

(7) *ITFS programming.* Video programming produced for the instructional television fixed service (ITFS).

(8) *Locally produced and distributed non-news programming with limited 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.

(10) *Primarily non-vocal musical programming.* Programming that consists primarily of non-vocal music.

(11) *Captioning expense in excess of 2 percent of gross revenues.* No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2 percent of the gross revenues received from that channel during the previous calendar year.

(12) *Channels producing revenues of under \$3,000,000.* No 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 pursuant to paragraph (c) of this section.

(e) *Responsibility for and determination of compliance.* (1) Compliance shall be calculated on a per channel, calendar quarter basis;

(2) Open captioning or subtitles in the language of the target audience may be used in lieu of closed captioning;

(3) Live programming or repeats of programming originally transmitted live that are captioned using the so-called “electronic news room” technique will be considered captioned. The live portions of noncommercial broadcasters’ fundraising activities that use automated software to create a continuous captioned message will be considered captioned;

(4) Compliance will be required with respect to the type of video programming generally distributed to residential households. Programming produced solely for closed circuit or private distribution is not covered by these rules;

(5) Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards the compliance with the requirements for new programming prior to January 1, 2006. Video programming that is exempt pursuant to paragraph (d) of this section that contains captions, except that video programming exempt pursuant to paragraph (d)(5) of this section (late night hours exemption), can count towards compliance with the requirements for pre-rule programming.

(6) For purposes of paragraph (d)(11) of this section, captioning expenses include direct expenditures for captioning as well as allowable costs specifically allocated by a programming supplier through the price of the video programming to that video programming provider. To be an allowable allocated cost, a programming supplier may not allocate more than 100 percent of the costs of captioning to individual video programming providers. A programming supplier may allocate the captioning costs only once and may use

any commercially reasonable allocation method;

(7) For purposes of paragraphs (d)(11) and (d)(12) of this section, annual gross revenues shall be calculated for each channel individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel. Revenue for channels shared between network and local programming shall be separately calculated for network and for non-network programming, with neither the network nor the local video programming provider being required to spend more than 2 percent of its revenues for captioning. Thus, for example, compliance with respect to a network service distributed by a multi-channel video service distributor, such as a cable operator, would be calculated based on the revenues received by the network itself (as would the related captioning expenditure). For local service providers such as broadcasters, advertising revenues from station-controlled inventory would be included. For cable operators providing local origination programming, the annual gross revenues received for each channel will be used to determine compliance. Evidence of compliance could include certification from the network supplier that the requirements of the test had been met. Multichannel video programming distributors, in calculating non-network revenues for a channel offered to subscribers as part of a multichannel package or tier, will not include a pro rata share of subscriber revenues, but will include all other revenues from the channel, including advertising and ancillary revenues. Revenues for channels supported by direct sales of products will include only the revenues from the product sales activity (e.g., sales commissions) and not the revenues from the actual products offered to subscribers. Evidence of compliance could include certification from the network supplier that the requirements of this test have been met.

(8) If two or more networks (or sources of programming) share a single channel, that channel shall be considered to be in compliance if each of the sources of video programming are in compliance where they are carried on a full time basis;

(9) Video programming distributors shall not be required to provide closed captioning for video programming that is by law not subject to their editorial control, including but not limited to the signals of television broadcast stations distributed pursuant to sections 614 and 615 of the Communications Act or pursuant to the compulsory copy-right licensing provisions of sections 111 and 119 of the Copyright Act (Title 17 U.S.C. 111 and 119); programming involving candidates for public office covered by sections 315 and 312 of the Communications Act and associated policies; commercial leased access, public access, governmental and educational access programming carried pursuant to sections 611 and 612 of the Communications Act; video programming distributed by direct broadcast satellite (DBS) services in compliance with the noncommercial programming requirement pursuant to section 335(b)(3) of the Communications Act to the extent such video programming is exempt from the editorial control of the video programming provider; and video programming distributed by a common carrier or that is distributed on an open video system pursuant to section 653 of the Communications Act by an entity other than the open video system operator. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.

(f) *Procedures for exemptions based on undue burden.* (1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will result in an undue burden.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would cause an undue

burden. The term “undue burden” means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning impose an undue burden include:

(i) The nature and cost of the closed captions for the programming;

(ii) The impact on the operation of the provider or program owner;

(iii) The financial resources of the provider or program owner; and

(iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. Undue burden shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the undue burden standard, and all subsequent pleadings, shall be filed in accordance with §0.401(a) of this chapter.

(5) The Commission will place the petition on public notice.

(6) Any interested person may file comments or oppositions to the petition within 30 days of the public notice of the petition. Within 20 days of the close of the comment period, the petitioner may reply to any comments or oppositions filed.

(7) Comments or oppositions to the petition shall be served on the petitioner and shall include a certification that the petitioner was served with a copy. Replies to comments or oppositions shall be served on the commenting or opposing party and shall include a certification that the commenter was served with a copy.

(8) Upon a showing of good cause, the Commission may lengthen or shorten any comment period and waive or establish other procedural requirements.

(9) All petitions and responsive pleadings shall contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on.

(10) The Commission may deny or approve, in whole or in part, a petition for an undue burden exemption from the closed captioning requirements.

(11) During the pendency of an undue burden determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

(g) *Complaint procedures.* (1) No complaint concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission unless such complaint is first sent to the video programming distributor responsible for delivery and exhibition of the video programming. A complaint must be in writing, must state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation. In the case of an alleged violation by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to paragraph (e)(9) of this section, the complaint shall be sent directly to the station or owner of the programming. A video programming distributor receiving a complaint regarding such programming must forward the complaint within seven days of receipt to the programmer or send written instructions to the complainant on how to refile with the programmer.

(2) A complaint will not be considered if it is filed with the video programming distributor later than the end of the calendar quarter following the calendar quarter in which the alleged violation has occurred.

(3) The video programming distributor must respond in writing to a complaint no later than 45 days after the end of the calendar quarter in which the violation is alleged to have occurred or 45 days after receipt of a written complaint, whichever is later.

(4) If a video programming distributor fails to respond to a complaint or a dispute remains following the initial complaint resolution procedures, a complaint may be filed with the Commission within 30 days after the time allotted for the video programming distributor to respond has ended. An

original and two (2) copies of the complaint, and all subsequent pleadings shall be filed in accordance with § 0.401(a) of this chapter. The complaint shall include evidence that demonstrates the alleged violation of the closed captioning requirements of this section and shall certify that a copy of the complaint and the supporting evidence was first directed to the video programming distributor. A copy of the complaint and any supporting documentation must be served on the video programming distributor.

(5) The video programming distributor shall have 15 days to respond to the complaint. In response to a complaint, a video programming distributor is obligated to provide the Commission with sufficient records and documentation to demonstrate that it is in compliance with the Commission's rules. The response to the complaint shall be served on the complainant.

(6) Certifications from programming suppliers, including programming producers, programming owners, networks, syndicators and other distributors, may be relied on to demonstrate compliance. Distributors will not be held responsible for situations where a program source falsely certifies that programming delivered to the distributor meets our captioning requirements if the distributor is unaware that the certification is false. Video programming providers may rely on the accuracy of certifications. Appropriate action may be taken with respect to deliberate falsifications.

(7) The Commission will review the complaint, including all supporting evidence, and determine whether a violation has occurred. The Commission shall, as needed, request additional information from the video programming provider.

(8) If the Commission finds that a violation has occurred, penalties may be imposed, including a requirement that the video programming distributor deliver video programming containing closed captioning in an amount exceeding that specified in paragraph (b) of this section in a future time period.

(h) *Private rights of action prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of

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this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.