

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

In the Matter of :
The Wild Outdoors
Video Programming Accessibility
Petition for Waiver of Closed Captioning
Requirements
CSR 5444

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 full exemption from Section 79.1 of the Commission's rules, implementing Section 713 of the Communications Act of 1934, as amended (the "Act"), filed by Jay Gregory and Tammy Gregory ("Gregorys" or "Petitioners"), owners and producers of the video program, "The Wild Outdoors." Several informal comments were filed. For the reasons discussed herein, we grant a partial exemption, 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. In Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility the Commission established rules and implementation schedules for the closed captioning of video programming. In enacting Section 713, Congress recognized that in

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, we believe that 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).

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

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> Congress defined “undue burden” to mean significant difficulty or expense.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Petitions must include information that demonstrates how the statutory factors are met.<sup>12</sup> Petitioners also are instructed to submit any other information they deem appropriate and relevant to the Commission’s final determination.<sup>13</sup> 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.<sup>14</sup>

### III. DISCUSSION

5. The Gregorlys seek a “full exemption” from the closed captioning requirements for their video program “The Wild Outdoors,” which is broadcast weekly on television stations in Kansas City and St. Joseph, Missouri, and carried on The Outdoor Channel.<sup>15</sup> They assert that twenty-six shows are

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<sup>6</sup>47 U.S.C. § 613(d)(1).

<sup>7</sup>*Report and Order*, 13 FCC Rcd at 3342.

<sup>8</sup> 47 U.S.C. § 613(d)(3).

<sup>9</sup> 47 U.S.C. § 613(e).

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

<sup>11</sup>47 C.F.R. § 79.1(f).

<sup>12</sup>47 C.F.R. § 79.1(f)(2).

<sup>13</sup>47 C.F.R. § 79.1(f)(3).

<sup>14</sup>47 C.F.R. § 79.1(f)(11).

<sup>15</sup>Petitioners do not explain what is meant by their request for “full exemption.” We will assume, however, that they seek an exemption from having to provide any closed captioning for the entire period that their program is aired.

produced each year, each show is thirty minutes in duration, and that providing closed captioning would constitute an undue burden.<sup>16</sup> The Gregorys state that it would cost approximately \$480 per show, or \$12,480 per year, to include “pop up”<sup>17</sup> captions to the “The Wild Outdoors” program, and that such captioning would have to be done for the twenty-six new shows that are produced yearly.<sup>18</sup> They submit that they lack the technical capabilities to provide closed captioning and that they would be unable to produce and market the program if required to purchase captioning service.<sup>19</sup> Petitioners also state that they do not have the financial means to absorb the cost of closed captioning, and if required to caption, would have to cease production because of cost and budget constraints.<sup>20</sup> In the informal comments filed, parties generally argue that grant of an exemption from the closed captioning rules is not warranted because the Petitioners have not provided documentation regarding the profitability or revenue produced by the “The Wild Outdoors” program and, as hearing-impaired individuals, they state that they are entitled to equal access to programs broadcast.<sup>21</sup>

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).<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

7. Regarding the first factor to be considered in an undue burden analysis, the nature and cost of the closed captions, the Gregorys argue that the cost of closed captioning will be approximately \$480 per show, or \$12,480 per year. Petitioners assert that captioning would be a burden and that it would cause them to have to cease production of “The Wild Outdoors” because of cost and budget constraints. The Gregorys, however, do not provide details regarding their financial resources. They also do not address whether they have sought any means to recoup the cost of closed captioning, such as through grants or sponsorships, or through arrangements with The Outdoor Channel or program distributors (e.g. cable systems). Moreover, Petitioners do not provide information regarding the basis of

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<sup>16</sup>Petition at 1.

<sup>17</sup>“Pop up” captions are similar to movie subtitles, whereby the captions pop a sentence or more at a time contemporaneous with the dialogue. Each caption is time coded so that it appears synchronous with the dialogue.

<sup>18</sup>Petition at 2.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>See Comments of John Babbitt, Brenda and Garry Mowl; Malisa W. Janes; and Willis Mann.

<sup>22</sup>47 U.S.C. § 613(e); 47 C.F.R. § 79.1(f)(2).

<sup>23</sup>*Report and Order*, 13 FCC Rcd at 3366.

<sup>24</sup>*Id.*

the \$480 figure quoted as the cost for captioning. Nor do the Gregorys indicate whether several estimates were sought to determine the most reasonable price for the captioning service. Without additional information on the financial resources of Petitioners, their efforts to find companies that provide captioning at a reasonable cost, a listing of various prices quoted, or information concerning other possible means of gaining captioning, the impact of implementing closed captioning is difficult to determine. The captioning cost information submitted is not adequate to assess the impact of the cost of closed captions. Thus, because the Gregorys have not submitted sufficient information, we are unable to determine whether or not factor one of the undue burden test favors granting the petition.

8. With regard to the second factor, the impact on the operation of the provider or program owner, the Petitioners state that they would be unable to produce and market their program if required to provide for closed captioning. The Gregorys explain that cost and budget constraints are the specific reason for such inability to caption. As with the analysis of the first factor, however, additional and more detailed financial information would have assisted us in accessing the reasonableness of the request for relief from the captioning requirement. 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, Petitioners indicate that their financial resources are limited. 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.<sup>25</sup> Based on the limited information the Petitioners have chosen to provide, however, we are unable to determine whether or not Petitioners have sufficient financial resources to comply with their closed captioning obligations.

10. Finally, with regard to the fourth factor, the type of operations of the program provider, Petitioners point out that their production company is a small operation, consisting of only two individuals and their company does not have the technical capabilities or financial resources to caption.<sup>26</sup> In addition, Petitioners state that if forced to caption, production of the program would have to cease. The information that Petitioners have submitted regarding operations provides a degree of insight as to the level of difficulty the company might encounter in seeking to comply with the captioning requirements. It appears that production of the "The Wild Outdoors" is accomplished with limited staff and resources. More detailed information, however, would have been helpful in assessing whether a full exemption is warranted.

11. 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.<sup>27</sup> We believe, however, that the petition for exemption filed by the Gregorys is not supported by sufficient evidence to demonstrate that a full exemption is justified. We recognize that captioning involves an expense, but the significance of the burden here is unclear. Indeed, the information submitted by the Gregorys is not sufficient to make a clear determination under three of the four exemption factors. However, we do note that Petitioners have shown clearly that the size of their operation is small, their staff is limited, and there is an indication that the requirement to caption will have an impact on their operation. Rather than the full exemption requested, we believe a partial exemption is

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<sup>25</sup>*Report and Order*, 13 FCC Rcd at 3366.

<sup>26</sup>We note that in most instances, closed captioning is not done by the distributor or the originator of the programming, but is contracted out to companies that perform such a service.

<sup>27</sup>*Id.* at 3277.

appropriate to allow Petitioners 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 Wild Outdoors” 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 “The Wild Outdoors” is required to caption pursuant to Section 79.1(b)(1).<sup>28</sup>

12. If Petitioners elect to seek a further exemption from the closed captioning requirements of Section 79.1, we advise Petitioners 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.

13. During this partial exemption period, we encourage Petitioners to explore additional or alternative sources of financing to enable them to provide closed captioning. Petitioners also are encouraged to consider alternative mechanisms that might constitute a reasonable substitute for closed captioning that would make their programming more readily accessible to persons with hearing disabilities.<sup>29</sup> 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.<sup>30</sup>

#### IV. ORDERING CLAUSE

14. For the reasons set forth above, the petition for full 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*.

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<sup>28</sup>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 “The Wild Outdoors” 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).

<sup>29</sup>*Id.* at 3364.

<sup>30</sup>*Id.*

15. **IT IS FURTHER ORDERED**, if captioning commences on or before the expiration of the partial waiver granted herein, that the Gregorys inform the Commission of the date on which they commence closed captioning of “The Wild Outdoors.”

16. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission’s rules.<sup>31</sup>

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree  
Chief, Cable Services Bureau

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<sup>31</sup>47 C.F.R. § 0.321.