

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

In the Matter of)	
)	
Closed Captioning of Video Programming)	CG Docket No. 05-231
)	
Closed Captioning Requirements for Digital Television Receivers)	ET Docket No. 99-254
)	

DECLARATORY RULING, ORDER, AND NOTICE OF PROPOSED RULEMAKING

Adopted: November 3, 2008

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By the Commission: Commissioners Copps, Adelstein, Tate, and McDowell issuing separate statements.

I. INTRODUCTION

1. In this *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* we take steps to ensure that all Americans, including persons who are deaf or hard of hearing, can enjoy video programming. In the *Declaratory Ruling*, we clarify several points regarding video programming distributors' obligations to close caption digital programming under section 713 of the Communications Act of 1934, as amended (Act), and the Commission's implementing regulations.¹ We are especially mindful of the need to clarify our rules in light of technological changes inherent in the digital television transition for full-power broadcasting, which must be completed by February 17, 2009, by Congressional mandate.² In the accompanying *Order*, we amend our rules to provide for more efficient complaint processes and methods for consumers to contact distributors with concerns about closed captioning. Finally, in the attached *Notice of Proposed Rulemaking*, we seek comment on how the exemption in section 79.1(d)(12) of the Commission's rules should apply to digital broadcasters that multicast.³ We find that these actions will ensure that the Commission's closed captioning rules are consistent with Congress's goal that "all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school, and workplace."⁴

¹ See 47 U.S.C. § 613 ("Video Programming Accessibility"); 47 C.F.R. § 79.1 ("Closed captioning of video programming"). Video programming distributors generally include over-the-air broadcast television services and all "multichannel video programming distributors" (MVPDs), which include cable television and satellite television services. See 47 C.F.R. § 79.1(a)(2) (defining "Video programming distributor").

² See Digital Television and Public Safety Act of 2005 ("DTV Act"), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) ("DRA") (*codified at* 47 U.S.C. §§ 309(j)(14) & 337(e)). The DTV Act established February 17, 2009, as the hard deadline for the end of analog transmissions by full-power stations. It also created a coupon program to subsidize the purchase of digital-to-analog converter boxes.

³ See 47 C.F.R. § 79.1(d)(12) (channels producing revenues of under \$3,000,000).

⁴ House Conference Report No. 458, 104th Cong., 2d Sess. at 183-84 (Jan. 31, 1996) (*H.R. Conf. Rep. No. 458*).

II. BACKGROUND

A. Section 713 and the Closed Captioning Regulations

2. Closed captioning is an assistive technology that provides persons with hearing disabilities access to television programs. Closed captioning displays the audio portion of a television signal as printed words on the television screen. Because closed captioning is hidden as encoded data transmitted within the television signal, the consumer can turn the captioning on or off. Captions may also identify speakers, sound effects, music, and laughter.

3. Captioning technology began more than forty years ago when the Public Broadcasting System initiated captions in an “open captioning format” by transmitting text with the video on the television screen in a manner visible to all viewers.⁵ In 1976, the Commission adopted rules providing that line 21 of the vertical blanking interval (VBI) be primarily used for the transmission of closed captioning in analog receivers. For analog television, closed captioning is hidden as encoded data transmitted within the VBI of the television signal which, “when decoded, provides a visual depiction of information simultaneously being presented on the aural channel (captions).”⁶ As discussed *infra*, in 2000, the Commission adopted rules for the display of captions on digital receivers. The Commission’s rules specify technical standards for the reception and display of captioning on analog and digital receivers.⁷

4. The Television Decoder Circuitry Act of 1990 (TDCA)⁸ requires closed captioning capability for all television receivers with screen sizes of 13 inches or larger, manufactured or sold in the United States.⁹ When this legislation passed, the video programming industry and private entities provided closed captioning of video programming selectively and on a voluntary basis.¹⁰ Although the amount of captioning increased following the enactment of the TDCA, Congress determined that, as the number of channels of video programming increased, “video programming through all delivery systems should be accessible.”¹¹

5. As part of the Telecommunications Act of 1996, Congress added a section entitled “Video Programming Accessibility,” to the Communications Act.¹² Section 713 requires closed captioning of video programming to ensure access for persons with hearing disabilities. Section 713 also

⁵ See generally *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996*, 12 FCC Rcd 1044 (Jan. 17, 1997); see also *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, Report, 11 FCC Rcd at 19214, 19223, para. 25 (July 29, 1996).

⁶ 47 C.F.R. § 73.682(a)(22).

⁷ 47 C.F.R. §§ 15.119, 15.122.

⁸ Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

⁹ See also *Implementation of Television Decoder Circuitry Act*, GEN Docket No. 91-1, Report and Order, 6 FCC Rcd 2419 (Apr. 15, 1991).

¹⁰ See *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272, 3276, para. 7 (Aug. 22, 1997) (*Closed Captioning Report and Order*), reconsideration granted in part, Order on Reconsideration, 13 FCC Rcd 19973 (Oct. 2, 1998) (*Closed Captioning Reconsideration Order*).

¹¹ H.R. Report 104-204, 104th Cong., 1st Sess. at 113-14 (1995).

¹² See Section 305 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613) (1996 Act).

directs the Commission to prescribe rules and implementation schedules for captioning of video programming.¹³

6. In 1997, the Commission adopted rules and implementation schedules for closed captioning that became effective on January 1, 1998.¹⁴ These rules require “video programming distributors”¹⁵ to provide an increasing number of hours of captioned programming over specified periods of time.¹⁶ The benchmarks (*i.e.*, implementation schedules) for captioning differ, based on whether the programming is analog or digital, Spanish or English, and whether it is pre-rule (*i.e.*, older) or new programming. Under the implementation schedule, effective January 1, 2006, *all* nonexempt, new English language programming must be captioned.¹⁷

7. Analog programming (whether Spanish or English) that first aired *prior to* January 1, 1998, is called *pre-rule analog* programming.¹⁸ Digital programming (whether Spanish or English) that first aired *prior to* July 1, 2002, is called *pre-rule digital* programming. Programming that first aired *after* the noted dates is called *new* programming (*i.e.*, analog or digital).¹⁹ Spanish language programming is subject to a longer phase-in schedule than is English language programming. Specifically, the rules require that, as of January 1, 2010, 100% of nonexempt new Spanish language programming be closed captioned,²⁰ and, as of January 1, 2012, and thereafter, 75% of nonexempt pre-rule Spanish language programming be closed captioned.²¹ For English language programming, the rules require that, as of January 1, 2006, 100% of new nonexempt English language programming must be closed captioned,²² and, beginning January 1, 2008, 75% of all pre-rule nonexempt English language programming must be closed captioned.²³ These timeframes are the same for analog or digital programming.

¹³ 47 U.S.C. § 613(b)-(c).

¹⁴ *See generally Closed Captioning Report and Order*. At the time the Commission adopted these rules, it indicated that it would subsequently review the rules to determine whether its expectations regarding closed captioning were being met. *Id.*, 13 FCC Rcd at 3387, paras. 254-57.

¹⁵ “Video programming distributor” is defined as (1) any television broadcast station licensed by the Commission; (2) any multichannel video programming distributor (MVPD) as defined in Section 76.1000(e); and (3) 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. 47 C.F.R. § 79.1(a)(2). MVPD is “an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS [Broadband Radio Service, formerly known as the Multipoint Distribution Service (MDS)/Multichannel Multipoint Distribution Service (MMDS) and Educational Broadband Service, formally known as the Instructional Television Fixed Service (ITFS)] provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.” 47 C.F.R. § 76.1000(e).

¹⁶ 47 C.F.R. § 79.1(b).

¹⁷ 47 C.F.R. § 79.1(b)(1)(iv).

¹⁸ 47 C.F.R. § 79.1(a)(6).

¹⁹ 47 C.F.R. § 79.1(a)(5).

²⁰ 47 C.F.R. § 79.1(b)(3)(iv).

²¹ 47 C.F.R. § 79.1(b)(4)(ii). Currently, a video programming distributor must caption at least 1350 hours of Spanish language video programming or all of its new nonexempt Spanish language video programming, whichever is less, per channel per quarter. 47 C.F.R. § 79.1(b)(3)(iii).

²² *See* 47 C.F.R. § 79.1(b)(1), (b)(3), (d), (e), (f); *see also Closed Captioning Report and Order*, 13 FCC Rcd at 3292-95, paras. 41-47; *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19978-79, paras. 9-10.

²³ 47 C.F.R. § 79.1(b)(2); *Closed Captioning Report and Order*, 13 FCC Rcd at 3301-02, paras. 61-63.

8. The dates that determine whether digital programming is pre-rule or new differ from the dates used to determine whether analog programming is pre-rule or new because, when the Commission established the closed captioning rules in 1997, final standards for digital television (DTV) receivers did not yet exist, making it difficult to format captions for such receivers.²⁴ Therefore, in 1997, the Commission temporarily defined program material prepared for digital transmission as pre-rule until such time as the necessary decoder standard rules had been adopted by the Commission and were effective.²⁵ In July 2000, the Commission adopted technical standards for the display of closed captions on DTV receivers.²⁶ At the same time, the Commission established July 1, 2002, as the date that determines whether digital programming constitutes new or pre-rule programming,²⁷ and adopted the same benchmark transition periods for new and pre-rule *digital* programming that exists for *analog* programming.

B. The TDI Petition and the 2005 Closed Captioning NPRM

9. On July 23, 2004, several advocacy groups filed a joint petition for rulemaking, seeking “to establish additional enforcement mechanisms to better implement the captioning rules, and to establish captioning quality standards to ensure high quality and reliable closed captioning.”²⁸ The *TDI Petition* also requested that the Commission revise the process for submitting closed captioning complaints and create a database of contact information for video programming distributors and providers.²⁹ On September 2, 2004, the Commission placed the *TDI Petition* on public notice.³⁰

²⁴ *Closed Captioning Report and Order*, 13 FCC Rcd at 3300-01, para. 60; *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19986-87, para. 27.

²⁵ *Closed Captioning Report and Order*, 13 FCC Rcd at 3300-01, para. 60.

²⁶ *Closed Caption Decoder Requirements for Digital Television Receivers, Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, ET Docket No. 99-254, MM Docket No. 95-176, Report and Order, 15 FCC Rcd 16788, 16790-91, para. 5 (July 31, 2000) (*DTV Closed Captioning Order*); 47 C.F.R. § 15.122(b) (incorporating by reference, EIA-708-B, “Digital Television Closed Captioning,” Electronics Industries Alliance (Dec. 1999) (“EIA-708-B”)); *see also* 47 C.F.R. § 79.1. The EIA-708 standard provides comprehensive instructions for the encoding, delivery, and display of closed captioning information for digital television systems. The standard provides for a larger set of captioning characters than the analog captioning standard, EIA-608, but the EIA-708 also supports transport of the analog EIA-608 captioning information for use when a digital broadcast is being viewed on an analog receiver through a DTV converter. *See Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15, RM 9832, Report & Order, 19 FCC Rcd at 18279, 18350, para. 163 (Sept. 7, 2004) (*DTV Second Periodic Review Report & Order*).

²⁷ *DTV Closed Captioning Order*, 15 FCC Rcd at 16790-91, para. 5; *see also* 47 C.F.R. § 79.1(a)(6)(ii). In the *DTV Closed Captioning Order*, the Commission observed that viewers will be able to watch digital programming on existing analog displays using a digital-to-analog converter, and alerted programming distributors that in order for them “to count captioned digital television programming toward their closed captioning requirements in Section 79.1, they must also transmit captions that can be decoded by the decoder in that analog set.” *DTV Closed Captioning Order*, 15 FCC Rcd at 16809, para. 63.

²⁸ *See* Telecommunications for the Deaf Inc. *et al.* Petition for Rulemaking, RM-11065 (July 23, 2004) (*TDI Petition*). Petitioners included Telecommunications for the Deaf, Inc. (TDI), the National Association of the Deaf (NAD), Self Help for Hard of Hearing People, Inc. (SHHH), the Association for Late Deafened Adults (ALDA), and the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN). The joint petitioners are collectively referred to herein as TDI or Petitioners.

²⁹ *See generally* *TDI Petition*.

³⁰ The *TDI Petition* appeared on Public Notice on September 2, 2004. *See* Public Notice, Report No. 2670 (Sept. 2, 2004).

10. On July 21, 2005, the Commission released a Notice of Proposed Rulemaking granting the *TDI Petition* and initiating a proceeding to examine the Commission's closed captioning rules.³¹ The *2005 Closed Captioning NPRM* sought comment on a broad range of issues concerning closed captioning. Interested parties filed more than 1600 comments, reply comments, and ex parte letters.³²

III. DECLARATORY RULING

11. Unless otherwise exempt, all digital programming – including, but not limited to, high definition (HD) programming – must be captioned pursuant to the applicable benchmarks for that type of programming.³³ There is no “digital exemption” to the obligation to caption digital programming. Although a particular digital channel may be exempt from the captioning rules for other reasons pursuant to section 79.1(d),³⁴ no digital channel, including an HD channel, is automatically exempt from the captioning rules simply because it is being transmitted in digital. Further, even where a digital channel is exempt from the closed captioning rules because it is subject to a self-implementing exemption in section 79.1(d),³⁵ or is otherwise exempt pursuant to the undue burden standard in section 79.1(f),³⁶ the distributor is still obligated to pass through any captioning it receives, even on rebroadcasts of programs, but is not obligated to create new digital captions where only analog captions are provided.³⁷ This

³¹ See *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, CG Docket No. 05-231, Notice of Proposed Rulemaking, 20 FCC Rcd 13211 (July 21, 2005) (*2005 Closed Captioning NPRM*).

³² See Appendix E, *infra*.

³³ See 47 C.F.R. § 79.1(b) (setting forth the captioning benchmarks for various types of programming). Under the benchmarks, as of January 1, 2006, 100 percent of “new” nonexempt English language video programming must be captioned. See 47 C.F.R. § 79.1(b)(1)(iv). “Video programming” is programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and exhibited for residential use. See 47 C.F.R. § 79.1(a)(1). Aside from defining “pre-rule” digital or analog programming based on the date on which it was first exhibited, the closed captioning rules make no distinction between analog and digital programming, all of which is covered under the rules. See 47 C.F.R. § 79.1(a)(6) (setting forth different threshold dates for “pre-rule programming” depending on whether that programming is analog or digital). Although the demarcation dates between new and pre-rule programming should be clear from our prior decisions and our rules, see, e.g., *DTV Closed Captioning Order*, 15 FCC Rcd at 16790-91, para. 5, and 47 C.F.R. § 79.1(a)(5), we amend the definitions of “new programming” and “pre-rule programming” to state expressly the applicable demarcation dates for analog new and pre-rule programming and for digital new and pre-rule programming to ensure complete clarity. See 5 U.S.C. § 553(b)(A) (exempting interpretative rules from notice and comment requirements of the Administrative Procedure Act); see also *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997) (court determined that Department of Justice supplemental interpretation of certain requirements for compliance with American Disabilities Act was an interpretation that “spells out a duty fairly encompassed within the regulation that the interpretation purports to construe,” and therefore was not “sufficiently distinct or additive to the regulation to require notice and comment”).

³⁴ 47 C.F.R. § 79.1(d) (setting forth thirteen self-implementing exemptions to the closed captioning rules).

³⁵ See, e.g., 47 C.F.R. § 79.1(d)(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”).

³⁶ 47 C.F.R. § 79.1(f) (permitting a video programming provider, producer, or owner to petition the Commission for an exemption from the closed captioning obligations where captioning would result in an “undue burden”).

³⁷ See 47 C.F.R. § 79.1(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 part 15

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requirement applies “regardless of whether the distributor has already met the relevant captioning benchmark.”³⁸ The Commission also encourages distributors that have met their closed captioning obligations to exceed those requirements, where the obligations are not currently to caption 100 percent of the programming.³⁹

12. Similarly, where an existing broadcaster ceases operations on its current analog channel after the completion of the digital transition for full power television (*i.e.*, on February 18, 2009), and commences or continues to air programming on its main⁴⁰ digital channel, that broadcaster is required to close caption its main digital channel pursuant to the relevant captioning benchmarks, as if there had been no change. The broadcaster will not be entitled to the self-implementing exemption (described below) that pertains to channels that generated less than \$3 million in revenues during the prior year. For example, if a local broadcaster’s current analog channel is channel 8, but its digital channel is channel 48 after February 17, 2009, the broadcaster may not claim that channel 48 had fewer than \$3 million in revenues in 2008, thus excusing it from captioning in 2009. Additionally, with regard to broadcasters that are currently simulcasting their programming on their analog channel and main digital channel, they must caption the digital channel as well as the analog channel.

13. Further, we clarify that the “new network” exemption under section 79.1(d)(9) of the Commission’s rules does not apply to a channel that merely transitions from analog to digital. Under the “new network” exemption, programming on a video programming network is exempt from the captioning requirements for the first four years after it begins operation.⁴¹ This exemption was adopted because new programming networks face significant start-up costs, and the additional costs of captioning could pose an economic burden that might deter entry.⁴² In the case of an analog channel that transitions to digital, the video programming distributor is already in operation and has presumably been captioning in compliance with our rules. Thus, the new network start-up costs the Commission was concerned about do not arise in the context of a transitioning station. In this circumstance, the new network exemption does not apply and, absent reliance on some other exemption, captioning must be provided.⁴³ Video programming

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of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor”); *Closed Captioning Report and Order*, 13 FCC Rcd at 3368-69, para. 211.

³⁸ *Closed Captioning Report and Order*, 13 FCC Rcd at 3312, para. 85.

³⁹ *See, e.g., id.* at 3312, para. 84 (“We also hope that once an entity invests in the software needed to convert a teleprompter script into captions, it will have an incentive to use this equipment for all or a significant portion of its live programming (*e.g.*, all its newscasts), and not just the amount of programming needed to satisfy the transition benchmarks. Thus, additional programming may be made accessible at a faster rate.”).

⁴⁰ The main digital channel is the digital equivalent of the prior analog channel. We note that the main digital channel number may differ from the prior analog channel number.

⁴¹ *See* 47 C.F.R. § 79.1(d)(9) (“*Programming on new networks.* Programming on a video programming network for the first four years after it begins operations, 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”). Commission staff has received complaints from consumers that some digital programming, including HD programming, is not closed captioned. In their complaints, some consumers allege that the distributor informed them that digital programming is not subject to closed captioning. *See, e.g.*, Comments filed by The Coalition of Organizations for Accessible Technology (COAT) at 6-8, filed in Media Bureau Docket No. 07-91 pursuant to the Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television (filed Aug. 9, 2007) (COAT Comments).

⁴² *See Closed Captioning Report and Order*, 13 FCC Rcd at 3346, para. 154 (Commission stated that it did not intend for the “closed captioning requirements to inhibit new sources of video programming due to [its] interest in fostering diversity in video programming”).

⁴³ We also note that where a licensee chooses to multicast, the multicast channels do not constitute a new network.

distributors are reminded that failure to comply with the closed captioning rules may result in enforcement action.

14. We remind distributors that, after February 17, 2009, some consumers will continue to use analog televisions connected to digital-to-analog converter boxes, and rely on antennas to receive over-the-air reception. The Commission's rules require that each digital-to-analog converter box manufactured after June 30, 2002, pass available analog caption information to an attached television receiver in a form recognizable by that receiver's built-in caption decoder circuitry.⁴⁴ Because these viewers will receive digital television programming on analog sets, in order for program distributors to count captioned digital programming toward the closed captioning requirements of section 79.1, they must transmit captions that can be decoded by the decoders in those analog sets.⁴⁵ As a practical matter, this means that video programming distributors, including broadcasters and MVPDs, must continue to transmit captions in the CEA-608 (analog) standard after February 17, 2009.⁴⁶

15. Finally, we remind MVPDs that provide customer premises equipment (CPE), such as set-top boxes, to their subscribers, that they are responsible for ensuring that this equipment transmits all available captions to the television set, for both analog and digital formatted programs.⁴⁷ Captions must be delivered intact and in a way that can be displayed by captioning decoders. In these circumstances, failure of the equipment to pass through captions would cause the distributor to be in violation of the pass-through requirement.⁴⁸ Further, the programming will not be considered captioned and the distributor may be in violation of the captioning benchmark for that type of programming.⁴⁹

IV. ORDER

A. Complaint Procedures

16. We agree with commenters asserting that the present closed captioning complaint process can be modified to better serve the interests of consumers or video programming distributors. We therefore adopt new complaint processes for alleged violations of the closed captioning rules, as described below, and amend our rules accordingly.

17. *Background.* Under the present rules, complaints must be filed in writing with the video programming distributor prior to the end of the calendar quarter following the calendar quarter in which the alleged violation has occurred. Video programming distributors must respond to the complaint no later than 45 days after the end of the quarter in which the violation is alleged to have occurred or 45 days after receipt of the written complaint, whichever is later.⁵⁰ If a video programming distributor fails to

⁴⁴ 47 C.F.R. § 15.122(a)(2).

⁴⁵ *DTV Closed Captioning Order*, 15 FCC Rcd at 16809, para. 63; *DTV Second Periodic Review Report & Order*, 19 FCC Rcd at 18350-51, paras. 163-64.

⁴⁶ This is not a new requirement; the Commission clarified this issue in the 2000 *DTV Closed Captioning Order*. See *DTV Closed Captioning Order*, 15 FCC Rcd at 16809, para. 63.

⁴⁷ The Commission has received complaints from consumers that CPE provided by cable or satellite providers removes captioning from some programs. See also COAT Comments at 5-6.

⁴⁸ 47 C.F.R. § 79.1(c).

⁴⁹ See *id.* This conclusion necessarily follows from the pass through rule found in section 79.1(c). 47 C.F.R. § 79.1(c).

⁵⁰ See generally 47 C.F.R. § 79.1(g). The Commission required that closed captioning complaints first be directed to video programming distributors because this approach would "lead to quicker action to resolve a complaint than if the complaint were filed directly with the Commission." *Closed Captioning Report and Order*, 13 FCC Rcd at 3381-83, paras. 240-43. If a consumer mistakenly sends a complaint to the wrong distributor (e.g., to a cable company instead of a local TV station that the cable company carries), or if the programming about which the

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respond to a complaint, or a dispute remains after the initial attempt at resolution by the video programming distributor and the complainant, the complaint may then be filed with the Commission within 30 days after the time allotted for the video programming distributor to respond.⁵¹

18. The *TDI Petition* argued that, under the current rules, four months could pass before a video programming provider is legally required to respond to a complaint, and that, in the interim, the consumer may suffer from lack of access to the television video programming.⁵² As a result, TDI sought to revise the complaint process to differentiate between complaints regarding the number of hours captioned and complaints regarding other captioning issues, such as technical problems resulting in missing or garbled captions.⁵³ TDI also asked the Commission to develop and make available on its website an optional standard captioning complaint form for consumers to use to file written complaints with the relevant video programming distributor/programmer.⁵⁴

19. In the *2005 Closed Captioning NPRM*, the Commission sought comment on whether the current complaint procedures should be amended to allow complainants to file directly with the Commission, without first complaining to the video programming distributor.⁵⁵ The Commission also sought comment on whether to amend the current rules to allow for shorter complaint and response times and, if so, what those timeframes should be.⁵⁶ Finally, the Commission sought comment on whether it should adopt a standardized complaint form.⁵⁷

20. *Discussion.* To simplify the complaint process for consumers, we will permit closed captioning complaints to be filed with either the video programming distributor or the Commission.⁵⁸ Most commenters support this approach, asserting that consumers often have difficulty determining where to file complaints, and the average consumer generally cannot identify the party responsible for captioning compliance.⁵⁹ Although NAB advocates having the Commission first receive the complaints

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consumer complains is exempt from the closed captioning rules pursuant to Section 79.1(e)(9), the distributor is required to either forward the complaint to the programmer within seven days, or return the complaint within seven days to the consumer, providing the name and address of the correct provider to whom the complaint should be sent. See 47 C.F.R. § 79.1(g)(1). In order to avoid confusion, the Commission also determined that all complaints of whatever nature (including complaints alleging failure to pass through) would be handled in the same fashion. *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20025, para. 116; see also *Closed Captioning Report and Order*, 13 FCC Rcd at 3383, para. 244.

⁵¹ *Closed Captioning Report and Order*, 13 FCC Rcd at 3382-83, para. 243; see also 47 C.F.R. § 79.1(g)(4). The rule specifies the information that the complainant and the distributor must provide to each other and to the Commission, and specifies how, if the Commission determines that a violation has occurred, appropriate penalties may be imposed.

⁵² *TDI Petition* at 21.

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 15-16.

⁵⁵ *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13222, para. 31.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See, e.g., TDI Reply Comments at 15; New Jersey Division on Civil Rights Comments at 5.

⁵⁹ See, e.g., TDI Reply Comments at 14; Northern Virginia Resource Center for Deaf and Hard of Hearing Persons (NVRC) Reply Comments at 4.

and then forward them to the broadcast station or MVPD,⁶⁰ the dual approach adopted here would appropriately enhance the complaint process.⁶¹

21. In addition, commenters generally support shortening the current complaint timeframes,⁶² although other commenters assert that programmers and distributors must have sufficient time to identify and remedy the problem.⁶³ We agree that captioning issues should be resolved as quickly as possible and therefore we adopt new timelines associated with captioning complaints, as discussed below.

22. The Commission also sought comment on whether consumers should be allowed to complain to video programming distributors via e-mail, phone, or fax.⁶⁴ Some commenters supported allowing consumers to complain to distributors in these ways.⁶⁵ We conclude that given the importance of these issues, the need to ensure that complaints accurately reflect the concerns of the complainant, and to provide distributors with adequate notice of the nature of the complaint, complaints must be in writing.⁶⁶ Therefore, we will continue to require closed captioning complaints to be in writing, and filed by e-mail, fax, or letter. Consumers may also use the Form 2000-C, attached as Appendix B, when complaining to the Commission.⁶⁷ Among other things, the Form 2000-C requests the name, address, and

⁶⁰ National Association of Broadcasters (NAB) Comments at 5; *but see* EchoStar Reply Comments at 5 (asserting that NAB's suggestion whereby a complaint is first filed with the Commission and then forwarded to the distributor will likely result in "protracted, rather than reduced, response times," and noting that its process for complaints regarding technical aspects of captioning, in which the subscriber contacts EchoStar directly, allows EchoStar to investigate its equipment and often address a problem in a matter of a few hours or days).

⁶¹ National Cable and Telecommunications Association (NCTA) Comments at 9, 25-26; *see also* Media Captioning Services (MCS) Comments at 10-11. For example, NCTA states that complaints should still be filed first with the cable operators because they, along with programmers, are better able to deal with captioning issues. NCTA Comments at 9, 25-26. This would not streamline the complaint process for all consumers since not everyone subscribes to cable. Those who do not would most likely still experience confusion regarding with whom to file a complaint. MCS suggests that complaints be filed with the distributor and the Commission simultaneously. MCS Comments at 10-11. Simultaneous filing, however, would likely result in confusion and duplicative work. A written closed captioning complaint should be first filed with either the distributor *or* the Commission, and a consumer who complains to a distributor first should wait until the required time has elapsed before complaining to the Commission.

⁶² *See e.g.*, WGBH/NCAM Comments at 19.

⁶³ *See* HBO Comments at 10-11; *see also* EchoStar Comments at 11 and Reply Comments at 6; Caption Colorado Comments at 6; AZN Comments at 25-26 (AZN jointly filed comments with the parties reflected in Appendix D. For convenience, they are collectively referred to herein as AZN); The United States Telecom Association (USTA) Comments at 9; American Cable Association (ACA) Comments at 4; Florida Association of Broadcasters (FAB) Comments at 6.

⁶⁴ *See 2005 Closed Captioning NPRM*, 20 FCC Rcd at 13222, para. 32.

⁶⁵ *See, e.g.*, Verizon Reply Comments at 5-6; NAB Comments at 5-6; WGBH Comments at 20.

⁶⁶ *See* 47 U.S.C. § 716. We note that this is also consistent with the Commission's rules for filing informal complaints against common carriers under section 208 of the Communications Act. 47 C.F.R. § 1.716.

⁶⁷ In its *Petition*, TDI asked the Commission to develop an optional standard captioning complaint form. *TDI Petition* at 15-16. We note that our request for comments on the complaint process occurred prior to the Commission's adoption of the Form 2000-C. The Office of Management and Budget (OMB) recently approved Form 2000-C Disability Access Complaint, for the filing of complaints pertaining to telecommunications relay service, closed captioning, and lack of access to emergency information on television (OMB control number 3060-0874, current version dated September 2007). While the Form 2000-C is intended for use when filing complaints with the FCC, the form requests information necessary for processing an informal closed captioning complaint; for this reason, consumers may wish to review the form and include the same information requested in the Form 2000-C in a complaint they file with a distributor.

telephone number (if known) of the company(s) involved in the complaint. We will amend the form to delete the requirement that closed captioning complaints must first be filed with the distributor, and to add questions eliciting information about the name and type of MVPD, if any, to whom a complainant subscribes. Specifically, we will amend the Form 2000-C to request the name of the broadcast station and, if applicable, the name and type of MVPD against whom the complaint is directed. These changes will be submitted to OMB.⁶⁸ Because this form is relatively new, we will closely monitor the effectiveness of the use of the Form 2000-C for captioning complaints over the next six months.

23. Regardless of whether the consumer files a complaint with the Commission or a video programming distributor, the consumer must file the complaint within sixty (60) days of the captioning problem. If the complaint is first filed with the Commission, the Commission shall promptly forward complaints that satisfy the complaint criteria, as described herein, to the appropriate video programming distributor.⁶⁹ For a complaint forwarded by the Commission, video programming distributors must respond to the complainant in writing within thirty (30) days of receipt of the complaint from the Commission. We believe this change in filing time periods reasonably accommodates concerns by viewers that the current complaint process allows too much time to pass before a complaint must be addressed and concerns by distributors that they be allowed sufficient time to address captioning problems. The distributor must send a copy of its response to the Commission.

24. For a complaint first filed with the video programming distributor, the video programming distributor must respond in writing to the complainant within thirty (30) days after receipt of a closed captioning complaint.⁷⁰ If a video programming distributor fails to respond to the complainant within thirty (30) days, or the response does not satisfy the consumer, the complainant may file the complaint with the Commission within thirty (30) days after the time allotted for the video programming distributor to respond. We believe 30 days provides distributors with sufficient time to review their records and respond to a complaint. Further, given that a distributor's response may require reviewing tapes of aired programming, a shorter time frame should benefit distributors because the programming at issue may be more readily accessible and not archived or otherwise not immediately available. If a consumer re-files his or her complaint with the Commission (after filing with the distributor), the Commission will forward the complaint to the distributor, and the distributor shall respond to the Commission and the complainant within thirty (30) days of receipt of the complaint from the Commission.

25. A video programming distributor receiving a complaint regarding programming of a broadcast television licensee, or programming over which the video programming distributor does not exercise editorial control,⁷¹ must forward the complaint within seven (7) days to the appropriate party and inform the complainant that it has forwarded the complaint.⁷² The video programming distributor also must notify the Commission that it forwarded the complaint. Similar to the time period established for responding to complaints sent to the correct video programming distributor, the entity receiving the forwarded complaint shall respond to the complainant within 30 days of the forwarding date of the

⁶⁸ While OMB approval is pending, the FCC Form 2000-C may be used in its current form and complainants should disregard the note contained in the current Form 2000-C indicating that they must first contact the station or video programming distributor.

⁶⁹ See WGBH/NCAM Comments at 19-20; see also MCS Comments at 10-11.

⁷⁰ American Society for Deaf Children (ASDC) Comments at 2; see also Vermont Association of the Deaf Comments and MCS Comments at 11; NAB Comments at 5 and Reply Comments at 5.

⁷¹ Under the rules, there are certain circumstances in which video programming distributors are not required to provide closed captioning because the video programming is by law not subject to their editorial control. See 47 C.F.R. § 79.1(e)(9).

⁷² See 47 C.F.R. § 79.1(g)(1), which currently has the same 7-day requirement; *Closed Captioning Report and Order*, 13 FCC Rcd at 3382, para. 242.

complaint. We note that this reflects a change to the current rule's requirement that the distributor either return the complaint to the consumer or forward it to the appropriate programmer. This change is intended to shorten and simplify the complaint process by avoiding possible consumer confusion if their complaint is returned to them by the distributor with no guidance as to next steps. Furthermore, because the video programming distributor is more likely to be in a better position than the complainant to know to whom the complaint should be directed, we believe this change will help to ensure that complainant's concerns are more quickly addressed.

26. In order to assist consumers in filing closed captioning complaints, and to expedite further the handling of complaints, we encourage consumers to include the following information in their filing: (1) the complainant's contact information, including name, mailing address, daytime phone number, and e-mail address if available; (2) the name of the broadcast station and, if applicable, the name and type of MVPD against whom the complaint is directed; (3) the name of the television program; (4) the date and time the closed captioning problem occurred; and (5) a description of the closed captioning problem. We note that this requested information will mirror the information requested in the FCC Form 2000-C, referenced in paragraph 22 above, as amended.⁷³

27. Consistent with existing Commission rules, in its response to a complaint before the Commission, a video programming distributor shall provide the Commission with sufficient records and documentation to demonstrate compliance with the Commission's rules.⁷⁴ The Commission has previously found that the broadcast station or MVPD has the burden of proof that it has complied with the closed captioning rules.⁷⁵ Where it appears from the video programming distributor's response to a complaint, or from other communications with the parties, that an informal complaint has been satisfied, the Commission may, in its discretion, consider the matter resolved, and will so notify the complainant. In all other cases, the Commission shall inform the parties of its review and disposition of the informal complaint.⁷⁶ We also note that a complaint may be referred to the Enforcement Bureau for action, regardless of where the complaint was filed first or its initial resolution.⁷⁷

B. Contact Information

28. We adopt new rules requiring video programming distributors to make their contact information available to consumers. We find these new requirements necessary to ensure that consumers can more easily and promptly contact the appropriate video programming distributor to report closed captioning problems or to file complaints. Therefore, we amend the Commission's rules to require video program distributors to make available contact information, as discussed below.

29. *Background.* The *TDI Petition* requested that the Commission require video programming distributors to post complete contact information on their websites, include it in billing inserts and directories, update this information within seven days of any change, and provide the

⁷³ See para. 22, *supra* (explaining that consumers submitting a closed captioning complaint may use the FCC Form 2000-C, and noting that we will amend the form to request information regarding the name and type of MVPD, if any, to whom a complainant subscribes).

⁷⁴ *Closed Captioning Report and Order*, 13 FCC Rcd at 3383, para. 243; see also 47 C.F.R. § 79.1(g)(5). The Commission has noted that "good business practices will necessitate that video programming distributors maintain records in order to ensure compliance with our rules, as well as to defend against possible consumer complaints." *Closed Captioning Report and Order*, 13 FCC Rcd at 3383, para. 244.

⁷⁵ *Closed Captioning Report and Order*, 13 FCC Rcd at 3381, para. 240.

⁷⁶ See 47 C.F.R. §§ 1.717 & 64.604(v)(B)(1).

⁷⁷ The new or modified information requirements for section 79.1(g), as described above, are subject to the Paperwork Reduction Act and therefore require the approval by the Office of Management and Budget. Accordingly, these requirements will be effective upon publication in the *Federal Register* of a notice announcing OMB's approval of this collection.

information to the Commission for posting on its website.⁷⁸ In the *2005 Closed Captioning NPRM*, the Commission sought comment on whether distributors should be required to provide names and telephone numbers for customer services on their websites, as well as in bills and telephone directories.⁷⁹ Commenters generally support requiring video programming distributors and broadcast services to make contact information readily available for captioning problems.⁸⁰ Individual consumers report confusion about whom to contact and dissatisfaction with the responsiveness of the video programming distributors.⁸¹

30. *Discussion.* Given the record in this proceeding, we find that additional contact information requirements are warranted. Specifically, we require video programming distributors to make available two different kinds of contact information – contact information for the receipt and handling of immediate closed captioning concerns by consumers, and contact information for written closed captioning complaints.

31. First, we require video programming distributors to make available, as described herein, contact information for the receipt and handling of immediate closed captioning concerns raised by consumers (*e.g.*, the captions suddenly disappear or become garbled). Consumers must be able to promptly determine whom to contact if a captioning problem arises while they are watching a program. To this end, programming distributors must designate a telephone number, fax number, and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns. To the extent that a distributor has personnel available, either on site or remotely, to address any technical problems that may arise, consumers using this dedicated contact information must be able to reach

⁷⁸ *TDI Petition* at 12-16.

⁷⁹ *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13222, para. 32.

⁸⁰ *See, e.g.*, New Jersey Division on Civil Rights Comments at 5; NVRC Reply Comments at 4; the National Disability Rights Network (NDRN) Comments at 3; TDI Reply Comments at 15; MCS Comments at 12; Verizon Reply Comments at 5-6; EchoStar Reply Comments at 6; *see also* NAB Comments at 5-6; NAB Reply Comments at 4-5 (it should be made “clear to consumers to which phone number and/or email address captioning complaints should be directed” and a requirement to post specific contact information should be limited to “those stations that have already established Internet websites”); Ronald Vickery (Nov. 10, 2005); Jimmy Beldon (Nov. 2, 2005); C.M. Boryslawskyj (Nov. 3, 2005); Margaret Bishop (Nov. 2, 2005); Ed Bosson (Nov. 7, 2005); George Breden (Nov. 2, 2005); Jack Cassell (Nov. 7, 2005); Marie Desrosiers (Nov. 8, 2005); Sarah Dixon (Nov. 3, 2005); Brenda Estes (Nov. 9, 2005); Joshua Finkle (Nov. 7, 2005); Anatoliy Feygin (Nov. 8, 2005); Claudia Foy (Nov. 4, 2005); Malisa Janes (Nov. 7, 2005); Marshall Lawrence (Nov. 17, 2005); Mary Lou Mayfield (Nov. 7, 2005); Dana Mulvany (Nov. 10, 2005); Pauline Newton (Nov. 9, 2005); Reyes Preciado (Nov. 2, 2005); Ricky Schoenberg (Nov. 2, 2005); Louis Schwarz (Nov. 2, 2005); and Rebecca Sneiderman (Nov. 3, 2005); *but see* HBO Comments at 13 (there is no reason why “extra” contact information is necessary, “since all video programming distributors maintain customer service contact points as part of their standard operations . . . [and] this information on a central FCC website would require an enormous effort to gather and to update information.”); USTA Comments at 9 (“requiring video programming distributors to designate specific individuals to immediately handle captioning complaints” and to inform consumers and the Commission about personnel changes “is simply impractical and unnecessary”).

⁸¹ *See generally* Comments of Dave Branfield (Oct. 31, 2005); Ron and Joyanne Burdett (Oct. 31, 2005); Tawny Holmes (Nov. 29, 2005); Andrea Panella (Oct. 27, 2005); Philip Moos (Nov. 10, 2005); Wayne Scott (Aug. 3, 2005); Judith Viera (Dec 1, 2005); Dave Volz (Nov. 2, 2005); Ed Bosson (Nov. 7, 2005); Kim Mihan (Dec. 1, 2005); David Nelson (Nov. 10, 2005); C.M. Boryslawskyj (Nov. 3, 2005); Anatoliy Feygin (Nov. 8, 2005); Charley Tiggs (Nov. 30, 2005); and Peggy Hlibok (Oct. 4, 2005); *see also* NVRC Reply Comments at 4 (citing consumers’ reports to them that repeated calls to stations are not answered); MCS Comments at 11 (citing consumers’ reports to them expressing frustration with resolving captioning problems and receiving no explanations as to why captions were not present though MCS verified that they transmitted the captions); and *TDI Petition* Exhibit B (copies of complaint letters and e-mails).

someone, either directly or indirectly, who can address the consumer's captioning concerns.⁸² We are not requiring that distributors alter their hours of operation or the hours during which they have staffing available; at the same time, however, where staff is available to address technical issues that may arise during the course of transmitting programming, they also must be knowledgeable about and able to address closed captioning concerns. As the Commission previously has stated, it is important that video programming distributors make their organizations accessible to persons with hearing disabilities seeking information about the entity's closed captioning or other matters, and we expect all video programming distributors to take measures to readily accommodate incoming calls placed through a Telecommunications Relay Service (TRS) operator.⁸³ In situations where a distributor is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours.

32. Second, we require video programming distributors to make contact information available for the receipt and handling of written closed captioning complaints filed pursuant to section 79.1(g) of the Commission's rules that do not raise the type of immediate issues that are addressed above. This contact information shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with our rules, as well as the person's title or office, telephone number, fax number, postal mailing address, and e-mail address.⁸⁴

33. Distributors shall include the contact information required in paragraphs 31 and 32 above on their websites,⁸⁵ in telephone directories, and in billing statements (to the extent billing statements are issued). We recognize that broadcast services are not subscription services with corresponding bills; for this reason, distributors shall, at a minimum, place such contact information in telephone directories and on their websites, if they have a website.⁸⁶ Distributors shall keep their contact information current, and when there are changes they must update this information as promptly as possible, and in any event within 10 business days for websites, by the next billing cycle for billing statements, and by the next publication of directories.⁸⁷

34. In addition, to assist consumers in locating contact information, the Commission shall provide a list of video programming distributors' contact information (*i.e.*, the name of the appropriate

⁸² If the issue is merely a matter of turning on the closed captions or making other such similar adjustments, the staff person responding to the inquiry should take the necessary corrective actions to restore the captions immediately; there may be occasions, however, where a captioning concern does not lend itself to immediate resolution – such as in instances where the issue does not reside with the distributor. In such an event, the staff should refer the matter appropriately for resolution.

⁸³ *Closed Captioning Reconsideration Order*, 13 FCC Red at 20025, para. 116 and n.394. We expect staff reached through the designated closed captioning contact information will be familiar with TRS. We will monitor the accessibility of reaching video programming distributors through their provided contact information and will take further action to ensure accessibility if necessary.

⁸⁴ The information requirements in paragraphs 31 and 32 above are subject to the Paperwork Reduction Act and therefore require the approval by the Office of Management and Budget. Accordingly, these requirements will be effective upon publication in the *Federal Register* of a notice announcing OMB's approval of this collection, and we require distributors to have fully complied with these requirements within 30 days thereafter.

⁸⁵ This assumes the distributor has an established website. If the distributor does not have a website, it is not required to establish one in order to satisfy this contact information requirement.

⁸⁶ These requirements are also effective 30 days after our publication in the *Federal Register* of a notice announcing OMB approval of the collection requirements. See note 84, *supra*.

⁸⁷ For example, in the event the designated contact person is no longer responsible for closed captioning issues, the distributor must promptly update its contact information to list the contact information required above for the new person.

person and/or office to contact, telephone numbers, e-mail addresses) on its website.⁸⁸ To establish this listing, we will require video programming distributors and broadcast services to file the required contact information, as outlined above, for both immediate concerns and written captioning complaints, with the Chief of the Disability Rights Office, Consumer and Governmental Affairs Bureau, or by sending the information to CLOSEDCAPTIONING_POC@fcc.gov, within 30 days of our publication in the *Federal Register* of a notice announcing approval by the Office of Management and Budget. After compiling and posting the list on the FCC's website, Commission staff shall prepare a Public Notice advising consumers and other interested parties how to obtain access to the contact information. This information shall also be available by telephone inquiry to the Commission's Consumer Center.⁸⁹ Distributors shall promptly notify the Commission each time there is a change in any of this required information, and in any event within 10 business days.⁹⁰

V. NOTICE OF PROPOSED RULEMAKING

35. As the nation transitions from analog to digital broadcasting, the video programming and broadcasting landscape will change substantially. Digital broadcasting not only affords consumers the potential for better picture and sound quality, it also allows for the more efficient use of spectrum.⁹¹ With analog broadcasting, broadcasters use their spectrum allocation to provide programming on a single channel. With digital broadcasting, broadcasters may use their digital allotment to multicast several streams of programming, known as "multicasting." Because section 79.1(d)(12) of our rules exempts from the closed captioning requirements certain programming "channels," in this *Notice of Proposed Rulemaking* we seek comment on the application of that exemption to digital broadcasting.

36. Section 79.1(d)(12) exempts video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year from the Commission's closed captioning obligations.⁹² In 1997, when the Commission adopted the exemption for channels producing less than \$3 million in revenues, it specified that "[a]nnual 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."⁹³ The Commission did not determine, however, what constitutes a "channel" for purposes of satisfying this self-implementing exemption. As noted above, at that time broadcasters used their spectrum allocation to provide analog programming on a single channel; with digital broadcasting, broadcasters can multicast several streams of programming. We therefore seek comment on whether, for purposes of section 79.1(d)(12), each programming stream on a multicast signal

⁸⁸ See TDI Reply Comments at 15 (stating that in order for consumers to know where to file closed captioning complaints, video programming distributors should provide appropriate contact information on their bills and websites, and that this information should be posted on the Commission's Web site).

⁸⁹ Those phone numbers are 1-888-225-5322 (voice) and 1-888-835-5322 (TTY).

⁹⁰ We note that this Commission requires telecommunications manufacturers and service providers and TRS providers to have contact information posted on the Commission's Web site. See 47 C.F.R. §§ 7.17(b), 64.604(c)(2) & (c)(6)(v)(A)(3); see also *Implementation of Sections 255 and 251(A)(2) of the Communications Act of 1934, as enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6469, paras. 127-28 (Sept. 29, 1999).

⁹¹ See generally FCC Consumer Publication "DTV Is Coming (And Sooner Than You Think!)" <http://www.fcc.gov/cgb/consumerfacts/digitaltv.html>.

⁹² 47 C.F.R. § 79.1(d)(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").

⁹³ *Closed Captioning Report and Order*, 13 FCC Rcd at 3350, para. 165 (emphasis added).

constitutes a separate channel, or whether the broadcaster's entire operations attributable to its digital allotment should be considered one channel.⁹⁴

37. The determination of whether multicast channels constitute separate channels for purposes of the exemption in section 79.1(d)(12) has important consequences. If each multicast stream is a separate channel,⁹⁵ under the current rule such a channel would be exempt from the closed captioning rules until its revenues reach the \$3 million mark.⁹⁶ As a result, if we were to determine that each multicast stream is a separate channel, it is likely that there will be less captioned programming available. We seek comment on this assumption. At the same time, however, if the majority of programming aired on secondary multicast streams is already captioned, it is possible that the percentage of available captioning will not be greatly affected, given that programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact. We note that, under our rules, programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs, pursuant to the pass through rule.⁹⁷ Further, as noted in the *Declaratory Ruling*, the pass through rule applies regardless of whether a distributor is exempt from the captioning rules.⁹⁸ Therefore, given the pass through rule, it is likely that much of the programming delivered to broadcasters for airing on multicast streams will already be captioned, especially if it is programming provided by a network programmer, even if section 79.1(d)(12) applies to each multicast channel.⁹⁹ We seek comment on what percentage of programming that airs on multicast streams, other than the main stream, is network programming, and how much of that programming is already captioned.¹⁰⁰

⁹⁴ At the time the Commission adopted the closed captioning rules, it declined to adopt additional or different captioning requirements specific to DTV technology that rely on the extended capacities and potential inherent in the digital transmission process. *See id.* at 3384-85, paras. 247-49.

⁹⁵ We note that when the closed captioning rules were adopted, the Commission determined that compliance with the requirements would be measured on a channel-by-channel basis, and rejected the suggestion of those commenters who advocated a system-wide approach, stating that such an approach would prove administratively burdensome for video programming distributors. *Id.* at 3309, para. 79. The Commission also determined that each channel of a multiplexed signal will be obligated to meet the minimum requirements of the rules. *Id.* at 3309, para. 80.

⁹⁶ 47 C.F.R. § 79.1(d)(12). Calculating whether the \$3 million gross revenues threshold in section 79.1(d)(12) has been met requires a review of advertising revenues from station-controlled inventory, including network compensation and barter transactions. *See Closed Captioning Report and Order*, 13 FCC Rcd at 3350, para. 165; *see also Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20002, paras. 66-67. The \$3 million revenue exemption was "intended to address the problems of small providers that are not in a position to devote significant resources towards captioning (*i.e.*, those who would find it economically burdensome)." *Closed Captioning Report and Order*, 13 FCC Rcd at 3350, para. 164.

⁹⁷ *See* 47 C.F.R. § 79.1(c).

⁹⁸ *See* para. 11, *supra*.

⁹⁹ *See Closed Captioning Report and Order*, 13 FCC Rcd at 3308, para. 79 (Commission determined that measuring compliance with the rules on a channel-by-channel basis adequately addressed commenters' concerns regarding captioning responsibility for broadcast stations retransmitted by MVPDs, in that broadcast stations would be responsible for captioning in their role as video programming distributors, and MVPDs would be required to pass through those captions intact).

¹⁰⁰ We note that, as a practical matter, it is likely that only non-network portions of programming aired on multicast streams would not be captioned pursuant to the \$3 million threshold exemption. Network programming must be captioned unless otherwise exempt; for this reason, it is likely that network programming that is sent to a distributor will already contain captions. These captions must be passed through to the consumer.

38. We also seek comment on whether we should conclude that individual programming streams are not separate channels for purposes of calculating revenues for purposes of section 79.1(d)(12). In such circumstances, digital broadcasters would be exempt from the Commission's captioning requirements under section 79.1(d)(12) only if their overall operations, taking into account all activities on all "streams," received less than \$3 million in revenues. We seek comment on the relative merits of this approach and its practical effects, including how this determination might affect program diversity, the airing of locally-originated programming, or the airing of other kinds of programming that may afford little or no economic return. We also seek comment on whether this approach may result in an increase in the number of petitions for exemption from the closed captioning requirements under the "undue burden" standard set forth in section 79.1(f).¹⁰¹

39. Finally, we seek comment on whether we should revise the exemption as it applies to multicast streams to, for example, change the \$3 million threshold for the multicast programming streams other than the "main" stream or adopt a new non-revenue approach. Specifically, we seek comment on whether the \$3 million revenue amount is a reasonable threshold for determining if secondary multicast streams should be exempt from the closed captioning requirements, or whether, given the general nature of the programming on such channels, a smaller figure is appropriate and, if so, what that amount should be.

40. We also seek comment on whether it is appropriate to adopt something other than a fixed revenue threshold for determining whether secondary multicast streams must be captioned. For example, we seek comment on whether captioning requirements should be tied to a formula that considers the number of programming streams being offered (or some other variable). Such an approach might be similar to that used for determining a broadcaster's children's television programming requirements. In the context of children's television programming, the Commission sought comment on the continued application of our children's television requirements in light of the transition to digital television and the increased programming opportunities that are now available to broadcasters.¹⁰² The Commission ultimately adopted rules requiring that a multicast broadcaster's core programming obligation increases in proportion to the amount of free programming being offered.¹⁰³ We seek comment on similar alternatives for applying captioning requirements to multicast program streams.

VI. CONCLUSION

41. As we prepare for the completion of the full-power broadcast digital television transition on February 17, 2009, it is critical that video programming continue to be accessible to individuals who

¹⁰¹ See 47 C.F.R. § 79.1(f).

¹⁰² See *Children's Television Obligations of Digital Television Broadcasters*, MM Docket 00-167, Notice of Proposed Rulemaking, 15 FCC Rcd 22946 (Oct. 5, 2000) (*Children's Digital Television NPRM*); see also *Children's Television Obligations of Digital Broadcasters*, MM Docket 00-167, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943 (Nov. 23, 2004) (*Children's Digital Television Report and Order*).

¹⁰³ Pursuant to the Commission's rules pertaining to children's programming on digital stations, in addition to the existing three hours per week core programming on their "main program stream," DTV broadcasters that choose to multicast must increase their core children's programming in proportion to the additional hours of free programming offered on multicast channels – up to an additional three hours per week for each 24-hour free multicast program stream. The guidelines adopted in 2004 also permit digital broadcasters to choose to air some or all of the additional core programming on either the main stream or a multicast stream, as long as the multicast stream receives MVPD carriage comparable to the stream that generated the additional core programming obligation. See *Children's Digital Television Report and Order*. On reconsideration, the Commission declined to alter the new children's core programming "multicasting" rule adopted in the *Children's Digital Television Report and Order*, but clarified the way in which repeats of core programs will be counted under the rule adopted in 2004. See *Children's Television Obligations Of Digital Television Broadcasters*, MM Docket 00-167, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065 (Sept. 29, 2006) (*Children's Digital Television Second Reconsideration Order*).

are deaf or hard of hearing. To this end, in the *Declaratory Ruling* we clarify that transitioning from analog to digital does not, in itself, qualify an entity for the new network exemption from the closed captioning requirements. We also clarify that, unless otherwise exempt from the closed captioning rules, digital programming must be captioned pursuant to the applicable benchmarks for that type of programming. Specifically, 100 percent of new, non-exempt digital English language video programming must be captioned. We also remind distributors that, in order for captioned programming to count toward the distributors' captioning benchmarks, they must transmit captions that can be decoded by analog television sets. We remind MVPDs that provide customer premises equipment (CPE), such as set-top boxes, to their subscribers, that they are responsible for ensuring that this equipment transmits all available captions to the television set, for both analog and digital formatted programs.

42. In addition, in the *Order* we amend our rules to provide for more efficient complaint processes and methods for consumers to contact distributors with concerns about closed captioning. Together, these actions should further ensure that all Americans have access to video services and programs, consistent with Congress's mandate in Section 713 of the Act. In the *Notice of Proposed Rulemaking*, we seek comment on the application of the exemption set forth in section 79.1(d)(12) of our rules to digital multicast channels, in a manner that will serve the public interest by promoting both the availability of captioning and greater diversity in programming.

VII. PROCEDURAL MATTERS

43. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules,¹⁰⁴ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. When filing comments, please reference **CG Docket No. 05-231**. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.¹⁰⁵ For additional information on this proceeding, please contact Amelia Brown in the Consumer and Governmental Affairs Bureau, at (202) 418-2799.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/>, or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the relevant Web site for submitting comments.
- For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number, **CG Docket No. 05-231**. Parties also may submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and instructions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All

¹⁰⁴ 47 C.F.R. §§ 1.415, 1.419.

¹⁰⁵ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322, 11326, para. 8 (Apr. 6, 1998).

hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

44. Persons with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). This *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* also can be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb/dro/caption.html>.

45. We encourage all parties filing comments and reply comments to include the name of the filing party and the date of the filing on each page of their comments and reply comments. We further encourage that parties in their comments track the organization set forth in this *NPRM* in order to facilitate our internal review process. Comments and reply comments otherwise must comply with section 1.49 and all other applicable sections of the Commission's rules.¹⁰⁶

46. *Ex Parte Rules.* This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁰⁷ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹⁰⁸ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

47. *Regulatory Flexibility Certifications.* As required by the Regulatory Flexibility Act of 1980 (RFA),¹⁰⁹ the Commission has prepared a Final Regulatory Flexibility Certification in which it concludes that, under the terms of the RFA, there is no significant economic impact on small entities of the policies and rules addressed in this document. The certification is set forth in Appendix C.

48. As required by the RFA,¹¹⁰ the Commission also has prepared an Initial Regulatory Flexibility Certification of the possible significant economic impact on small entities of the policies and rules addressed in this document. The certification is set forth in Appendix D.

49. *Paperwork Reduction Act.* The *Order* adopts new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13.¹¹¹ It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,¹¹² we previously sought comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this document, we have assessed the effects of requiring that video

¹⁰⁶ See 47 C.F.R. § 1.49.

¹⁰⁷ 47 C.F.R. §§ 1.200 *et seq.*

¹⁰⁸ See 47 C.F.R. § 1.1206(b)(2).

¹⁰⁹ See 5 U.S.C. § 604.

¹¹⁰ See 5 U.S.C. § 603.

¹¹¹ 44 U.S.C. §§ 3501-3520.

¹¹² 44 U.S.C. § 3506(c)(4).

programming distributors provide contact information on their websites (if they have a website) and in bills and phone directories so that consumers can more easily complain about closed captioning concerns. We have also assessed the effects of providing this information to the FCC for posting on the FCC's website. We have also considered the impact of requiring that distributors forward complaints to the appropriate entity for response, where applicable, and notifying the FCC and the complainant that the complaint has been forwarded. We find that none of these requirements will pose a substantial burden for businesses with fewer than 25 employees.

50. *Congressional Review Act.* The Commission will send a copy of this *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹¹³

VIII. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that, pursuant to 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, this *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* IS ADOPTED and the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix A.

52. IT IS FURTHER ORDERED that the *Declaratory Ruling and Order* SHALL BE EFFECTIVE 30 days after publication in the *Federal Register*, except with regard to the information collection requirements contained in new rule section 79.1(i) and section 79.1(g), which will become effective upon publication in the *Federal Register* of notice of approval by the Office of Management and Budget of the information collections, and, with respect to section 79.1(i), with which distributors must comply within 30 days thereafter.

53. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Declaratory Ruling, Order, and Notice of Proposed Rulemaking*, including the Final and Initial Regulatory Flexibility Analyses (found in Appendices C and D hereto), to the Chief Counsel for Advocacy of the Small Business Administration.

54. To request materials in accessible formats (such as braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* can also be downloaded in Word and Portable Document Formats (PDF) at <http://www.fcc.gov/cgb/dro/caption.html>.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹¹³ See 5 U.S.C. § 801(a)(1)(A).

APPENDIX A

Revised Rules

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(a) is amended by revising paragraphs (5), (6)(i), and (6)(ii) to read as follows:

(5) New programming.

(i) Analog video programming that is first published or exhibited on or after January 1, 1998.

(ii) Digital video programming that is first published or exhibited on or after July 1, 2002.

(6) Pre-rule programming.

(i) Analog video programming that was first published or exhibited before January 1, 1998.

(ii) Digital video programming that was first published or exhibited before July 1, 2002.

3. Section 79.1 (g) is amended to read as follows:

(g) Complaint procedures.

(1) Complaints concerning an alleged violation of the closed captioning requirements of this section shall be filed with the Commission or with the video programming distributor responsible for delivery and exhibition of the video programming within sixty (60) days of the problem with captioning. 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.

(2) Complaints filed first with the Commission will be forwarded to the appropriate video programming distributor. The video programming distributor must respond in writing to the Commission and the complainant within 30 days of the receipt of the complaint from the Commission.

(3) Complaints sent to a video programming distributor regarding programming 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, shall be forwarded by the video programming distributor within seven (7) days of receipt to the entity responsible for closed captioning of the programming at issue. The video programming distributor must also notify the complainant and the Commission that it has forwarded the complaint. Entities receiving forwarded complaints must respond in writing to the complainant within 30 days of the forwarding date of the complaint.

(4) If a complaint is first filed with the video programming distributor, the video programming distributor must respond in writing to the complainant within thirty (30) days after receipt of a closed captioning

complaint. If a video programming distributor fails to respond to the complainant within thirty (30) days, or the response does not satisfy the consumer, the complainant may file the complaint with the Commission within thirty (30) days after the time allotted for the video programming distributor to respond. If a consumer re-files the complaint with the Commission (after filing with the distributor), the Commission will forward the complaint to the distributor, and the distributor shall respond to the Commission and the complainant within thirty (30) days of receipt of the complaint from the Commission.

(5) 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.

(6) ***

(7) ***

(8) ***

5. Section 79.1(i) is added to read as follows:

(i) Contact information.

(1) Video programming distributors shall make available contact information for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program. Programming distributors must designate a telephone number, fax number, and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns. Video programming distributors should ensure that any staff reachable through this contact information has the capability to immediately respond to and address consumers' concerns. To the extent that a distributor has personnel available, either on site or remotely, to address any technical problems that may arise, consumers using this dedicated contact information must be able to reach someone, either directly or indirectly, who can address the consumer's captioning concerns. This provision does not require that distributors alter their hours of operation or the hours during which they have staffing available; at the same time, however, where staff is available to address technical issues that may arise during the course of transmitting programming, they also must be knowledgeable about and be able to address closed captioning concerns. In situations where a distributor is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours. In those situations where the captioning problem does not reside with the distributor, the staff person receiving the inquiry should refer the matter appropriately for resolution.

(2) Video programming distributors shall make contact information available for the receipt and handling of written closed captioning complaints that do not raise the type of immediate issues that are addressed in subsection (1) of this section. The contact information required for written complaints shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with our rules. In addition, this contact information shall include the person's title or office, telephone number, fax number, postal mailing address, and e-mail address. Distributors shall include this information on their websites (if they have a website), in telephone directories, and in billing statements (to the extent the distributor issues billing statements). Distributors shall keep this information current and update it within 10 business days for websites, by the next billing cycle for billing statements, and by the next publication of directories.

(3) Video programming distributors shall file the contact information described in this section with the Chief of the Disability Rights Office, Consumer and Governmental Affairs Bureau, or by sending the information to CLOSEDCAPTIONING_POC@fcc.gov. After compiling and posting the list on the

FCC's website, Commission staff shall prepare a Public Notice advising consumers and other interested parties how to obtain access to the contact information. This information shall also be available by telephone inquiry to the Commission's Consumer Center. Distributors shall notify the Commission each time there is a change in any of this required information within 10 business days.

APPENDIX B

Form 2000C – Informal Complaint Form

Approved by OMB
3060-0874
Estimated time per response: 30 minutes
September 2007

Form 2000C – Disability Access Complaint

Consumer's Information:

First Name: _____ Last Name: _____
Company Name: _____
(Complete only if you are filing this complaint on behalf of a company or an organization.)
Street Address or Post Office Box Number: _____
City: _____ State: ____ Zip Code: _____ - _____
Telephone Number (Residential or Business): (____) ____ - _____ Ext: _____
E-mail Address: _____

Are you filing information on behalf of another party, such as client, parent, spouse or roommate?
 Yes No If yes, complete items a through g.

- a. Your relationship with the party: _____
b. The party's first name: _____
c. The party's last name: _____
d. The party's daytime phone number: (____) ____ - _____ Ext: _____
e. The party's street address or post office box number: _____
f. City _____ State: ____ Zip Code: _____
g. E-mail address: _____
h. Fax number: _____

IMPORTANT: Please indicate the preferred format or method of response to the complaint by the Commission and defendant: Letter Facsimile (fax) Telephone Voice TRS (designate form of TRS and appropriate contact information) _____ TTY
Internet E-mail ASCII Text Audio-Cassette Recording Braille

**** ANSWER EACH QUESTION THAT APPLIES TO YOUR SPECIFIC COMPLAINT ****

1. Check one box for your type of complaint:

Telecommunications Relay Service (TRS)
(i.e., TTY-based, IP Relay, CapTel, IP CapTel, Speech-to-Speech, Video Relay Service (VRS))
 Accessibility of emergency information on television

Closed Captioning (absence, quality or pass through High Definition (HD) programs)

NOTE: If your complaint is about closed captioning only, you must first contact the station or video programming distributor. For additional information, see
<http://www.fcc.gov/cgb/consumerfacts/closedcaption.html>.

Wireless telephone equipment or service (includes hearing aid compatibility and other accessibility issues)

Wireline telephone equipment or service (includes hearing aid compatibility and other accessibility issues)

2. Provide the name, address and telephone number (if known) of the company(s) involved in your complaint:

Name: _____
City: _____ State: _____ Zip Code: _____
Telephone number: (____) ____ - _____

3. If your complaint is about accessibility of telecommunications services or equipment, provide the make and model number of the equipment or device that this complaint is about:

4. If your complaint is about closed captioning or emergency information on television, provide the date (mm/dd/yyyy) ___/___/_____/ and time _____ AM ___ PM and any details of when the event or action you are complaining about occurred:

5. If your complaint is about access to emergency information on television, provide the following information:

- a. Television station call sign (e.g., "WZUE-TV"): _____
- b. Station channel (e.g., "13"): _____
- c. Station location: City _____ State: _____
- d. Date(s) and time(s) of emergency: ___/___/_____/ and time _____ AM ___ PM
- e. Detailed description of the emergency (i.e., flood, hurricane, tornado, etc., as well as the areas in which the emergency occurred): _____

6. If your complaint is about closed captioning, provide the following:

- a. Station call sign (e.g., "KDID," "WZUF," "KDIU-FM," "WZUE-TV"): _____
- b. Station frequency (e.g., "1020" or "88.5"): _____ or channel (e.g., "13"): _____
- c. Station location: City _____ State: _____
- d. Name of program(s) involved: _____

Note: If your complaint is about closed captioning only, you must first contact the station or video programming distributor. For additional information, see <http://www.fcc.gov/cgb/consumerfacts/closedcaption.html> .

7. Briefly describe your complaint and include the resolution you are seeking. If applicable, provide a full description of the telecommunications equipment or customer premises equipment (CPE) and/or the telecommunications service about which the complaint is made, and the date or dates on which the complainant either purchased, acquired or used, or attempted to purchase, acquire or use the telecommunications equipment, CPE or telecommunications service about which the complaint is being made.

You may submit this form over the Internet at <http://www.fcc.gov/cgb/complaints.html>, by e-mail to fccinfo@fcc.gov, by fax to 1-866-418-0232, or by postal mail to:

Federal Communications Commission
Consumer & Governmental Affairs Bureau
Consumer Complaints
445 12th Street, SW
Washington, D.C. 20554

In addition, you may submit your complaint over the telephone by calling 1-888-CALL-FCC or 1-888-TELL-FCC (TTY). If you choose to submit your complaint over the telephone, an FCC customer service representative will fill out an electronic version of the form for you during your conversation. If you have any questions, feel free to contact the FCC at 1-888-CALL-FCC or 1-888-TELL-FCC (TTY).

FCC NOTICE REQUIRED BY THE PAPERWORK REDUCTION ACT AND THE PRIVACY ACT

The Federal Communications Commission is authorized under the Communications Act of 1934, as amended, to collect the personal information that we request in this form. This form is used for complaints that involve disability access. The public reporting for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the required data, and completing and reviewing the collection of information. If you have any comments on this burden estimate, or how we can improve the collection and reduce the burden it causes you, please write to the Federal Communications Commission, OMD-PERM, Paperwork Reduction Project (3060-0874), Washington, DC 20554. We will also accept your comments regarding the Paperwork Reduction Act aspects of this collection via the Internet if you send them to PRA@fcc.gov. PLEASE DO NOT SEND YOUR COMPLETED FORMS TO THIS ADDRESS. Remember - You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently valid OMB control number or if we fail to provide you with this notice. This collection has been assigned an OMB control number of 3060 - 0874. In addition, the information that consumers provide when filling out FCC Form 2000 is covered by the system of records notice, FCC/CGB-1, Informal Complaints and Inquiries File (Broadcast, Common Carrier, and Wireless Telecommunications Bureau Radio Services). The Commission is authorized to request this information from consumers under 47 U.S.C. 206, 208, 301, 303, 309(e), 312, 362, 364, 386, 507, and 51; and 47 CFR 1.711 *et seq.* Under this system of records notice, FCC/CGB-1, the FCC may disclose information that consumers provide as follows: when a record in this system involves a complaint against a company, the complaint is forwarded to the defendant who must, within a prescribed time frame, either satisfy the complaint or explain to the Commission and the complainant its failure to do so; where there is an indication of a violation or potential violation of a statute, regulation, rule, or order, records from this system may be referred to the appropriate Federal, state, or local agency responsible for investigating or prosecuting a violation or for enforcing or implementing the statute, rule, regulation, or order; a record from this system may be disclosed to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit; a record on an individual in this system of records may be disclosed, where pertinent, in any legal proceeding to which the Commission is a party before a court or administrative body; a record from this system of records may be disclosed to the Department of Justice or in a proceeding before a court or adjudicative body when: (a) the United States, the Commission, a component of the Commission, or, when represented by the government, an employee of the Commission is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the Commission determines that the disclosure is relevant or necessary to the litigation; a record on an individual in this system of records may be disclosed to a Congressional office in response to an inquiry the individual has made to the Congressional office; a record from this system of records may be disclosed to GSA and NARA for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906. Such disclosure shall not be used to make a determination about individuals. In each of these cases, the FCC will determine whether disclosure of the information in this system of records notice is compatible with the purpose for which the records were collected. Furthermore, information in this system of records notice is available for public inspection after redaction of information that could identify the complainant or correspondent, *i.e.*, name, address and/or telephone number. **THE FOREGOING NOTICE IS REQUIRED BY THE PAPERWORK REDUCTION ACT OF 1995, PUBLIC LAW 104-13, OCTOBER 1, 1995, 44 U.S.C. SECTION 3507 AND THE PRIVACY ACT OF 1974, PUBLIC LAW 93-579, DECEMBER 31, 1974, 5 U.S.C. SECTION 552a(e)(3).**

APPENDIX C

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making (2005 NPRM)* in this proceeding.² The Commission sought written public comment on the proposals in the *2005 NPRM*, including comment on the IRFA. The Commission received one comment on the IRFA, and it is discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Order

2. The purpose of this proceeding was to consider the current status of the Commission's closed captioning rules. The rulemaking that was initiated in 2005 followed up on the Commission's prior assurances, made at the time the closed captioning rules were adopted in 1997, that certain captioning provisions would be reviewed and evaluated at a future date. The 2005 rulemaking sought to determine whether any revisions should be made to enhance the effectiveness of the closed captioning rules.

3. The closed captioning rules that were adopted in 1997 require that all video programming distributors, including over-the-air broadcast television services and all multichannel video programming distributors ("MVPDs") (including cable television, direct-to-home satellite services, wireless cable systems, satellite master antenna television, and open video systems)⁴ increase gradually the amount of captioned programming offered and, generally require that 100 percent of new English language programming be closed captioned as of January 1, 2006, subject to certain exceptions.⁵ New analog programming is defined as analog programs first published or exhibited on or after January 1, 1998.⁶ New digital programming is defined as digital programming first aired after June 30, 2002.⁷ Additionally, these rules established a transition period for captioning of pre-rule programming, and required that 75 percent of all pre-rule nonexempt English language programming delivered to consumers during the first quarter of 2008 and thereafter must be captioned.⁸ Pre-rule analog programming is defined as programs first published or exhibited before January 1, 1998.⁹ Pre-rule digital programming is defined as digital

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *2005 Closed Captioning NPRM*, 20 FCC Rcd at 13234, Appendix B – Initial Regulatory Flexibility Analysis.

³ See 5 U.S.C. § 604.

⁴ "Video programming distributor" is defined in 47 C.F.R. § 79.1(a)(2) as any television broadcast station licensed by the Commission and any multichannel video programming distributor as defined in section 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.

⁵ See 47 C.F.R. §§ 79.1(b)(1), (b)(3), (d), (e), (f); see also *Closed Captioning Report and Order*, 13 FCC Rcd at 3292-95, paras. 41-47; *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 19978-82, paras. 9-16.

⁶ 47 C.F.R. § 79.1(a)(5).

⁷ *Closed Caption Decoder Requirements for Digital Television Receivers and Converter Boxes, Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, ET Docket No. 99-254, MM Docket No. 95-176, Report and Order, 15 FCC Rcd 16788, 16790-91, para. 5 (July 31, 2000) (*DTV Closed Captioning Order*).

⁸ 47 C.F.R. § 79.1(b)(2)(ii).

⁹ 47 C.F.R. § 79.1(a)(6).

programming first aired before July 1, 2002.¹⁰ The rules also require that, pursuant to an established phase-in schedule, as of January 1, 2010, 100 percent of nonexempt new Spanish language programming be closed captioned,¹¹ and, as of January 1, 2012, and thereafter, 75 percent of nonexempt Spanish language pre-rule programming be closed captioned.¹² The existing rules contain several exemptions, pursuant to which entities or programming that meet the prescribed criteria are exempt from the rules without having to seek Commission approval.¹³ In addition, the existing rules provide a process whereby video programming providers may petition the Commission for an exemption from the rules where it would be an undue burden to require captioning.¹⁴

4. The *2005 Closed Captioning NPRM* sought comment on several aspects of the rules. It also sought comment on a Petition for Rulemaking that was filed by Telecommunications for the Deaf, Inc. and several other consumer advocacy groups. It sought comment on, *inter alia*, the possibility that the existing rule would allow for shorter complaint filing and response times, what those time frames should be, and on the possibility that complainants should be permitted to complain directly to the Commission without complaining to the video programming distributor first. Further, the *2005 Closed Captioning NPRM* sought comment on the possibility that video programming distributors would be required to provide contact information to viewers and to give this information to the Commission for posting on the Commission's website, in order to assist consumers in having their closed captioning concerns addressed more quickly.

5. The *Order* responds to the proposals made in the *2005 Closed Captioning NPRM* and the Comments submitted thereto. Specifically, the *Order* amends the existing closed captioning rules to shorten the complaint processing times and allows complaints to be filed directly with the FCC. The *Order* also adopts a new requirement that video programming distributors make information available on their websites (if they have a website) in bills and in directories to make it easier for closed captioning consumers to contact them with closed captioning concerns and complaints. The *Order* also adds a requirement to the rules to ensure that any staff reachable through the above-noted contact information has the capability to immediately respond to and address consumers' concerns.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. Media Captioning Services (MCS) filed the only comment in this proceeding responding to the IRFA.¹⁵ MCS commented on many issues raised in the *2005 Closed Captioning NPRM*, as well. Specifically, with regard to the issues raised in the *2005 Closed Captioning NPRM*, MCS commented that, in order to encourage high quality captioning, the FCC should promote tax incentives for video programmers who use very small captioning concerns to meet captioning requirements; should utilize the antitrust laws (presumably to penalize entities that engage in anti competitive behavior resulting in higher

¹⁰ See note 7, *supra*.

¹¹ 47 C.F.R. § 79.1(b)(3)(iv).

¹² 47 C.F.R. § 79.1(b)(4)(ii).

¹³ 47 C.F.R. § 79.1(d).

¹⁴ 47 C.F.R. § 79.1(f).

¹⁵ See Comments of Media Captioning Services (MCS) to Marlene H. Dortch, Secretary, FCC, November 9, 2005. As stated, MCS' comments were the only comments we received regarding the regulatory flexibility analysis. Several other commenters raised concerns regarding the impact of the proposals on small entities, but not in the regulatory flexibility context. Some of these commenters would be considered small businesses. In general, these commenters stated that the proposals set forth in the *2005 Closed Captioning NPRM* could result in increased costs and decreased local programming. For example, Hubbard Broadcasting commented that real-time captioning services are "disproportionately burdensome" to smaller broadcasters, and that the suggestions proposed in the *2005 Closed Captioning NPRM* would "vastly increase the costs of local news production." Reply Comments of Hubbard Broadcasting, Inc. at 4-5.

captioning prices); should use the Telecommunications Relay Service fund to compensate very small captioning companies; and should establish a fund from the sale of analog spectrum to compensate very small captioning companies that provide captioning services to video programmers in the DMAs between 26 and 100. MCS also suggested that the Commission require a functional equivalence guideline for real-time captioning and for pre-produced programming. MCS offered specific suggestions for these standards, and MCS also suggested that complaints regarding closed captioning should be directed to the video programming distributor and the FCC, simultaneously.

7. In its comments pertaining to the regulatory flexibility analysis, MCS noted that the IRFA does not include any discussion of the impact that proposed regulations would have on closed captioning companies.¹⁶ MCS noted that SBA considers companies providing real-time captioning services with annual gross receipts of \$6 million or less to be small entities, and considers companies earning \$25 million or less from pre-production business to be small entities.¹⁷ MCS asserted that virtually all companies in the closed captioning industry would be classified as small businesses.¹⁸ MCS stated that the definitions are deficient since an “element of the definition of ‘small business’ is that the entity would not be dominant in its field of operations.”¹⁹ However, according to MCS, three dominant companies in the industry would be classified as small entities based on the annual gross receipts standards noted above.²⁰

8. The Commission appreciates the comments filed by MCS in this regard. We note that video programming distributors (VPDs) are the entities directly responsible for compliance with closed captioning rules, and may only air programming that is not captioned if the programming is not subject to a captioning benchmark or is exempt from the rules pursuant to section 79.1(d) or 79.1(f). Even with regard to programming that is not produced by a video programming distributor, the VPD is responsible for ensuring that the program owner has certified that it or its programming is exempt from the closed captioning rules. Although closed captioning companies play a vital role in the closed captioning regime, they are not the entities that are directly affected by the Commission’s requirements that video programming be captioned, because they are not the entities ultimately responsible for compliance with the closed captioning rules. The 2005 IRFA included all multi-channel video programming distributors and broadcasters -- these are the entities that are ultimately responsible for closed captioning. In addition to captioners, program owners and producers that are not the video programming distributors were also omitted from the 2005 IRFA, for the same reason – they are merely indirectly affected by the rules and are not ultimately responsible for compliance with the rules. However, in order to better inform the public about our actions and to create a more complete record in this FRFA, we are including captioners as entities affected by the modifications adopted in the Order (*see paras. 28-30, infra*).

C. Description and Estimate of the Number of Small Entities Impacted

9. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.²¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,”

¹⁶ MCS Comments at 19-20 (November 9, 2005).

¹⁷ *Id.*

¹⁸ *Id.* In its comments, MCS referred to Standard Industry Classification (SIC) codes. However, SIC codes were replaced on August 26, 2008, by North American Industry Classification System (NAICS) codes; accordingly, the FCC must use the NAICS codes.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 5 U.S.C § 604(a)(3).

and “small business concern” under section 3 of the Small Business Act.²² 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 SBA.²³

10. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.²⁴ A “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”²⁵ Nationwide, as of 2002, there were approximately 1.6 million small organizations.²⁶ The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”²⁷ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.²⁸ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”²⁹ Thus, we estimate that most governmental jurisdictions are small.

11. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”³⁰ The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”³¹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.³² Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more.³³ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

12. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or

²² 5 U.S.C. § 601(6).

²³ 5 U.S.C. § 632

²⁴ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

²⁵ 5 U.S.C. § 601(4).

²⁶ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

²⁷ 5 U.S.C. § 601(5).

²⁸ U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

²⁹ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

³⁰ U.S. Census Bureau, 2002 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

³¹ 13 C.F.R. § 121.201, NAICS code 517110.

³² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 5, NAICS code 517110 (issued Nov. 2005).

³³ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”³⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.³⁵ To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.³⁶ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.³⁷ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.³⁸ Thus, the majority of these firms can be considered small.

13. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.³⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁴⁰ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.⁴¹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have fewer than 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁴² Thus, under this second size standard, most cable systems are small. Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small.⁴³

14. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”⁴⁴ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual

³⁴ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

³⁵ The NAICS Code associated with this size standard is 517110.

³⁶ 13 C.F.R. § 121.201, NAICS code 517110.

³⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

³⁸ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁹ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

⁴⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁴¹ 47 C.F.R. § 76.901(c).

⁴² Warren Communications News, *Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁴³ See 13 C.F.R. 121.201, NAICS code 517110.

⁴⁴ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁴⁵ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁴⁶ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁴⁷ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

15. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. As noted, Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small, under the currently applicable SBA classification.⁴⁸ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁴⁹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁵⁰ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁵¹ Thus, under this size standard, the majority of firms can be considered small.

16. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS falls under the SBA definition of "Wireless Telecommunications Carriers (except satellite)", which establishes as a small DBS company any DBS company which has less than 1500 employees.⁵² The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁵³ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁵⁴ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV⁵⁵ and EchoStar Communications Corporation ("EchoStar"),⁵⁶ report

⁴⁵ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

⁴⁶ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁴⁷ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

⁴⁸ NAICS Code 517110.

⁴⁹ 13 C.F.R. § 121.201, NAICS code 517110.

⁵⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁵¹ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁵² 13 C.F.R. § 121.201, NAICS Code 517210.

⁵³ 13 C.F.R. § 121.201, NAICS code 517110.

⁵⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁵⁵ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of Status of Competition in the Market for the Delivery of Video

annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$13.5 million, and thus does not qualify as a small business.⁵⁷ The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.⁵⁸ The Commission does not know of any source which provides this information and, thus, the Commission has no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, the Commission believes it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, the Commission acknowledges the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

17. *Television Broadcasting.* This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."⁵⁹ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁶⁰ The Commission has estimated the number of licensed commercial television stations to be 1,379.⁶¹ In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of \$13 million or less.⁶² We therefore estimate that the majority of commercial television broadcasters are small entities.

18. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁶³ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

(Continued from previous page)
 Programming, Eleventh Annual Report, FCC 05-13, para. 55 (rel. Feb. 4, 2005) ("2005 Cable Competition Report").

⁵⁶ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

⁵⁷ Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

⁵⁸ Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

⁵⁹ U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting" (partial definition); <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

⁶⁰ 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2008).

⁶¹ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁶² We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

⁶³ "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 21.103(a)(1).

19. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.⁶⁴ These stations are non-profit, and therefore considered to be small entities.⁶⁵ In addition, there are also 2,295 low power television stations (LPTV).⁶⁶ Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

20. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁶⁷ The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁶⁸ An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁹ The SBA has approved these small business size standards in the context of LMDS auctions.⁷⁰ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses. Because some LMDS services may not have been auctioned, the SBA standard which applies to such services is Wireless Telecommunications Carriers (except satellite), pursuant to which a service is small if it has fewer than 1500 employees.⁷¹

21. *Wireless Telecommunications Carriers (except satellite).*⁷² Wireless Telecommunications Carriers, except satellite, is a NAICS standard which has a size standard of fewer than 1500 employees.⁷³ Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service ("BRS"), formerly Multipoint Distribution Service ("MDS"), and the Educational Broadband Service ("EBS"), formerly Instructional Television Fixed Service ("ITFS"), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of

⁶⁴ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁶⁵ See generally 5 U.S.C. §§ 601(4), (6).

⁶⁶ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁶⁷ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

⁷¹ The NAICS Code for this SBA classification is 517110.

⁷² NAICS code 517210. Standard for small business is 1500 employees or fewer.

⁷³ NAICS Code 517210.

March 2005. As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small.⁷⁴ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁷⁵ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁷⁶ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁷⁷ The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS. Other standards also apply, as described.

22. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Wireless Telecommunications Carriers (except satellite).⁷⁸ As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1500 employees are considered to be small.⁷⁹ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁸⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁸¹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁸² Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

23. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

⁷⁴ 13 C.F.R. § 121.201, NAICS Code 517210.

⁷⁵ 13 C.F.R. § 121.201, NAICS Code 517110.

⁷⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁷⁷ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁷⁸ 13 C.F.R. § 121.201, NAICS Code 517210.

⁷⁹ 13 C.F.R. § 121.201, NAICS Code 517210.

⁸⁰ 13 C.F.R. § 121.201, NAICS Code 517110.

⁸¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁸² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

24. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁸³ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁸⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁸⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁸⁶ This standard has been replaced by the Wireless Telecommunications Carriers (except satellite) standard, which considers firms with fewer than 1,500 employees to be small.⁸⁷ The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service.⁸⁸ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies adopted herein.

25. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

26. *Telephone Companies.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁸⁹ According to Commission data,⁹⁰ 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

27. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The

⁸³ See 47 U.S.C. § 573.

⁸⁴ 13 C.F.R. § 121.201, NAICS Code 517110.

⁸⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁸⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁸⁷ NAICS Code 517210.

⁸⁸ See <http://www.fcc.gov/csb/ovs/csovscer.html> (current as of June 2004). This data was collected when “Cable and Other Program Distribution” was the operative distribution technology.

⁸⁹ 13 C.F.R. § 121.201, NAICS code 517110.

⁹⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

appropriate size standard under NAICS rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁹¹ According to Commission data,⁹² 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

28. *Closed Captioning Services.* These entities are indirectly affected by our action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, “Teleproduction and Other Postproduction Services” and “Court Reporting and Stenotype Services.”

29. The first category of *Teleproduction and Other Postproduction Services* “comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.” The relevant size standard for small businesses in these services is an annual revenue of less than \$29.5 million.⁹³ For this category, Census Bureau data for 2002 show that there were 1,316 firms that operated for the entire year.⁹⁴ Of this total, 1,301 firms had annual receipts of under \$25 million, and 10 firms had receipts of \$25 million to \$49,999,999.⁹⁵ Consequently, we estimate that the majority of *Teleproduction and Other Postproduction Services* firms are small entities that might be affected by our action.

30. The second category of *Court Reporting and Stenotype Services* “comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.” The size standard for small businesses in these services is an annual revenue of less than \$7 million.⁹⁶ For this category, Census Bureau data for 2002 show that there were 2,487 firms that operated for the entire year.⁹⁷ Of this total, 2,461 firms had annual receipts of under \$5 million, and 16 firms had receipts of \$5 million to \$9,999,999.⁹⁸ Consequently, we estimate that the majority of *Court Reporting and Stenotype Services* firms are small entities that might be affected by our action.

⁹¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁹² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

⁹³ U.S. Census Bureau, 2002 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services”; <http://www.census.gov/epcd/naics02/def/NDEF512.HTM>. The size standard is \$29.5 million.

⁹⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 512191 (issued Nov. 2005).

⁹⁵ *Id.* An additional 5 firms had annual receipts of \$50 million or more.

⁹⁶ U.S. Census Bureau, 2002 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/epcd/naics02/def/NDEF561.HTM>. The size standard is \$7 million.

⁹⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 561492 (issued Nov. 2005).

⁹⁸ *Id.* An additional 10 firms had annual receipts of \$10 million or more.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

31. The *Order* revises the Commission's rules to allow complaints concerning an alleged violation of the closed captioning requirements to be filed with the Commission or with the video programming distributor responsible for delivery and exhibition of the video programming within sixty (60) days of the problem with captioning. The *Order* requires that complaints that are filed first with the Commission will be forwarded to the appropriate video programming distributor, and the video programming distributor must respond in writing to the Commission and the complainant within 30 days of the receipt of the complaint from the Commission. The *Order* also requires that, when a complaint is sent to a video programming distributor regarding programming by a television broadcast station or other programming for which the video programming distributor is exempt from closed captioning responsibility pursuant to section 79.1(e)(9) of the closed captioning rules, the video programming distributor shall forward such complaint within seven (7) days of receipt to the entity responsible for closed captioning of the programming at issue. The *Order* requires that the video programming distributor must also notify the complainant and the Commission that it has forwarded the complaint. The *Order* requires that entities receiving forwarded complaints must respond in writing to the complainant within 30 days of the forwarding date of the complaint. The *Order* requires that, if the complaint is filed first with the video programming distributor, and the video programming distributor fails to respond to it within 30 days 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. The *Order* requires that video programming distributors shall respond to the Commission and the complainant within 30 days of receipt of a complaint from the Commission.

32. The *Order* also adopts provisions requiring that video programming distributors make available contact information for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a program, as well as contact information for the receipt and handling of written closed captioning complaints that do not raise immediate issues. The *Order* requires that programming distributors must designate a telephone number, fax number, and e-mail address for purposes of receiving and responding immediately to any closed captioning concerns. Video programming distributors should ensure that any staff reachable through this contact information has the capability to immediately respond to and address consumers' concerns. The *Order* requires that, to the extent that a distributor has personnel available, either on site or remotely, to address any technical problems that may arise, consumers using this dedicated contact information must be able to reach someone, either directly or indirectly, who can address the consumer's captioning concerns. This provision does not require that distributors alter their hours of operation or the hours during which they have staffing available; at the same time, however, the *Order* requires that, where staff is available to address technical issues that may arise during the course of transmitting programming, they also must be knowledgeable about and be able to address closed captioning concerns. The *Order* requires that, in situations where a distributor is not immediately available, any calls or inquiries received, using this dedicated contact information, should be returned or otherwise addressed within 24 hours. The *Order* requires that, in those situations where the captioning problem does not reside with the distributor, the staff person receiving the inquiry should refer the matter appropriately for resolution.

33. As noted, the *Order* requires video programming distributors to make contact information available for the receipt and handling of written closed captioning complaints, and this information shall include the name of a person with primary responsibility for captioning issues and who can ensure compliance with the rules, as well as the person's title or office, telephone number, fax number, postal mailing address, and e-mail address. The *Order* requires that distributors include this information on their websites (if they have a website), in telephone directories, and in billing statements (to the extent the distributor issues billing statements), and that distributors keep this information current and update it within 10 business days for websites, by the next billing cycle for billing statements, and by the next publication of directories.

34. The *Order* requires video programming distributors to file the contact information noted above with the Chief of the Disability Rights Office, Consumer and Governmental Affairs Bureau, or by sending the information to CLOSEDCAPTIONING_POC@fcc.gov. The *Order* requires the Commission staff to prepare a Public Notice advising consumers and other interested parties how to obtain access to the contact information, once it has been compiled and posted on the FCC's website. The *Order* requires that this information also be available by telephone inquiry to the Commission's Consumer Center. Distributors shall notify the Commission each time there is a change in any of this required information within 10 business days.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

35. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁹⁹

36. In amending our closed captioning rules, we believe that we have minimized 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 captioned programming while preserving the diversity of available programming. For instance, in revising the complaint process, the Commission has decreased the timeframes for filing complaints and responding to complaints. This change in filing time periods reasonably accommodates concerns by viewers that the current complaint process allows too much time to pass before a complaint must be addressed and concerns by distributors that they be allowed sufficient time to address captioning problems. Although the Commission considered retaining the former rule, pursuant to which complaints were filed first with the distributor, the dual approach adopted by the *Order* will enhance the complaint process. In addition, the *Order* contains an optional complaint form (FCC Form 2000-C) to assist consumers in the filing of complaints.¹⁰⁰ The information requested on the form will facilitate a more efficient complaint process for both complainants and distributors.

37. By requiring that video programming distributors provide contact information in bills, directories, on websites (if they have websites) and by sending this information to the Commission for placement on the Commission's website, the *Order* seeks to remedy concerns by consumers who report confusion about whom to contact about closed captioning concerns and dissatisfaction with the responsiveness of the video programming distributors. The *Order* does not require that distributors create websites specifically for the purpose of providing contact information.

38. The *Order* does not require that distributors alter their hours of operation or the hours during which they have staffing available. The *Order* only requires that, where staff is available to address technical issues that may arise during the course of transmitting programming, the staff must be knowledgeable about and be able to address closed captioning concerns. The *Order* also reminds video programming distributors of the importance of making their organizations accessible to persons with hearing disabilities seeking information about the entity's closed captioning or other matters. As such the *Order* expresses the Commission's expectation that all video programming distributors take measures to readily accommodate incoming calls placed through Telecommunications Relay Service (TRS). In situations where a distributor is not immediately available, any calls or inquiries received, using the

⁹⁹ 5 U.S.C. § 603(c)(1)-(4).

¹⁰⁰ *Order* at Appendix B.

dedicated contact information described in the *Order*, should be returned or otherwise addressed within 24 hours.

39. The economic burdens associated with the changes to the closed captioning rules adopted in the *Order* are minimal. The benefits of revising the complaint process, requiring that contact information be available to consumers and requiring that distributors have personnel able to address captioning problems when they are available to address other technical problems outweigh any slight burdens these requirements may impose. Furthermore, there are several provisions of the closed captioning rules that were adopted in 1997 that are intended to address concerns of small businesses. These 1997 provisions are not affected by the *Order*, nor were they addressed in the *2005 NPRM*. These provisions are intended to provide relief to small businesses who may find closed captioning to be unduly burdensome, and bear mentioning in this FRFA. For instance, the existing closed captioning rules contain several self-implementing exemptions that factor the costs of captioning and/or the financial status of distributors into a determination of whether the entity is exempt from the captioning requirements. The *Order* does not alter the existing exemption that excuses a video programming provider from spending more than 2 percent of its annual gross revenues received from a channel on closed captioning (section 79.1(d)(11)), nor does the *Order* alter the current provision in the rules that exempts video programming providers from closed captioning where the distributor's annual gross revenues for the channel did not exceed \$3 million for the previous calendar year (section 79.1(d)(12)). Both of these previously adopted provisions were intended to address the problems of small video programming providers that are not in a position to devote significant resources toward closed captioning. These exemptions relieve small entities of any burdensome obligation to provide closed captioning without significantly reducing the availability of captioning.

40. In addition, another provision in the current rules allows the Commission to grant exemptions to the rules where a petitioner has shown it would be an undue burden (*i.e.*, significant difficulty or hardship) to close caption (section 79.1(f)). This mechanism allows the Commission to address the impact of these rules on individual entities and modify the rules to accommodate individual circumstances. The procedures in section 79.1(f) were specifically designed to ameliorate the impact of the closed captioning rules in a manner consistent with the objective of increasing the availability of captioned programming.

F. Report to Congress

41. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress and the U.S. Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.¹⁰¹

¹⁰¹ *See* 5 U.S.C. § 604(b).

APPENDIX D

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rulemaking (Notice)*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided in paragraph 43 of the Item. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *Notice* and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need For, and Objectives of, the Proposed Rules

2. We initiate this review relating to closed captioning in anticipation of the transition to digital television (DTV) by full power broadcasters, which will occur on February 18, 2009. This rulemaking proceeding proposes several options for the appropriate treatment of digital broadcasters that choose to use their digital allotment to multicast several streams of programming (known as “multicasting”). In light of this new broadcasting environment, the *Notice* proposes several options for determining the closed captioning obligations for multicasting broadcasters. The *Notice* seeks comment on section 79.1(d)(12), which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year.⁴ In order to determine whether each stream of a digital broadcaster’s multicast operation must be captioned, the Commission proposes several possible alternatives and the possible outcomes to each alternative.

3. The proposals set forth in the *Notice*, for which comment is sought, contemplate as possible outcomes the following: treat each multicast stream as a separate channel and calculate their revenues separately; treat each multicast stream as a separate channel and calculate their revenues separately, but decrease the revenue threshold for determining whether the non-main programming streams must close caption; treat individual programming streams as one channel, in which case the revenues would be aggregated for purposes of determining if the exemption in Section 79.1(d)(12) applies; or, impose a new non-revenue approach for deciding how much programming must be captioned on multicast streams.

B. Legal Basis

4. The authority for this proposed rulemaking is contained 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.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ 47 C.F.R. § 79.1(d)(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”).

C. Description and Estimate of the Number of Small Entities Impacted

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules.⁵ The RFA generally 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.⁶ 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 SBA.⁷

6. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.⁸ A “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”⁹ Nationwide, as of 2002, there were approximately 1.6 million small organizations.¹⁰ The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹¹ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹² We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”¹³ Thus, we estimate that most governmental jurisdictions are small.

7. *Wired Telecommunications Carriers.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”¹⁴ The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”¹⁵ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.¹⁶ Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had

⁵ 5 U.S.C. § 604(a)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 632

⁸ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

⁹ 5 U.S.C. § 601(4).

¹⁰ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹¹ 5 U.S.C. § 601(5).

¹² U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

¹³ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

¹⁴ U.S. Census Bureau, 2002 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

¹⁵ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 5, NAICS code 517110 (issued Nov. 2005).

employment of 1,000 employees or more.¹⁷ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

8. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”¹⁸ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.¹⁹ To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.²⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.²¹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.²² Thus, the majority of these firms can be considered small.

9. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.²³ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁴ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.²⁵ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.²⁶ Thus, under this second size standard, most cable systems are small. Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small.²⁷

¹⁷ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

¹⁸ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹⁹ The NAICS Code associated with this size standard is 517110.

²⁰ 13 C.F.R. § 121.201, NAICS code 517110.

²¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

²² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

²³ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁴ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

²⁵ 47 C.F.R. § 76.901(c).

²⁶ Warren Communications News, *Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²⁷ See 13 C.F.R. 121.201, NAICS code 517110.

10. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”²⁸ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.³⁰ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,³¹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

11. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. As noted, Wired Telecommunications Carriers with fewer than 1500 employees are considered to be small, under the currently applicable SBA classification.³² The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.³³ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.³⁴ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.³⁵ Thus, under this size standard, the majority of firms can be considered small.

12. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS falls under the SBA definition of “Wireless Telecommunications Carriers (except satellite)”, which establishes as a small DBS company any DBS company which has less than 1500 employees.³⁶ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.³⁷ According to Census Bureau data for

²⁸ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁹ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

³⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

³¹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

³² NAICS Code 517110.

³³ 13 C.F.R. § 121.201, NAICS code 517110.

³⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

³⁵ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁶ 13 C.F.R. § 121.201, NAICS Code 517210.

³⁷ 13 C.F.R. § 121.201, NAICS code 517110.

2002, there were a total of 1,191 firms in this category that operated for the entire year.³⁸ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV³⁹ and EchoStar Communications Corporation ("EchoStar"),⁴⁰ report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$13.5 million, and thus does not qualify as a small business.⁴¹ The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.⁴² The Commission does not know of any source which provides this information and, thus, the Commission has no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, the Commission believes it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, the Commission acknowledges the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

13. *Television Broadcasting.* This Economic Census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public."⁴³ The SBA has created the following small business size standard for Television Broadcasting firms: those having \$14 million or less in annual receipts.⁴⁴ The Commission has estimated the number of licensed commercial television stations to be 1,379.⁴⁵ In addition, according to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations (or approximately 72 percent) had revenues of \$13 million or less.⁴⁶ We therefore estimate that the majority of commercial television broadcasters are small entities.

³⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

³⁹ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, FCC 05-13, para. 55 (rel. Feb. 4, 2005) ("2005 Cable Competition Report").

⁴⁰ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

⁴¹ Rainbow DBS, which provides service under the brand name VOOOM, reported an estimated 25,000 subscribers. *Id.*

⁴² Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

⁴³ U.S. Census Bureau, 2007 NAICS Definitions, "515120 Television Broadcasting" (partial definition); <http://www.census.gov/naics/2007/def/ND515120.HTM#N515120>.

⁴⁴ 13 C.F.R. § 121.201, NAICS code 515120 (updated for inflation in 2008).

⁴⁵ See *FCC News Release*, "Broadcast Station Totals as of December 31, 2007," dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁴⁶ We recognize that BIA's estimate differs slightly from the FCC total given *supra*.

14. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations⁴⁷ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

15. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.⁴⁸ These stations are non-profit, and therefore considered to be small entities.⁴⁹ In addition, there are also 2,295 low power television stations (LPTV).⁵⁰ Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

16. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁵¹ The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁵² An additional small business size standard for “very small business” was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁵³ The SBA has approved these small business size standards in the context of LMDS auctions.⁵⁴ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses. Because some LMDS services may not have been auctioned, the SBA standard which applies to such services is Wireless Telecommunications Carriers (except satellite), pursuant to which a service is small if it has fewer than 1500 employees.⁵⁵

⁴⁷ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 21.103(a)(1).

⁴⁸ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2007,” dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁴⁹ See generally 5 U.S.C. §§ 601(4), (6).

⁵⁰ See *FCC News Release*, “Broadcast Station Totals as of December 31, 2007,” dated March 18, 2008; http://www.fcc.gov/Daily_Releases/Daily_Business/2008/db0318/DOC-280836A1.pdf.

⁵¹ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, para. 348 (1997).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

⁵⁵ The NAICS Code for this SBA classification is 517110.

17. *Wireless Telecommunications Carriers (except satellite)*.⁵⁶ Wireless Telecommunications Carriers, except satellite, is a NAICS standard which has a size standard of fewer than 1500 employees.⁵⁷ Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (“BRS”), formerly Multipoint Distribution Service (“MDS”), and the Educational Broadband Service (“EBS”), formerly Instructional Television Fixed Service (“ITFS”), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small.⁵⁸ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁵⁹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁶⁰ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁶¹ The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS. Other standards also apply, as described.

18. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Wireless Telecommunications Carriers (except satellite).⁶² As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1500 employees are considered to be small.⁶³ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁶⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this

⁵⁶ NAICS code 517210. Standard for small business is 1500 employees or fewer.

⁵⁷ NAICS Code 517210.

⁵⁸ 13 C.F.R. § 121.201, NAICS Code 517210.

⁵⁹ 13 C.F.R. § 121.201, NAICS Code 517110.

⁶⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁶¹ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁶² 13 C.F.R. § 121.201, NAICS Code 517210.

⁶³ 13 C.F.R. § 121.201, NAICS Code 517210.

⁶⁴ 13 C.F.R. § 121.201, NAICS Code 517110.

category that operated for the entire year.⁶⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁶⁶ Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

19. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

20. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁶⁷ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.⁶⁸ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁶⁹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁷⁰ This standard has been replaced by the Wireless Telecommunications Carriers (except satellite) standard, which considers firms with fewer than 1,500 employees to be small.⁷¹ The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service.⁷² Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies adopted herein.

21. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

⁶⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁶⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁶⁷ *See* 47 U.S.C. § 573.

⁶⁸ 13 C.F.R. § 121.201, NAICS Code 517110.

⁶⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁷⁰ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁷¹ NAICS Code 517210.

⁷² *See* <http://www.fcc.gov/csb/ovs/csovscer.html> (current as of June 2004). This data was collected when "Cable and Other Program Distribution" was the operative distribution technology.

22. *Telephone Companies.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷³ According to Commission data,⁷⁴ 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

23. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under NCAIS rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁷⁵ According to Commission data,⁷⁶ 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. The Commission estimates that ten LECs currently provide video programming, and several smaller telephone companies provide the service.

24. *Closed Captioning Services.* These entities are indirectly affected by our action. The SBA has developed two small business size standards that may be used for closed captioning services. The two size standards track the economic census categories, “Teleproduction and Other Postproduction Services” and “Court Reporting and Stenotype Services.”

25. The first category of *Teleproduction and Other Postproduction Services* “comprises establishments primarily engaged in providing specialized motion picture or video postproduction services, such as editing, film/tape transfers, subtitling, credits, closed captioning, and animation and special effects.” The relevant size standard for small businesses in these services is an annual revenue of less than \$29.5 million.⁷⁷ For this category, Census Bureau data for 2002 show that there were 1,316 firms that operated for the entire year.⁷⁸ Of this total, 1,301 firms had annual receipts of under \$25 million, and 10 firms had receipts of \$25 million to \$49,999,999.⁷⁹ Consequently, we estimate that the majority of *Teleproduction and Other Postproduction Services* firms are small entities that might be affected by our action.

26. The second category of *Court Reporting and Stenotype Services* “comprises establishments primarily engaged in providing verbatim reporting and stenotype recording of live legal proceedings and transcribing subsequent recorded materials.” The size standard for small businesses in

⁷³ 13 C.F.R. § 121.201, NAICS code 517110.

⁷⁴ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

⁷⁵ 13 C.F.R. § 121.201, NAICS code 517110.

⁷⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, Page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

⁷⁷ U.S. Census Bureau, 2002 NAICS Definitions, “512191 Teleproduction and Other Postproduction Services”; <http://www.census.gov/epcd/naics02/def/NDEF512.HTM>. The size standard is \$29.5 million.

⁷⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 512191 (issued Nov. 2005).

⁷⁹ *Id.* An additional 5 firms had annual receipts of \$50 million or more.

these services is an annual revenue of less than \$7 million.⁸⁰ For this category, Census Bureau data for 2002 show that there were 2,487 firms that operated for the entire year.⁸¹ Of this total, 2,461 firms had annual receipts of under \$5 million, and 16 firms had receipts of \$5 million to \$9,999,999.⁸²

Consequently, we estimate that the majority of *Court Reporting and Stenotype Services* firms are small entities that might be affected by our action.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

27. We do not anticipate that the proposals contained in the *Notice* will impose additional reporting, recordkeeping or compliance requirements.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁸³

29. How the Commission resolves the question of how to treat digital multicast streams for purposes of the closed captioning rules is important, for purposes of section 79.1(d)(12), which exempts from the closed captioning obligations video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year. By its very nature, current section 79.1(d)(12) decreases the closed captioning burden on entities whose annual gross revenues for the previous year were less than \$3 million. With regard to the proposal to treat each of the multicast streams individually, the *Notice* suggests that this likely will result in less captioned programming being available, and seeks comment on this assumption. Although this decision may decrease burdens on small businesses, it may mean that individuals who rely on closed captioning are burdened. At the same time, however, if the majority of programming aired on secondary multicast streams is already captioned, it is possible that the percentage of available captioning will not be greatly affected, given that programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, pursuant to the existing pass through rule, which is unaffected by the *Notice*. We note that, under our rules, programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs.⁸⁴ Another alternative being considered by the Commission would retain the concept that each stream of multicast programming is separate, but the revenue threshold for determining whether one of the non-main programming streams

⁸⁰ U.S. Census Bureau, 2002 NAICS Definitions, “561492 Court Reporting and Stenotype Services”; <http://www.census.gov/epcd/naics02/def/NDEF561.HTM>. The size standard is \$7 million.

⁸¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Administrative and Support and Waste Management and Remediation Services, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 561492 (issued Nov. 2005).

⁸² *Id.* An additional 10 firms had annual receipts of \$10 million or more.

⁸³ 5 U.S.C. § 603(b).

⁸⁴ *See* 47 C.F.R. § 79.1(c).

is exempt would be less than \$3 million. Given the general nature of the programming on such channels, the Commission seeks comment on whether a smaller figure may be appropriate.

30. In the alternative, if the Commission adopts the proposal to aggregate the revenues of all multicast streams, digital broadcasters would be exempt from the Commission's captioning requirements under section 79.1(d)(12) only if their overall operations, taking into account all activities on all "streams," received less than \$3 million in revenues. However, the *Notice* notes that this conclusion might affect program diversity, the airing of locally-originated programming, or the airing of other kinds of programming that may afford little or no economic return. The Commission further seeks comment on whether it also may result in an increase in the number of petitions for exemption from the closed captioning requirements based on the undue burden standard in the Commission's current rules.⁸⁵

31. The last alternative the *Notice* considers is the establishment of a captioning requirement that is not dependant on revenues but relies on some other criteria, such as a formula that considers the number of programming streams being offered (or some other variable) in order to determine captioning obligations.

F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals

None.

⁸⁵ See 47 C.F.R. § 79.1(f).

APPENDIX E

List of Commenters

Industry and Organization comments and date filed

Accessible Media Industry Coalition (AMIC)	11/9/05
Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell)	11/9/05
American Cable Association (ACA)	11/10/05
American Society for Deaf Children (ASDC)	11/10/05
AZN Television and several networks (AZN)	11/10/05
Casino & Gambling Television	
Comcast SportsNet (Mid-Atlantic)	
Comcast SportsNet (Philadelphia)	
E! Entertainment Television	
G-4 Videogame TV	
The Golf Channel	
Inspirational Life Television	
The Inspiration Network	
Outdoor Life Network	
Style Network	
TV One	
Block Communications, Inc. (Block)	10/3/05
Caption Colorado, L.L.C.	11/8/05
CaptionMax	11/10/05
Caption Perfect, Inc.	11/10/05
Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., Media General Communications, Inc., and Meredith Corporation (Cosmos)	11/10/05
DirectTV, Inc. (DirecTV)	11/10/05
Disability Rights Network	11/10/05
Echostar Satellite, LLC (Echostar)	11/10/05
ENCO Systems, Inc. (Enco)	8/17/05
Florida Association of Broadcasters (FAB)	11/10/05
Global Translation, Inc. (Global)	11/7/05
Home Box Office, Inc. (HBO)	11/10/05
Hubbard Broadcasting, Inc. (HBI)	11/10/05
KJLA, LLC (KJLA)	11/10/05
Lincoln Broadcasting Company (Lincoln)	11/10/05
Media Captioning Services (MCS)	11/9/05
Motion Picture Association of America (MPAA)	11/10/05
National Association of Broadcasters (NAB)	11/10/05
NBC/Telemundo License Co. (NBC/Telemundo)	11/10/05
National Cable & Telecommunications Assoc. (NCTA)	11/10/05
National Court Reporters Association (NCRA)	11/5/05
Radio-Television News Directors Assoc. (RTNDA)	11/10/05
United States Telecom Association (USTA)	11/10/05
WGBH/ National Center for Accessible Media (WGBH/NCAM)	11/10/05

Late-Filed Comments

Association of Public Television Stations (APTS)	5/11/06
California Association of the Deaf	11/28/05
Connecticut Association of the Deaf	11/29/05
D.C. Association of the Deaf	11/15/05
Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)	2/1/06
Empire State Association of the Deaf	11/29/05
Florida Association of the Deaf	11/28/05
Georgia Association of the Deaf	11/25/05
National Captioning Institute (NCI)	11/14/05
National Educational Telecommunications Assn (NETA) and Organization of State Broadcasting Executives (OSBE)	6/1/06
New Jersey Division on Civil Rights	11/23/05
New Mexico Association of the Deaf	11/30/05
North Carolina Association of the Deaf	11/28/05
Ohio Association of the Deaf	11/29/05
Oklahoma Association of the Deaf	12/1/05
PA Society for the Advancement of the Deaf	11/14/05
Vermont Association of the Deaf	11/29/05
West TX Association of the Deaf	11/29/05
Wisconsin Association of the Deaf	11/28/05

Reply Comments

AZN and several networks (AZN) AZN Television, Casino & Gambling Television Comcast SportsNet (Mid-Atlantic) Comcast SportsNet (Philadelphia) E! Entertainment Television G-4 Videogame TV The Golf Channel Inspirational Life Television The Inspiration Network Outdoor Life Network Style Network TV One- omitted	2/10/06
Accessible Media Industry Coalition (AMIC)	12/14/05
CBS Broadcasting, Inc. (CBS)	12/16/05
Communication Service for the Deaf (CSD)	12/16/05
DirectTV, Inc. (DirectTV)	12/16/05
Echostar Satellite, LLC (Echostar)	12/16/05
Hearing Access Program	12/16/05
Home Box Office, Inc. (HBO)	12/16/05
Hubbard Broadcasting, Inc. (HBI)	12/16/05
KVMD Licensee Co., LLC and Rancho Palos Verdes Broadcasters, Inc. (KVMD)	12/16/05
Lincoln Broadcasting Company (Lincoln)	12/16/05
Local Market Broadcasters (LMB)	12/16/05
Marantha Broadcasting Company, Inc.	12/16/05
Motion Picture Association of America, Inc. (MPAA)	

National Association of Broadcasters (NAB)	12/16/05
National Cable & Telecommunications Association (NCTA)	12/16/05
Northern Virginia Resource Center for Deaf and Hard of Hearing Persons (NVRCC)	12/16/05
Radio-Television News Directors Association (RTNDA)	12/16/05
Time Warner Cable Inc., and Bright House Networks, LLC (Time Warner/ Bright House)	12/16/05
Telecommunications for the Deaf and Hard of Hearing, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, Hearing Loss Association of America, Association of Late Deafened Adults, Inc., National Association of the Deaf (TDI)	12/16/05
The Walt Disney Co., ESPN, Disney ABC Cable Networks, ABC Television Network, and ABC-owned Television Stations (Disney)	12/16/05
Verizon	12/16/05
WGBH National Center for Accessible Media (WGBH/NCAM)	12/16/05

Note: The Commission has also received hundreds of comments from concerned individuals in this proceeding. These comments are available through the Commission's electronic comment filing system.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re. *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers*, CG Docket No. 05-231 and ET Docket No. 99-254.

Today's decision takes several important steps to update and enhance our closed captioning rules. It improves our complaint process. It makes it easier for consumers to get immediate help with specific captioning problems. And it clarifies some important captioning issues as we continue to transition to digital television.

This is as it should be. For individuals who are deaf and hard of hearing, closed captions provide a critical link to news, entertainment and emergency information. By acting on many of the issues raised in the petition filed by Telecommunications for the Deaf, the National Association of the Deaf, Self Help for Hard of Hearing People, the Association for Late Deafened Adults and the Deaf and Hard of Hearing Consumer Advocacy Network, we help meet our obligation to keep our rules current and ensure that video programming is accessible to everyone.

But while this item represents progress, many open issues remain. For instance, I have publicly called on the Commission to immediately implement the October 2007 recommendation (reiterated in June 2008) from its Consumer Advisory Committee to convene a working group on digital closed captioning that includes representatives from the broadcast, cable and satellite industries, consumer electronics manufacturers and retailers, and captioning providers and consumers. The working group would: (1) identify current and anticipated problems with the transmission and display of digital captioning; (2) evaluate the captioning capabilities of digital equipment; and (3) develop solutions to ensure that captions are passed through intact to the consumer.

I hope that we act on that recommendation soon. In the meantime, today's decision is a good step forward and I'm pleased to support it.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re. *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers, CG Docket No. 05-231 and ET Docket No. 99-254.*

I am pleased to support today's decision to clarify the closed captioning obligations of video programmers and to streamline the complaint process. With this item, we have taken a critical step towards ensuring that we do not neglect those in the deaf and hard-of-hearing community when we transition to digital television in early 2009.

In light of the upcoming DTV transition, our decision stresses the importance of minimizing disruptions to consumers' access to programming. This rationale holds true for hearing-impaired viewers who have come to rely on receiving closed captioned programs. Under the Declaratory Ruling we adopt today, we remind video program distributors that the closed captioning rules will continue to apply regardless of technological changes in the media landscape.

For more than a decade, these rules have helped individuals who are deaf or hard-of-hearing stay connected to news, information, and entertainment. However, since its inception, our process for ensuring that video programmers meet these obligations has been unnecessarily complicated. Consumers affected by a distributor's failure to provide closed captioning were forced to take their complaints directly to the distributor, and faced a long waiting period before the distributor was required to act. I applaud today's decision to streamline the process by providing a means for consumers to contact the Commission directly as well as requiring programmers to dedicate a phone line, email address and fax number for handling complaints in a timely manner.

As we monitor the advances we make with our improved complaint process, we should continue to consider whether it may be necessary to require all video programmers to file periodic compliance reports. Although today's decision will make it easier for consumers to identify video programmers that are not meeting their closed captioning obligations, there may be situations in which failures to comply slip through the cracks. I encourage the Commission to persist with reassessing our rules as we transition to digital to ensure that we are meeting the needs of hearing-impaired viewers to the greatest extent feasible.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re. *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers, CG Docket No. 05-231 and ET Docket No. 99-254.*

With today's Order the Commission ensures that a key at-risk group will be protected during and after the 2009 DTV Transition. The hearing impaired community depends on closed captioning not only for entertainment, but also news and information. Most importantly, these citizens rely on closed captions for the emergency alerts. In 1996, Congress mandated that the FCC establish rules making video programming accessible through closed captions. This Order clarifies that the closed captioning viewers currently depend upon will remain in place after February 17, 2009. Networks that are transitioning from analog to digital will still be required to caption the same programming they currently caption, and will not qualify for an exemption as a "new network." I believe this Order appropriately clarifies the closed captioning rules for the new digital world we are preparing to enter, and protects thousands of Americans from losing critical communications services.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re. *Closed Captioning of Video Programming; Closed Captioning Requirements for Digital Television Receivers, CG Docket No. 05-231 and ET Docket No. 99-254.*

I am delighted that the Commission has moved to streamline and simplify the complaint process for consumers experiencing problems with closed captioning. It also is appropriate for us to clarify, to the extent anyone seriously needs such guidance, that the mere transition of a programming channel or network from analog to digital format does not alter the existing obligations of a “video programming distributor” – meaning a broadcaster, cable operator, satellite television operator, or other multichannel video provider – to provide closed captioning to serve people with hearing disabilities.

Today’s revisions to the consumer complaint process for closed captioning should not be an end point for reform of the Commission’s complaint processes generally. I have not forgotten the February 2008 findings of the U.S. Government Accountability Office (“GAO”), which reviewed the FCC’s enforcement procedures generally and found them wanting in several respects.⁸⁶ Among other issues, GAO noted that the Commission has received an annually increasing number of complaints of all types in recent years, but that the agency has not set measurable enforcement goals in many instances and lacks reliable data-collection and analysis processes that would help us better analyze trends, allocate Commission resources, and accurately track and monitor complaints and their disposition. Going forward, I will look for us to re-double our efforts to make the consumer complaint process easier and accurately assess how well we handle our enforcement responsibilities.

⁸⁶ See U.S. Government Accountability Office, Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce House of Representatives, *Telecommunications: FCC Has Made Some Progress in the Management of Its Enforcement Program but Faces Limitations, and Additional Actions Are Needed*, GAO-08-125 (February 2008).