

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

In the Matter of :)	
)	
OUTLAND SPORTS, INC.)	
)	CSR 5443
)	
Video Programming Accessibility)	
)	
Petition for Waiver of Closed Captioning)	
Requirements)	

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 2001

Released: July 9, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this Order, we address a petition for exemption from Section 79.1 of the Commission's rules,¹ implementing Section 713 of the Communications Act of 1934, as amended (the "Act"),² filed by Outland Sports, Inc. ("Outland" or "Petitioner"), producer of the half hour video program, "Outdoor Traditions" which airs weekly on The Outdoor Channel network. Several informal comments were filed.³ For the reasons discussed herein, Outland's undue burden petition is denied, to the extent stated herein.

II. BACKGROUND

2. Section 713, Video Programming Accessibility, was added to the Communications Act by Section 305 of the Telecommunications Act of 1996. Section 713 generally requires that video programming be closed captioned, regardless of distribution technologies, to ensure that it is accessible to persons with hearing disabilities.⁴ In *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility* the Commission established rules and implementation schedules

¹47 C.F.R. § 79.1.

²47 U.S.C. § 613.

³Interested parties filed comments by e-mail following the end of the official comment period. Because these comments are untimely filed, they need not be considered. In this instance, however, the public interest is better served by permitting the most complete record possible. Therefore, we will consider these comments. Comments were received from the following individuals: John Babbitt; Brenda and Garry Mowl; Malisa W. Janes; and Willis Mann.

⁴For a more complete description of closed captioning, see *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, 11 FCC Rcd 19214 (1996).

for the closed captioning of video programming.⁵ In enacting Section 713, Congress recognized that in some situations requiring that programming be closed captioning might prove to be burdensome on video programming providers or owners, and it authorized the Commission to adopt appropriate exemptions.⁶ Accordingly, the Commission established transition schedules to phase in the closed captioning of video programming, and provided for exemptions in instances where imposing a captioning obligation would be burdensome.⁷ As provided by the statute, the Commission adopted exemptions for programs, classes of programs, or services for which the provision of closed captioning would be economically burdensome to the provider or owner of such programming.

3. In addition, the statute provides the Commission with authority to grant a petition for an exemption from the closed captioning requirements upon a showing that the requirements would result in an undue burden for the program provider or owner.⁸ Congress defined “undue burden” to mean significant difficulty or expense.⁹ When determining if the closed captioning requirements will impose an undue burden, the statute requires the Commission to consider the following factors: (1) the nature and cost of the closed captions for the programming; (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 operation of the provider or program owner.¹⁰

4. The Commission’s rule permits any party in the video distribution chain, including a video programming provider or program owner, to petition for an exemption from closed captioning where it can be shown that such requirements would impose an undue burden.¹¹ Petitions must include information that demonstrates how the statutory factors are met.¹² Petitioners also are instructed to submit any other information they deem appropriate and relevant to the Commission’s final determination.¹³ While an undue burden petition is pending, the programming that is the subject of the petition will be considered exempt from the closed captioning requirements.¹⁴

III. DISCUSSION

5. Outland seeks an exemption from the closed captioning requirements for the video program “Outdoor Traditions,” which is broadcast weekly on The Outdoor Channel network. Petitioner states that because of the show’s budget constraints, the requirement to caption could result in the end of production of the program.¹⁵ Petitioner questions whether captioning is necessary for its program, as it

⁵*Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, 13 FCC Rcd 3272 (1997) (“*Report and Order*”).

⁶47 U.S.C. § 613(d)(1).

⁷*Report and Order*, 13 FCC Rcd at 3342.

⁸ 47 U.S.C. § 613(d)(3).

⁹ 47 U.S.C. § 613(e).

¹⁰*Id.*; see also 47 C.F.R. § 79.1(f).

¹¹47 C.F.R. § 79.1(f).

¹²47 C.F.R. § 79.1(f)(2).

¹³47 C.F.R. § 79.1(f)(3).

¹⁴47 C.F.R. § 79.1(f)(11).

¹⁵Petition at 1.

states that “Outdoor Traditions” is a hunting show with very limited scripting because most of the show’s audio are natural sounds.¹⁶ While petitioning for an exemption based upon the undue burden standard, Outland alternatively argues that it is eligible for an exemption from the closed captioning requirements until 2002. It states that the Commission’s rules exempts from captioning for a four year period new networks that had not yet reached their fourth anniversary by the effective date of the captioning rules, January 1, 1998.¹⁷ Outland asserts that The Outdoor Channel network began full time operation in June 1994.¹⁸ In the informal comments filed, parties generally argue that grant of an exemption from the closed captioning rules is not warranted because Petitioner has not provided documentation regarding the profitability or revenue produced by the “Outdoor Traditions” program, and as hearing-impaired individuals, they state that they are entitled to equal access to programs broadcast.¹⁹

6. Section 79.1(f) of the Commission’s rules permits exemptions from the closed captioning requirements provided there is sufficient evidence to demonstrate that compliance with the requirements would cause an undue burden. The rule provides that an exemption is warranted only when the applicability of the closed captioning requirements would cause significant difficulty or expense. In making that determination, we are to evaluate petitions in accordance with the four factors set forth by Congress in Section 713(e).²⁰ Further, in the *Report and Order*, the Commission determined that we are to consider the resources of the individual outlet and its ability to provide closed captioning when deciding whether to grant a petition for an undue burden exemption.²¹ The Commission stated that the overall budget and revenues of the individual outlet, and not simply the resources it chooses to devote to a particular program, are relevant for these purposes.²²

7. Regarding the first factor to be considered in an undue burden analysis, the nature and cost of the closed captions, Outland argues that the cost of producing “Outdoor Traditions” each week is approximately \$1000, and the cost of closed captioning will range from approximately \$417 to \$ 475 per show.²³ Outland states that it would be an additional cost of 40 percent to provide captioning for each show.²⁴ Outland asserts that captioning would be a burden and that it would cause it to cease production because of cost and budget constraints. Regarding the sufficiency of the information filed by Petitioner in establishing whether its meets the undue burden standard, we note that Outland sought the services of at least three captioning providers and in its exemption filing indicated a range of quotes, as well as, the correspondence received from such captioning companies. Its efforts to seek information from various sources on the cost of captioning its program is evident and other entities seeking waiver of the captioning requirements should make similar efforts and showings. Petitioner, however, does not provide details regarding its financial resources. It also does not address whether it has sought any means to recoup the

¹⁶*Id.*

¹⁷Petition at 2. Section 79.1(d)(9) in part, states that a video programming network in operation less than four years on January 1, 1998 is exempt until January 1, 2002. *See* 47 C.F.R. § 79.1(d)(9).

¹⁸Petition at 2.

¹⁹*See* Comments of John Babbitt; Brenda and Garry Mowl; Malisa W. Janes; and Willis Mann

²⁰47 U.S.C. § 613(e); 47 C.F.R §b79.1(f)(2).

²¹*Report and Order*, 13 FCC Rcd at 3366.

²²*Id.*

²³Petition at 1.

²⁴*Id.*

cost of closed captioning, such as through grants or sponsorships, or through arrangements with The Outdoor Channel or program distributors (e.g. cable systems). Without additional information on the financial resources of Petitioner, or other possible means of gaining captioning, the impact of implementing closed captioning is difficult to determine. We note that Petitioner has submitted evidence that the cost of captioning will significantly increase the production cost of the Outdoor Traditions program. However, without a better understanding of the overall resources at issue, the captioning cost information submitted is not adequate to assess the impact of the cost of closed captions on Outland Sports. Nevertheless, we find the information submitted by Outland marginally favors exemption under the first factor.

8. With regard to the second factor, the impact on the operation of the provider or program owner, the Petitioner states its program is produced and aired within a few days of its shooting. Outland asserts that having to adjust its deadlines in order for the show to be captioned would be nearly, if not, impossible.²⁵ However, this information does not assist us in accessing the reasonableness of the request for relief from the captioning requirement. Outland does not explain in sufficient detail why its program has to be aired within a few days of its shooting or why adjustments in its schedule to provide for captioning would be so prohibitive. Closed captioning perhaps could be worked into a production schedule without the overarching detrimental impact Outland relates. Accordingly, we are again unable to determine whether or not the second factor favors granting the petition.

9. With regard to the third factor, financial resources of the provider or program owner, Petitioner indicates that its financial resources are limited and that Outland operates on a budget.²⁶ It states that captioning will increase the show's budget by 40 percent and could result in the end of production of "Outdoor Traditions." In order to make this determination, we will examine the overall budget and revenues of the individual outlet and not simply the resources it chooses to devote to a particular program."²⁷ We note that Outland Sports is a manufacturer of a wide variety of hunting and outdoor products and uses the Outdoor Traditions program as a means of promoting its products. Based on the limited information the Petitioner has chosen to provide, however, we are unable to determine whether or not Petitioner has sufficient financial resources to comply with its closed captioning obligations.

10. Finally, with regard to the fourth factor, the type of operations of the program provider, Petitioner points out that Outland is a company that manufactures a wide variety of hunting accessories.²⁸ It states that the television show is a means of promoting these accessories and is not a "money maker."²⁹ Further, it asserts that the additional cost of adding closed captioning to the show would make it more difficult to justify the show's existence.³⁰ While petitioner states that the program does not generate revenue, we believe such reason is insufficient to warrant an exemption, because a program could be far from a "money maker" yet have access to significant financial resources to cover costs related to its production. The additional cost of captioning could possibly be absorbed or addressed by gaining financing from outside sources or by a budget adjustment in the production of the program. We do not

²⁵*Id.*

²⁶*Id.*

²⁷*Report and Order*, 13 FCC Rcd at 3366.

²⁸Petition at 2.

²⁹*Id.*

³⁰*Id.*

know, however, whether any such efforts have been made. As with the analysis of the first factor, additional and more detailed information would have assisted us in assessing whether a full exemption is warranted. Accordingly, we are again unable to determine whether or not factor four favors granting the petition.

11. We note that the Commission's rules provide that programming on networks which had not yet reached their fourth anniversary by the effective date of the captioning rules, January 1, 1998, are exempt for a four year period.³¹ Outland indicates that The Outdoor Channel network began operations in June 1994 and that programming on the network is exempt from the captioning requirements until January 2002. Commission records, however, indicate that The Outdoor Channel began operation in April 1993. Consequently, the Commission's rules require that the program "Outdoor Traditions" on the Outdoor Channel network be closed captioned because the network it is not subject to the new network exemption of Section 79.1(d)(9) of the Commission's rules.³²

12. The Commission seeks to make closed captioning an integral part of video programming. Persons with hearing disabilities should have the same opportunity to share in the benefits provided by television programming that others have.³³ We recognize that captioning involves an expense, but the significance of the burden here is unclear. Indeed, the information submitted by Outland is not sufficient to make a clear determination under three of the four exemption factors. However, we do note that Outland has demonstrated that closed captioning will significantly increase the production cost of the Outdoor Traditions program. Rather than the full exemption requested, we believe a partial exemption is appropriate to allow Petitioner relief from the captioning requirements for a limited period during which, if they so chose, they may request a broader exemption on a more complete record. The duration of this partial exemption will be limited to one year from the release date of this *Order*. The exemption will apply to all episodes of the "Outdoor Traditions" program created during the exemption period. We note that the partial exemption granted herein applies solely to the Petitioners and should not, at this time, affect the amount of programming that a broadcaster or cable network carrying "Outdoor Traditions" is required to caption pursuant to Section 79.1(b)(1).³⁴

13. If Petitioners elect to seek a further exemption from the closed captioning requirements of Section 79.1, we advise Petitioner that our rules require a detailed showing for each prong of the undue burden exemption supported by record evidence. Failure to support a future exemption request with adequate evidence will result in the dismissal of their petition.

³¹ *Order on Reconsideration*, 13 FCC Rcd 19973, 19998 (1998).

³² See 47 C.F.R. § 79.1(d)(9).

³³ *Id.* at 3277.

³⁴ The responsibility for compliance with the closed captioning rules is on video programming distributors, defined as all entities who provide video programming directly to customers' homes (i.e. broadcasters and MVPDs). The partial exemption granted herein would reduce the amount of programming that a broadcaster or cable network carrying "Outdoor Traditions" is required to caption only in the situation in which the amount of programming subject to closed captioning exemption aired by a broadcaster or cable network exceeds the number of hours that such broadcaster or cable network is not required to caption pursuant to Section 79.1(b)(1). After January 1, 2006, when 100% of a programming distributor's new nonexempt programming must be captioned, an exemption granted by the Commission to a program producer would operate to reduce the amount of programming that a broadcaster or cable network is required to caption by the number of hours that the exempt program is aired by the broadcaster or cable network. 47 C.F.R. § 79.1(b)(1)(iv).

14. During this partial exemption period, we encourage Petitioner to explore additional or alternative sources of financing to enable it to provide closed captioning. Petitioner also is encouraged to consider alternative mechanisms that might constitute a reasonable substitute for closed captioning that would make its programming more readily accessible to persons with hearing disabilities.³⁵ The *Report and Order* noted that some alternatives may include, but are not limited to, text or graphic display of the content of the audio portion of the programming, or the use of sign language interpretation.³⁶

IV. ORDERING CLAUSE

15. For the reasons set forth above, the petition for exemption from the closed captioning requirements of Section 79.1 of the Commission's rules **IS DENIED**. A partial exemption **IS GRANTED** to the extent indicated above for one year from the release date of this *Order*.

16. **IT IS FURTHER ORDERED**, if captioning commences on or before the expiration of the partial waiver granted herein, that Outland inform the Commission of the date on which it commences closed captioning of "Outdoor Traditions."

17. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules.³⁷

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Cable Services Bureau

³⁵*Id.* at 3364.

³⁶*Id.*

³⁷47 C.F.R. § 0.321.