

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

In the Matter of:	)	
	)	
	)	
Closed Captioning and Video Description	)	
of Video Programming	)	
	)	
	)	MM Docket No. 95-176
	)	
	)	
Implementation of Section 305 of the	)	
Telecommunications Act of 1996	)	
	)	
Video Programming Accessibility	)	

**CLARIFICATION ORDER**

**Adopted: February 27, 2001**

**Released: March 2, 2001**

By the Commission:

**I. INTRODUCTION**

1. In this *Clarification Order*, the Commission addresses CBS Corporation's ("CBS") Request for Clarification of the *Order on Reconsideration*<sup>1</sup> in the above-captioned proceeding implementing Section 713 of the Communications Act of 1934, as amended ("Communications Act").<sup>2</sup> Section 713 titled "Video Programming Accessibility" was added to the Communications Act by Section 305 of the Telecommunications Act of 1996 ("1996 Act") and generally requires that video programming be closed captioned to ensure that it is accessible to persons with hearing disabilities.<sup>3</sup> The National Association of the Deaf and the Consumer Action Network ("NAD/CAN"), Self Help for Hard of Hearing People, Inc. ("SHHH"), and Mr. Jack O'Keeffe of Aliquippa, Pennsylvania filed comments. The Council of Organizational Representatives on National Issues Concerning People Who are Deaf or Hard of Hearing ("COR") and Telecommunications for the Deaf, Inc. ("TDI") filed reply comments.

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<sup>1</sup>*Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility, Order on Reconsideration*, 13 FCC Rcd 19973 (1998) ("*Order on Reconsideration*").

<sup>2</sup>47 U.S.C. § 613.

<sup>3</sup>Pub. L. 104-104, 110 Stat. 56 (1996).

2. **Summary of Decision:** To the extent indicated below, we grant CBS' request for clarification. Large Programming Providers<sup>4</sup> must real-time caption a specific amount of programming set forth in our rules. This amount is called the Benchmark Amount. In addition, if a Large Programming Provider captioned more programming during the first six months of 1997 than the Benchmark Amount, the Large Programming Provider must also caption up to that additional amount. If the Large Programming Provider used real-time captioning during the first six months of 1997, our rules require the Large Programming Provider must real-time caption its entire captioning requirement (Benchmark Amount plus additional amount). If the Large Programming Provider used ENR<sup>5</sup> captioning during the first six months of 1997, our rules require that the Large Programming Provider must real-time caption the Benchmark Amount but gives the Large Programming Provider the choice of whether to caption the additional amount of programming using the ENR captioning method or the real-time captioning method.

## II. BACKGROUND

3. Section 713 required the Commission to prescribe rules and implementation schedules for the closed captioning of video programming<sup>6</sup> regardless of the entity that provides the programming to consumers or the category of programming.<sup>7</sup> Section 713 required the Commission to adopt rules including implementation schedules to ensure that: (1) video programming first published or exhibited after the effective date of such regulations ("new programming") is fully accessible through the provision of closed captions; and (2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations ("pre-rule programming") through the provision of closed captions.<sup>8</sup>

4. The statute directed the Commission to adopt exemptions from the general captioning requirements for programs, classes of programs, or services for which we determine that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.<sup>9</sup> The

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<sup>4</sup>Defined as 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.

<sup>5</sup>Formerly known as electronic newsroom reporting ("ENR"), the Commission now refers to this technology as the electronic newsroom captioning technique. *See Federal Communications Commission Fact Sheet: Closed Captioning of Video Programming* (June 1999).

<sup>6</sup>Closed captioning is an assistive technology designed to provide access to television for persons with hearing disabilities. Closed captioning is similar to subtitles in that it displays the audio portion of a television signal as printed words on the screen. To assist viewers with hearing disabilities, captions may also identify speakers, sound effects, music and laughter. Unlike subtitles, however, closed captioning is hidden as encoded data transmitted within the television signal. For a more complete description of closed captioning, *See Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, Report, 11 FCC Rcd 19214 (1996) ("*Report*") and *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, Notice of Proposed Rulemaking, 12 FCC Rcd 1044 (1997) ("*Notice*").

<sup>7</sup>*Notice* 12 FCC Rcd at 1048; *Report and Order* 13 FCC Rcd at 3276.

<sup>8</sup>47 U.S.C. § 613(b) & (c).

<sup>9</sup>47 U.S.C. § 613(d)(1). In addition, under Section 713, a provider of video programming or the owner of any  
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statute also states that a provider of video programming or program owner may petition the Commission for an exemption from closed captioning when the requirements would impose an undue *burden*, which is defined as significant difficulty or expense.<sup>10</sup> Section 713 also gave the Commission exclusive jurisdiction with respect to any complaint under this section.<sup>11</sup> To implement Section 713, the Commission added a new Part 79, Closed Captioning of Video Programming, to its rules, which became effective on January 1, 1998.<sup>12</sup>

5. The Commission established rules and procedures for measuring compliance with the closed captioning requirements adopted in the *Closed Captioning and Video Description of Video Programming - Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility ("Report and Order")*.<sup>13</sup> In the *Report and Order*, the Commission determined that it would allow video programmers to count, as part of compliance with the closed captioning requirements, any captions created using the electronic newsroom technique.<sup>14</sup> The electronic newsroom technique is commonly used for live programming, especially newscasts, and creates captions from a news script computer or teleprompter. Only material that is scripted can be captioned using this technique and, thus, within a program live field reports, breaking news, sports and weather may remain uncaptioned.<sup>15</sup>

6. On reconsideration, however, the Commission decided that it would be "more consistent with the statutory intent" of Section 713 to limit the circumstances where we will count the use of electronic newsroom captioning as a substitute for real-time captioning, and to eventually phase out our recognition of electronic newsroom captioning.<sup>16</sup> Acknowledging that a real-time captioning requirement could, in certain instances, impose an economic burden on smaller entities since resources are likely to be limited the Commission, "in recognition of the goal of Section 713 to ensure full accessibility, made [its] best effort to identify a class of video programmers for whom a real-time captioning requirement would not be economically burdensome."<sup>17</sup> We concluded that it would not be economically burdensome to impose a real-time captioning requirement on a limited group of the largest video programming providers, including 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

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program carried by the provider is not obligated to supply closed captions if such action would be inconsistent with contracts in effect on February 8, 1996, the date of enactment of the 1996 Act. 47 U.S.C. § 613(d)(2).

<sup>10</sup>47 U.S.C. § 613(d)(3) & (e).

<sup>11</sup>47 U.S.C. § 613(h).

<sup>12</sup>For a more complete summary of the rules, see *Report and Order* 13 FCC Rcd at 3280-82. See also 47 C.F.R. Part 79.

<sup>13</sup>13 FCC Rcd 3272, 3309-13 (1997); 47 C.F.R. § 79.1(e).

<sup>14</sup>13 FCC Rcd at 3311-12; 47 C.F.R. § 79.1(e)(3).

<sup>15</sup>*Report*, 11 FCC Rcd at 19231, 19235.

<sup>16</sup>*Order on Reconsideration*, 13 FCC Rcd at 19991. "Real-time" captioning is a methodology that converts the entire audio portion of a live program to captions. See *Federal Communications Commission Fact Sheet: Closed Captioning of Video Programming* (June 1999).

<sup>17</sup>*Id.* at 19991-92.

("DMAs"), and nonbroadcast networks serving 50% or more of the total number of multichannel video programming distributor ("MVPD") households (hereinafter "Large Programming Providers").<sup>18</sup> Whenever a broadcast television station, a broadcast television network or a nonbroadcast network satisfies one of these criteria, it becomes subject to the limitations placed on the use of electronic newsroom captioning to comply with our rules.<sup>19</sup>

7. We established an eight-year transition schedule to phase in closed captioning for new non-exempt video programming with benchmarks set at two-year intervals.<sup>20</sup> Captioning is measured on a per channel, calendar quarter basis.<sup>21</sup> To ensure that video programming distributors have sufficient time to make the necessary arrangements to comply with closed captioning requirements, the initial benchmark for captioning was set for the first calendar quarter of 2000.<sup>22</sup> For example, the timetable for closed captioning of new English language programming is set forth in Section 79.1(b)(1) of the Commission's rules. In 2000 and 2001, video program distributors must provide at least 450 hours of captioned new programming per channel during each calendar quarter. In 2002 and 2003, that number will increase to 900 hours per channel, per calendar quarter. In 2004 and 2005, that number will increase to an average of 1,350 hours per channel, per calendar quarter. As of January 1, 2006, 100% of the distributor's new, nonexempt programs must be provided with captions.<sup>23</sup> Notwithstanding the specific transition requirements and the exemptions otherwise provided for in the rules, in order to make sure that the level of captioning is generally increasing, the Commission also required video programming providers to continue to provide closed captioning at a level substantially the same as the average level that they provided during the first six months of 1997, even if the amount of captioned programming exceeds the requirement under the benchmarks.<sup>24</sup> The Commission refers to this requirement as the "no backsliding" rule.

### III. DISCUSSION

8. CBS's request seeks to have the Commission clarify the obligations of those program providers that used the electronic newsroom technique during the first six months of 1997 and will not be permitted to count electronic newsroom captioned programming toward the applicable captioning requirements beginning January 1, 2000. Specifically, CBS seeks an order clarifying that these program providers, while encouraged to switch to real-time captioning, will be permitted to continue to use electronic newsroom captioning to fulfill their obligation to caption substantially the same amount of live programming as they captioned using this method in 1997, as long as they do not count electronic newsroom captioning towards compliance with the applicable benchmark requirements.

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<sup>18</sup>*Id.* at 19992.

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

<sup>20</sup>Programs first shown on or after January 1, 1998, are considered "new" programming.

<sup>21</sup>47 C.F.R. § 79.1(e)(1).

<sup>22</sup>*Report and Order*, 13 FCC Rcd at 3294.

<sup>23</sup>With respect to all the benchmark periods, if a video programming distributor provides less than the prescribed number of hours of new nonexempt video programming, then 95% of its new nonexempt video programming must be provided with captions. 47 C.F.R. § 79.1(b)(1).

<sup>24</sup> 47 C.F.R. § 79.1(b)(3).

9. CBS seeks clarification of the real-time captioning requirement in conjunction with the applicable benchmarks and the no backsliding rule. Specifically, CBS seeks clarification regarding whether it is permitted to count electronic newsroom captioning towards compliance with the no backsliding rule as long as it does not count electronic newsroom captioned programming to meet the express benchmark requirements. In discussing the real-time captioning requirement, we stated in the *Order on Reconsideration* that:

we believe that a better balance of the desire to ensure accessibility of video programming against the reality of resource limitations, is to find that certain video programming providers, i.e., those most likely to have access to real-time captioning resources and for which such a requirement will not impose an economic burden, *should not be allowed to use [electronic newsroom captioning] in lieu of real-time captioning.*<sup>25</sup>

Portions of the *Order on Reconsideration* refer to the amount of programming that a Large Programming Provider must real-time caption to remain in "compliance with the rules,"<sup>26</sup> while other portions refer to real-time captioning "required by the benchmark."<sup>27</sup>

10. NAD/CAN maintain that CBS and other providers covered by the Commission's new real-time mandates should not be permitted to count electronic newsroom captioning toward compliance with any of the Commission's captioning mandates, including the no backsliding rule. NAD/CAN argue that permitting providers to fulfill their captioning obligations through electronic newsroom captioning would conflict with Congress' mandate for full access to video programming.<sup>28</sup>

11. SHHH contends that the Commission determined that, beginning January 1, 2000, the four major national broadcast networks (ABC, CBS, Fox and NBC) and television stations in the top 25 television markets that are affiliated with these networks will not be permitted to count electronic newsroom captioned programming toward compliance with their captioning requirements. SHHH argues that CBS's interpretation of this mandate would effectively grandfather certain past users of electronic newsroom captioning and permit them to continue using the electronic newsroom captioning method in the year 2000 and beyond.<sup>29</sup> SHHH argues that the Commission should affirm that, effective January 1, 2000 and thereafter, the major national broadcast television networks and their affiliates in the top 25 television markets shall, in addition to meeting the applicable benchmarks, continue to provide captioning at a level substantially the same as the average level of captioning that they provided during the first six months of 1997, and shall not count new programming captioned by the electronic newsroom captioning technique

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<sup>25</sup>*Order on Reconsideration*, 13 FCC Rcd at 19991-92 (emphasis added).

<sup>26</sup>*Id.* at 19991-92 (See paragraphs 38 & 40).

<sup>27</sup>*Id.* at 19993 (See paragraph 40).

<sup>28</sup>NAD/CAN Comments at 2-4. NAD/CAN assert that full access cannot be achieved with electronic newsroom captioning because it does not provide captioning of live interviews, field reports, sports and weather updates, late breaking stories which are not pre-scripted, and banter among anchor persons. *Id.* at 3.

<sup>29</sup>SHHH Comments at 2.

towards compliance with these rules.<sup>30</sup>

12. COR opposes the CBS proposal that it be permitted to continue counting the electronic newsroom captioning technique to satisfy the no backsliding rule, as it would nullify the intent and effect of both Section 713 of the Communications Act and the Commission's own real-time ruling in its *Order on Reconsideration*.<sup>31</sup> TDI opposes CBS's request for clarification for three reasons. First, the Commission's *Order on Reconsideration* states plainly that electronic newsroom captioning will not be acceptable for any nonexempt programming.<sup>32</sup> Second, the Commission determined that electronic newsroom captioning is inferior to real-time closed captioning because it does not provide the same degree of access to the individuals who are deaf, hard of hearing, late deaf, and deaf-blind.<sup>33</sup> Finally, TDI argues that the financial impact on CBS for implementing real-time closed captioning is neither significant nor burdensome.<sup>34</sup>

13. Mr. Jack O'Keeffe argues that the Commission should reject CBS's request and reaffirm that the rules require CBS and its affiliates in the top 25 television markets, in addition to meeting all captioning benchmarks, continue to provide captioning at substantially the same level provided during the first six months of 1997, and should not count programming captioned by electronic newsroom captioning towards compliance.<sup>35</sup>

14. To the extent necessary, we hereby clarify the interaction between our closed captioning rules. Section 79.1(b)(5), the no backsliding rule, requires that video programming distributors shall continue to provide captioned programming at substantially the same level as the average level of captioning that they provided during the first six months of 1997 even if that amount of captioning exceeds the benchmark requirements set forth in Section 79.1(b)(1)-(4).<sup>36</sup> A programming provider must satisfy its express benchmark requirement, and the amount required by the no backsliding rule if the amount of programming captioned through any method for the first six months of 1997 exceeds the express benchmark requirements.

15. With regard to Large Programming Providers, we hereby clarify that to satisfy the electronic newsroom captioning requirement set forth in Section 79.1(e)(3), those providers must real-time caption only the express benchmark amount set forth in Sections 79.1(b)(1)-(4). If the amount required by the no backsliding rule of Section 79.1(b)(5) exceeds the express benchmark requirements,

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<sup>30</sup>*Id.* at 5.

<sup>31</sup>*COR Reply Comments at 2.* COR argues that video programming providers have an obligation under Section 713 to provide full access to their programs unless doing so would impose an economic or undue burden on these providers. COR also notes that the Commission has already determined that "persons with hearing disabilities do not have full access to . . . programming when electronic newsroom captioning is used." *Id.* at 3, quoting *Order on Reconsideration*, 13 FCC Rcd at 19991.

<sup>32</sup>TDI Reply Comments at 3, citing *Order on Reconsideration* at 19991-92.

<sup>33</sup>*Id.*, citing, *Federal Communications Fact Sheet: Closed Captioning of Video Programming* (March 1999).

<sup>34</sup>*Id.* at 3-5. TDI observes that the captioning requirements set forth in the *Order on Reconsideration* apply only to major broadcast networks and their affiliates in the top 25 national television markets.

<sup>35</sup>O'Keeffe's Comments at 1.

<sup>36</sup>47 C.F.R. § 79.1(b)(5).

Large Programming Providers are permitted to use whichever captioning method that the Large Programming Provider used during the first six months of 1997 to satisfy the no backsliding requirement. Thus, if a Large Programming Provider was using the electronic newsroom captioning method during the first six months of 1997, it may use electronic newsroom captioning to satisfy the no backsliding rule. Conversely, if a Large Programming Provider was using the real-time captioning method during the first six months of 1997, it must use real time captioning to satisfy the no backsliding rule.

16. While some commenters strongly argue that all captioning required of Large Programming Providers not count the electronic newsroom captioning format, these arguments are contrary to the intent of the no backsliding rule. The no backsliding rule was intended to ensure that broadcasters that were captioning more programming in the first six months of 1997 than that required by the express captioning benchmarks did not scale-back its captioning efforts to the benchmark levels. The no backsliding rule was not intended to impose greater costs and responsibilities on programming providers.<sup>37</sup>

#### IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(j) and 303(r), that the Request for Clarification filed by CBS Corporation **IS GRANTED** to the extent discussed in this Clarification Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>37</sup>Exemptions to our closed captioning rules 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. 47 C.F.R. § 79.1(f)(1).