

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

In the Matter of: )  
)  
Home Shopping Club L.P. )  
) CSR 5459  
Petition for Waiver of )  
Closed Captioning Requirements )  
)

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 2000

Released: June 19, 2000

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In the above-captioned proceeding, Home Shopping Club (“HSC”) filed a petition seeking a waiver of the Commission’s closed captioning requirements.<sup>1</sup> HSC maintains that requiring its programming to comply with the Commission’s closed captioning requirements constitutes an undue burden as defined by Section 76.1(f)(2) of the Commission’s rules. An opposition was filed by Telecommunications for the Deaf, Inc. (“TDI”), to which HSN filed a reply.

II. BACKGROUND

2. Section 713 of the Communications Act of 1934, as amended (“the Act”), Video Programming Accessibility, was added to the Act by Section 305 of the Telecommunications Act of 1996.<sup>2</sup> Section 713 generally requires that video programming be closed captioned, regardless of distribution technologies, to ensure that it is accessible to persons with hearing disabilities.<sup>3</sup> In *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*, the Commission established rules and implementation schedules for the closed captioning of video programming.<sup>4</sup> The Commission’s rules hold video programming distributors, defined as all entities who provide video programming directly to a customer’s home, regardless of the distribution technologies employed by such entities, responsible for providing closed captioning.<sup>5</sup> For programming first published or exhibited after the effective date of the Commission’s closed captioning rules, the Commission adopted an eight year transition period during which distributors will be required to increase over time the amount of closed

<sup>1</sup> 47 C.F.R. § 79.1(b).

<sup>2</sup> 47 U.S.C. § 613.

<sup>3</sup> For a more complete description of closed captioning, see *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*, Report, 11 FCC Rcd 19214 (1996).

<sup>4</sup> 13 FCC Rcd 3272 (1998) (“*Report and Order*”).

<sup>5</sup> *Id.* at 3286; see also 47 C.F.R. § 79.1(a)(2).

captioned video programming they distribute until full accessibility of new programming is achieved.<sup>6</sup> The Commission adopted a ten year transition period for captioning of pre-rule programming.<sup>7</sup>

3. Pursuant to exemptions authorized in Section 713, the Commission's rules exempt certain video programming from the closed captioning requirements. These exemptions include programming for which such requirements would be "economically burdensome,"<sup>8</sup> constitute a breach of contract,<sup>9</sup> or impose an undue burden.<sup>10</sup> In determining whether the closed captioning requirements would result in an undue burden, the factors the Commission is required by Section 713(e) of the Act to consider include: (a) the nature and cost of the closed captions for the programming; (b) the impact on the operation of the provider or program owner; (c) the financial resources of the provider or program owner; and (d) the type of operations of the provider or program owner.<sup>11</sup>

4. The Commission's procedures permit any party in the video distribution chain, including a video programming provider or program owner, to petition for an exemption from the closed captioning requirements where it can be shown that such requirements would impose an undue burden.<sup>12</sup> Petitions must include information that demonstrates how the statutory factors are met.<sup>13</sup> Petitioners are also permitted to submit any other information they deem appropriate.<sup>14</sup> While an undue burden petition is pending, the programming subject to the request for exemption will be considered exempt from the closed captioning requirements.<sup>15</sup>

### III. DISCUSSION

5. HSC distributes video programming to full power and low power television stations and cable systems.<sup>16</sup> HSC's programming includes two separate services, The Home Shopping Network and America's Store. HSC also has an interest in The Home Shopping Network en Español L.P.<sup>17</sup> HSC

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<sup>6</sup> *Report and Order*, 13 FCC Rcd at 3292.

<sup>7</sup> *Id.* at 3301.

<sup>8</sup> 47 C.F.R. § 79.1(d); *see also* 47 U.S.C. § 613(d)(1) (the statute allows the Commission to "exempt by regulation programs, classes of programs, or services" for which the Commission determines that "the provision of closed captioning would be economically burdensome.")

<sup>9</sup> 47 C.F.R. § 79.1(d)(1).

<sup>10</sup> *See* 47 C.F.R. § 79.1(d)(2) and (f).

<sup>11</sup> 47 U.S.C. § 613(e); *see also* 47 C.F.R. § 79.1(f).

<sup>12</sup> 47 C.F.R. § 79.1(f).

<sup>13</sup> 47 C.F.R. § 79.1(f)(2).

<sup>14</sup> 47 C.F.R. § 79.1(f)(3).

<sup>15</sup> 47 C.F.R. § 79.1(f)(3).

<sup>16</sup> HSC Petition at 2.

<sup>17</sup> *Id.*

asserts that its retail programming typically offers viewer products for sale for a short period of time.<sup>18</sup> The general format is that while an item is being offered for sale, a host or hosts present and discuss the attributes of a product while demonstrating or displaying it. Concurrently on-screen with the host's presentation is visual text providing information regarding the product, such as the item's reference number, product name, price, information on the availability of the product and instructions on how to place an order.<sup>19</sup> HSC argues that because its programming is broadcast live, captioning would need to be performed in real time.<sup>20</sup> HSC maintains that requiring its programming to include closed captioning under such circumstances is an undue burden that causes significant difficulty and extreme expense. We will evaluate HSC's petition in accordance with the four factors set forth by Congress in Section 713(e).<sup>21</sup>

6. Regarding the first factor to be considered in an undue burden analysis, the nature and cost of the closed captions, HSC argues that cost of providing real time closed captioning would be disproportionately high as compared to the cost of its programming. HSC maintains that to caption its live programming, HSC would have to pay \$149.00 an hour, which is forty percent of its average cost of \$376.56 for salaries of individuals involved in the production of one hour of programming.<sup>22</sup> In opposition, TDI offers that HSC could offset the cost of closed captioning by seeking a sponsorship for it.<sup>23</sup> HSC does not address whether it has sought any means to recoup the costs of closed captioning. Although HSC claims closed captioning will cause a forty percent increase in labor costs to execute one hour of programming, we cannot determine whether this expense will add a disproportionate increase to overall program costs. Labor costs for production employees are one of several categories of expenses associated with HSC's production and distribution of its programming. Using only one cost category is not an adequate gauge to assess the impact of the cost of closed captions. Thus, because HSC has not submitted sufficient information, we are unable to determine whether or not factor one of the undue burden test favors granting the petition.

7. Under the second factor, impact on the operation of the provider or program owner, HSC contends that the burden imposed by the closed captioning requirements is severe. HSC argues that in addition to increased production costs, its vulnerability to suits by consumers or product manufacturers would be increased because the real time closed captioning required for its programming might contain a mistake.<sup>24</sup> HSC also argues that mistakes in the captioning will generate ill will among customers who rely on mistaken information in captions.<sup>25</sup> We find that HSC's claim regarding increased liability to be more conjecture than an argument based on any existing legal precedent. Although other home shopping networks provide closed captioning, HSC did not cite any example of any of them being subject to a lawsuit based on inaccurate captions. We note that the Commission chose not to adopt standards for the

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<sup>18</sup> HSC maintains it generally offers a product for about 10 minutes. *Id.*

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

<sup>20</sup> *Id.* at 5.

<sup>21</sup> 47 U.S.C. § 613(e).

<sup>22</sup> This amount specifically excludes capital costs and distribution costs. HSC Petition at 5.

<sup>23</sup> TDI Opposition at 2.

<sup>24</sup> HSC Petition at 6.

<sup>25</sup> HSC Reply at 3.

quality and accuracy of closed captioning, instead allowing video programmers to establish quality standards through their arrangements with captioning suppliers.<sup>26</sup> The Commission anticipated that this approach would result in high quality captions comparable to the level of quality of other aspects of the programming such as audio and video.<sup>27</sup> We believe that HSC has overstated the potential impact of captioning mistakes on its operation. Accordingly, factor two does not favor the grant of HSC's requested exemption.

8. With regard to the third factor, financial resources of the provider or program owner, HSC argues that its financial resources are not relevant to the analysis of its waiver request because the closed captioning costs are extreme and the captioning provides no meaningful benefit. We disagree with HSC that its financial resources are not relevant. Section 713(e) of the Act requires specifically that the financial resources of the program provider are one of the factors to be considered when making an undue burden determination.<sup>28</sup> Our rules define undue burden as "significant difficulty or expense."<sup>29</sup> The Commission has stated that "we will examine the overall budget and revenues of the individual outlet and not simply the resources it chooses to devote to a particular program."<sup>30</sup> Based on the limited information HSC has chosen to provide, we cannot conclude other than HSC has sufficient financial resources to comply with its closed captioning obligations.

9. Finally, with regard to the fourth factor, the type of operations of the program provider, HSC argues that consideration must be given to the unique nature of its programming, which already places relevant product information on the screen. HSC believes that closed captioning does not improve the accessibility of electronic retailing to the hearing disabled population because all of the information necessary for a viewer to make a decision to buy and place an order for a product is already displayed visually on screen.<sup>31</sup> HSC believes that not only would closed captioning be redundant, the closed captioning display would obscure information about its products that would otherwise be readily seen. HSC maintains that closed captions replicate, and in some cases conceal, important product information displayed on the screen. Secondly, HSC argues that the banter of its hosts duplicates the textual information on-screen, and does not add any information that is critical to viewers.<sup>32</sup> TDI dismisses the contention that closed captioning adds no value to HSC's programming, and submits that that it is not HSC's role to determine whether a certain segment of the population has adequate access to certain information.<sup>33</sup>

10. The Commission has concluded that the spoken dialog in programs that use graphics and text to sell products or services adds information that would be lost to consumers with hearing disabilities

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<sup>26</sup> *Report and Order*, 13 FCC Rcd at 3374.

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

<sup>28</sup> 47 U.S.C. § 613(e)(3).

<sup>29</sup> 47 C.F.R. § 79.1(f)(2).

<sup>30</sup> *Report and Order*, 13 FCC Rcd at 3366.

<sup>31</sup> HSC Reply at 5.

<sup>32</sup> HSC Petition at 8.

<sup>33</sup> TDI Opposition at 4.

and that the captioning rules should apply.<sup>34</sup> In two previous Orders, the Commission has considered and rejected requests to exempt such programming under the “primary textual” exemption.<sup>35</sup> The Commission has noted that users of closed captioning could turn off the captioning when they find that the captions interfere with other textual or graphical material.<sup>36</sup> Accordingly, factor four does not favor the grant of HSC’s requested exemption.

11. In conclusion, after considering the factors enumerated in Section 79.1(f)(2), we find that HSC has not demonstrated that the closed captioning requirements would impose an undue burden on it. Although HSC demonstrates that closed captioning will raise its production costs, it fails to provide sufficient information to allow us to conclude that the increased costs would cause an undue burden. Further, we continue to believe that the audio description of products by the hosts on HSC’s programming adds information not provided by the textual on-screen display and therefore is subject to the captioning requirements. Thus, we deny HSC’s petition.<sup>37</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition filed by Home Shopping Club L.P. requesting a waiver of the closed captioning requirements **IS DENIED**.

13. This action is taken pursuant to delegated authority by Section 0.321 of the Commission's rules.<sup>38</sup>

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen  
Chief, Cable Services Bureau

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<sup>34</sup> See *Closed Captioning and Video Description of Video Programming*, Order on Reconsideration, 13 FCC Rcd 19973, 20008 (1998) (“*Order on Reconsideration*”).

<sup>35</sup> 47 C.F.R. § 79.1(d)(4). See *Report and Order*, 13 FCC Rcd at 3344, *Order on Reconsideration*, 13 FCC Rcd at 20008.

<sup>36</sup> *Report and Order*, 13 FCC Rcd at 3344.

<sup>37</sup> Regarding HSC’s waiver request for its programming on The Home Shopping Network en Español, because closed captioning is not yet required for this video programming, discussion of an exemption is not ripe at this time. See 79.1 (b)(3) and (4). HSC can file for an exemption when its obligation to provide closed captioning for HSN en Español is effective if it believes one is warranted.

<sup>38</sup> 47 C.F.R. §0.321.