

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

In the Matter of:	)	
	)	
ABS-CBN International	)	
	)	CSR 5827
Video Programming Accessibility	)	
	)	
Petition for Waiver of Closed Captioning	)	
Requirements	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 2005

Released: August 11, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. In this Order, we address a petition for exemption from Section 79.1 of the Commission’s rules,<sup>1</sup> implementing Section 713 of the Communications Act of 1934, as amended (the “Act”),<sup>2</sup> filed by ABS-CBN International (“ABS-CBN”) regarding its programming aired on The Filipino Channel, the ABS-CBN News Channel and Cinema 1.<sup>3</sup> For the reasons discussed below, ABS-CBN’s petition is denied, to the extent stated herein.

2. 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> In enacting Section 713, Congress recognized that, in certain limited situations, the costs of captioning might impose an undue burden on video programming providers or owners, and it authorized the Commission to adopt appropriate exemptions.<sup>5</sup> Congress defined “undue burden” to mean “significant difficulty or expense.”<sup>6</sup> When determining if the closed captioning requirements will impose an undue burden, the statute requires the Commission to consider the following factors: (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.<sup>7</sup> A petition for exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to close caption

<sup>1</sup> 47 C.F.R. § 79.1.

<sup>2</sup> 47 U.S.C. § 613.

<sup>3</sup> ABS-CBN first began distributing video programming in April 1996.

<sup>4</sup> *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, 13 FCC Rcd 3272 (1997) (“Report and Order”).

<sup>5</sup> 47 U.S.C. § 613(d)(1).

<sup>6</sup> 47 U.S.C. § 613(e).

<sup>7</sup> *Id.*; see also 47 C.F.R. § 79.1(f).

video programming would cause an undue burden.<sup>8</sup> Petitioners also are instructed to submit any other information they deem appropriate and relevant to the Commission's final determination.<sup>9</sup>

## II. DISCUSSION

3. In its petition, ABS-CBN indicates that the company's programming is offered as a package, is available via three subscription channels- The Filipino Channel, the ABS-CBN News Channel, and Cinema 1, and that the substantial majority of the programming on these three channels are in the Filipino language, Tagalog, and only a small portion, approximately 17% is in English or predominantly in English.<sup>10</sup> Specifically, ABS-CBN states that none of the programming on ABS-CBN's Cinema 1 is in English and The Filipino Channel currently airs thirteen hours of English programming each week.<sup>11</sup> It also asserts that the ABS-CBN News Channel is mainly broadcast in English but is only available to subscribers as part of a package of three predominantly non-English language channels.<sup>12</sup> ABS-CBN points out that the requirement to provide closed captioning applies to English and Spanish language programming.<sup>13</sup> It argues that because its programming is a part of a package that consists of predominantly non-English/non-Spanish programs, the programming bundle as a whole should be considered exempt under Section 79.1(d)(3).<sup>14</sup> ABS-CBN also states that it would be forced to bear the same costs as English language producers despite the fact that its incidental English language programming would only reach a small foreign-language speaking audience.<sup>15</sup>

4. In addition, ABS-CBN argues that it should be exempted from the captioning requirements because of the undue burden and the imposition of a closed captioning requirement will have a substantial impact on the company's operations.<sup>16</sup> The programming that ABS-CBN provides on its channels is produced almost exclusively in the Philippines and because there is no closed captioning requirement in the Philippines, the burden of supplying the closed captioning to accompany each of its English and news programs would fall on ABS-CBN.<sup>17</sup> Also, ABS-CBN asserts that if an exemption is not granted, the Commission should waive the closed captioning requirements because application of the rule would place a substantial economic burden on a niche, predominantly non-English/non-Spanish language programmer.<sup>18</sup> In addition, ABS-CBN argues that application of the captioning rule affects ABS-CBN's First Amendment rights as a broadcaster by burdening substantially more speech than is necessary because although the FCC rules exempt non-English and non-Spanish programming from the closed captioning requirement, they do not also exempt incidental English/Spanish that is bundled with

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<sup>8</sup> 47 C.F.R. § 79.1(f)(2).

<sup>9</sup> 47 C.F.R. § 79.1(f)(3).

<sup>10</sup> Petition at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3, citing *Report and Order*, 13 FCC Rcd 3272, 3343 (1997); *Implementation of Section 305 of the Telecommunications Act of 1996- Video Programming Accessibility*, 13 FCC Rcd 19974, 20015-16 (1998) ("Order on Reconsideration").

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4-7.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* at 7.

otherwise exempt programs.<sup>19</sup>

5. In the *Report and Order*, the Commission concluded that discrete portions of programs which contain non-English dialogue, such as where characters in an English language film speak in another language without translation, need not be captioned.<sup>20</sup> ABS-CBN indicates that The Filipino Channel airs thirteen hours of English language programming each week and that the ABS-CBN News Channel is mainly broadcast in English. ABS-CBN does not provide specific information regarding the distribution of the thirteen hours of English language in its programming. It has not indicated that the thirteen hours amounts to small discrete “snippets” within otherwise foreign language programs. However, because of the significant number of hours of English language programming aired on The Filipino Channel, it would appear that such an amount would not equate to small, incidental, and discrete portions of dialogue. Similarly, ABS-CBN acknowledges that ABS-CBN News Channel is broadcast mainly in English. Therefore, because the English language portions in ABS-CBN’s programming are not small, discrete, or incidental, an overall exemption pursuant to Section 79.1(d)(3) is not warranted or appropriate.

6. With regard to ABS-CBN’s waiver request, ABS-CBN argues that application of the rule would place a substantial economic burden on its operations and that a waiver is warranted because the class exemption for non-English/non-Spanish programming is narrowly tailored to apply in cases where captioning would be an economic burden but “could not have so limited the FCC’s discretion where core First Amendment interests may be affected.”<sup>21</sup> An applicant for waiver must “plead with particularity the facts and circumstances which warrant such action” and has the burden to show that the public interest would be served better by waiver than by strict application of the rule.<sup>22</sup> ABS-CBN has failed to sustain its burden in this regard. Although ABS-CBN has submitted a pleading in which it puts forth that its programming budget may be impaired and that captioning would pose an economic burden, it has not provided any detailed financial data that would support the requested action. The public interest benefits of making video programming accessible to persons with hearing disabilities by providing closed captioning weighs in favor of not waiving the rule. In addition, the argument that ABS-CBN puts forth that the incidental English included in its otherwise exempt programming is improperly burdened fails to warrant a waiver because the English language programming at issue actually fails to be incidental or discrete portions of its programming. Moreover, contrary to ABS-CBN’s assertion, the requirement to provide programming with closed captioning is not inconsistent with the First Amendment because the rules are content-neutral regulations, and satisfy the applicable test of serving an important government interest without burdening substantially more speech than necessary.<sup>23</sup>

7. Our decision herein is without prejudice to ABS-CBN bringing a future petition for exemption that adequately documents that compliance with our rules continues to impose an undue burden. Implicit in the Section 79.1(f) requirement of a showing as to the financial resources of a petitioner, such as ABS-CBN, is the question of the extent to which the distributors of its programming can be called upon to contribute towards the captioning expense. Thus, any subsequent petition should document whether ABS-CBN solicited captioning assistance from the distributors of its programming and the response to these solicitations. Absent such a petition, Petitioner is given 3 months from the release

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<sup>19</sup> *Id.* at 9.

<sup>20</sup> See *Report and Order*, 13 FCC Rcd at 3311.

<sup>21</sup> Petition at 10.

<sup>22</sup> *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). See also 47 C.F.R. § 1.3 (the Commission may waive its rules for “good cause”).

<sup>23</sup> See *Implementation of Video Description of Video Programming, Report and Order*, 15 FCC Rcd 15230, 15255 (2000).

date of this *Order* to come into complete compliance with the rules.

8. Accordingly, **IT IS ORDERED** that the petition for exemption from the closed captioning requirements of Section 79.1 of the Commission's rules **IS DENIED** to the extent indicated herein. Petitioner must comply with the captioning requirements within 3 months from the release date of this *Order*.

9. **IT IS FURTHER ORDERED** that the waiver request filed by ABS-CBN International **IS DENIED**.

10. This action is taken under delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>24</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
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<sup>24</sup> 47 C.F.R. § 0.283.