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A Deaf Ear No More

FCC Turns Up Volume On Closed Captioning Complaints

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In the guise of looking at closed captioning requirements for digital television and easing the complaint filing process, the Commission has added new contact information posting and filing requirements for television stations and other video programming distributors. The Commission also has sought comment on how the revenue-based per channel exemption from closed captioning requirements should be applied to stations with multicast programming streams. The impressively-titled *Declaratory Ruling, Order, and Notice of Proposed Rulemaking* was the outgrowth of a petition filed by Telecommunications for the Deaf, Inc. and other advocacy groups for the deaf and hard of hearing back in 2004.

Of immediate import to most television stations are the changes that the Commission has made in the complaint process for viewers who encounter difficulties with closed captioning. The changes are designed primarily to help consumers make their problems known and obtain a prompt resolution.

Who's who? Contact information – file it, post it, keep it current. From an operational standpoint, the most significant change is the new requirement that video programming distributors (VPDs) – a group which, for these purposes, consists of over-the-air broadcasters and multichannel video programming distributors, such as cable operators and satellite TV operators – provide contact information so that viewers will know how best to direct their inquiries and complaints. Apparently, a major issue has been that viewers have been uncertain as to whom they should contact with questions and problems. In order to alleviate that perceived difficulty, the Commission will now require that two different types of contact information be made available. While these new information requirements should prove useful for would-be complainants, they also set up a trap for the unwary VPD.

First, VPDs must provide a telephone number, fax number, ***and*** e-mail address for purposes of receiving *and responding immediately* to any closed captioning concerns, such as technical problems which cause captions to vanish or become garbled. If a VPD

has staff available either on-site or remotely for addressing technical issues, then consumers must be able to reach someone, either directly or indirectly, who can address the captioning problems. Further, for telephonic inquiries, the VPD must be able to accommodate incoming calls placed through a Telecommunications Relay Service (TRS) operator. For those inquiries made after-hours or when staff might otherwise be unavailable, a response should be provided within 24 hours.

Second, VPDs must provide contact information for closed captioning complaints of a more general and less immediate nature. That information must include the name of a person with primary responsibility for captioning issues and rule compliance, the person's title or office, telephone number, fax number, mailing address, and e-mail address.

All of this contact information must be included in telephone directories, posted on the VPD's website (if it has one), and included in billing statements for multichannel providers. The Commission also will compile a database of this information. *It is therefore requiring all VPDs to file their contact information with the Commission within 30 days of Office of Management and Budget approval.*

Of course, to remain useful, the information must be kept current. When any changes are made to the contact information, websites must be updated within ten days, any bills must be updated by the next billing cycle, and directories must be updated by the next publication. *Updates also must be filed with the FCC within ten business days of the change(s).* All of this means that, as employees responsible for closed captioning compliance come and go, and in the event of any change in mailing address, e-mail address, or telephone number, stations must remember to make the required updates.

Complaint process tweaked. In order to further ease the complaint process (at least as far as the complainant is concerned), the requirements for both the timing and the location of filing of complaints have changed. (The FCC has noted that complainants may also use Form 2000-C – the general Disability Access Complaint form – for filings regarding closed captioning.) The Commission has reduced the period in which a complaint may be filed to within 60 days of the captioning problem; it has also reduced, to 30 days after receipt of the complaint, the time in which a VPD must respond in writing. Further, if a complainant has misdirected his complaint to a VPD which happens not to have been the source of the problem, that VPD can't just declare the complaint to be somebody else's problem and throw it away; rather, the recipient-VPD must assist the complainant in correctly directing the complaint. As another aid to consumers, a complaint will no longer be required to be filed first with the programming distributor but, instead, may be filed first with the Commission.

Analog v. DTV – The same rules apply. In looking at the consumer impact of the now-imminent DTV transition, the *Declaratory Ruling* portion of the order also offers the clarification that digital programming is fully subject to essentially the same closed captioning requirements as analog programming. While there would not seem to have been much doubt about the matter, the Commission explicitly states that *there is no exemption for DTV programming just because it is digital*. The only real difference is the controlling date for determining whether a program is considered to be “new” or “pre-rule.” At this point, **all** “new”, non-exempt English-language programs must have captions, while providing captions for only 75 percent of “pre-rule” programming is sufficient. Spanish language programming is currently subject to lesser requirements, but the same rules will kick in for new programs as of January 1, 2010, and for pre-rule programs as of January 1, 2012. For shows in either language, the dividing line between new and pre-rule programming is the date on which the program first aired.

For analog programming the magic date was set at January 1, 1998, *i.e.*, the effective date of the rules. Because there were no technical standards for display of closed captioning on DTV receivers at that point, the setting of the critical date for digital programming was delayed until there were. The established date is now July 1, 2002.

As an operational matter, the Commission notes that for those viewers relying on digital-to-analog converter boxes, it will be necessary for stations to continue to broadcast captions in the analog standard following the DTV transition. While the boxes will convert digital programming to analog for viewing, the requirement for the converter boxes is only that they pass through analog caption information in a manner that can be decoded by analog sets.

The Commission also seeks to disabuse stations of the notion that certain of the self-executing exemptions from captioning requirements will come into play because of the change from digital to analog. For example, a station may *not* claim the “new network” exemption because of a change from analog to digital. It also may *not* claim the exemption for channels with less than \$3 million in revenues the previous year based solely on switching from a primary analog channel to a primary digital channel. For example, if a station’s analog operation on Channel 5 produced the bulk of its revenues in 2008, while its digital operation on companion Channel 45 produced little revenue this year, the station **cannot** claim exemption for its all-digital operation on Channel 45 for 2009.

Comments sought on \$3 million exemption. Speaking of the \$3 million revenue exemption, the Commission is examining this rule provision more closely and has sought comment on how it should apply to digital stations. The language of the rule specifies that this revenue-based exemption is for any “channel” that has revenues below \$3

million. In the new multicast environment, however, the question arises as to what constitutes a “channel.” Is each multicast programming stream a separate channel, or is a “channel” the entire 6 MHz television channel that each station is allotted? Obviously, the answer to that question could have a significant impact on how much captioning must be provided on each multicast programming stream. The Commission notes, however, that the impact could be less than might be expected, as many programming suppliers already include captions, and stations will continue to be required to pass through captioning that they receive. The Commission also asks whether the \$3 million threshold continues to be appropriate or whether there should be some sort of sliding scale or perhaps a different (lesser) figure for each multicast stream.

Comments are due and the rule interpretations in the *Declaratory Ruling* become effective 30 days after publication in the Federal Register. The new information collection and posting requirements become effective 30 days after notice of OMB approval is published in the Federal Register.