

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

In the Matter of
Interpretation of Economically Burdensome
Standard;
Amendment of Section 79.1(f) of the
Commission's Rules;
Video Programming Accessibility
CG Docket No. 11-175

REPORT AND ORDER

Adopted: July 19, 2012

Released: July 20, 2012

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we determine that the four factors contained in section 713(e) of the Communications Act (Act) will continue to apply when evaluating individual requests for captioning exemptions under section 713(d)(3) and our corresponding rules, notwithstanding a change in terminology in the statute, enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which replaced the term "undue burden" in that section with the term "economically burdensome." We further amend section 79.1 of the Commission's rules to replace all current references to "undue burden" with the term "economically burdensome." These rule amendments correspond with the new statutory language in the CVAA requiring petitioners seeking individual closed captioning exemptions under section 713(d)(3) of the Act to show that providing captions on their programming would be economically burdensome.

II. BACKGROUND

2. In 1996, Congress added section 713 to the Act, establishing requirements for closed captioning on video programming to ensure access by persons with hearing disabilities to television programming, and directing the Commission to prescribe rules to carry out this mandate. In 1997, the Commission adopted rules and implementation schedules for closed captioning, which became effective on January 1, 1998. The Commission's closed captioning rules currently require video programming

1 CVAA, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.); Pub. L. No. 11-265, 124 Stat. 2795 (2010) (technical amendments to the CVAA).

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

3 47 U.S.C. §§ 613(b), (c).

4 See 47 C.F.R. § 79.1; 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 (1997) ("Closed Captioning Report and Order"), Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video

distributors (VPDs)⁵ to caption 100% of all new, non-exempt English and Spanish language programming.⁶

3. Section 713 of the Act authorizes the Commission to grant individual exemptions from the television closed captioning requirements. Individual exemptions are considered on a case-by-case basis upon submission of a petition to the Commission.⁷ As originally enacted, section 713 authorized the Commission to grant individual closed captioning exemptions upon a showing that providing closed captioning would “result in an undue burden.”⁸ Section 713(e) of the Act defines “undue burden” to mean “significant difficulty or expense,” and directs the Commission to consider the following factors in making undue burden determinations: (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.⁹

4. The CVAA amended section 713(d)(3) of the Act by replacing the term “undue burden” with the term “economically burdensome.”¹⁰ As amended, section 713(d)(3) states:

A provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome.¹¹

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Programming Accessibility, MM Docket No. 95-176, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (“*Closed Captioning Reconsideration Order*”).

⁵ A “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).

⁶ 47 C.F.R. §§ 79.1(b)(1)(iv) and (b)(3)(iv).

⁷ 47 U.S.C. § 613(d)(3). Any entity in the programming distribution chain, including the provider, producer or owner of the programming, may petition the Commission for an individual exemption under section 79.1(f) of the Commission’s rules. A “video programming provider” is defined as “[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 C.F.R. § 79.1(a)(3). A petitioner may seek an exemption for “a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider.” 47 C.F.R. § 79.1(f)(1).

⁸ Pub. L. 104-104, Title III, sec. 305, 110 Stat. 126 (1996) (1996 Amendments to Communications Act.)

⁹ 47 U.S.C. § 613(e). The Commission’s rules mirror the statutory criteria for making undue burden determinations. *See* 47 C.F.R. § 79.1(f)(2). Any petitioner filing under this section also may present for the Commission’s consideration “any other factors the petitioner deems relevant to the Commission’s final determination,” including alternatives that might constitute a reasonable substitute for closed captioning. 47 C.F.R. § 79.1(f)(3).

¹⁰ Pub. L. No. 111-260 § 202(c), amending 47 U.S.C. § 613(d)(3). The CVAA made two additional changes to section 713(d) of the Act. First, the new law codifies existing Commission policy that during the pendency of an exemption petition, a provider or owner shall be exempt from having to provide closed captioning. Pub. L. No. 111-260 § 202(c), amending 47 U.S.C. § 613(d)(3). *See also* 47 C.F.R. § 79.1(f)(11). Second, Congress directed the Commission to act upon an exemption petition filed under section 713(d) of the Act within six months after receiving the petition, unless the Commission finds that an extension of this period is necessary to determine whether the captioning requirements are economically burdensome. Pub. L. No. 111-260 § 202(c), amending 47 U.S.C. § 613(d)(3).

¹¹ 47 U.S.C. § 613(d)(3)(2010).

5. On October 20, 2011, the Commission adopted an order (*Interim Standard Order*), offering provisional guidance on how to interpret this statutory change.¹² The Commission determined that Congress did not intend to make a substantive change in the standard for evaluating individual exemption petitions under section 713(d)(3) of the Act, but rather simply to change the nomenclature in section 713 from “undue burden” to “economically burdensome.”¹³ Accordingly, the *Interim Standard Order* provisionally directed the Consumer and Governmental Affairs Bureau (CGB) to continue to use the “undue burden” factors contained in section 713(e) and codified in sections 79.1(f)(2) and (3) of the Commission’s rules when making determinations as to whether an individual petitioner has made a showing that providing closed captioning would be “economically burdensome.”¹⁴ In a *Notice of Proposed Rulemaking (NPRM)* accompanying the *Interim Standard Order*, the Commission proposed to make permanent its decision to continue utilizing the “undue burden” factors when evaluating individual exemption petitions under the CVAA’s new language, and sought comment on this proposal.¹⁵ The Commission also proposed to replace all current references to “undue burden” in section 79.1(f) of its rules with the term “economically burdensome” in order to conform the rules to the new terminology introduced by the CVAA.¹⁶

6. In response to the *NPRM*, the Commission received only a single comment, jointly filed by Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, the Association of Late-Deafened Adults, the Hearing Loss Association of America, and the Cerebral Palsy and Deaf Organization (Consumer Groups).¹⁷ Consumer Groups state that the Commission’s proposed interpretation of the economically burdensome standard is consistent with Congress’s expressed and unambiguous intent not to change substantively the factors that are used to evaluate individual exemption petitions.¹⁸ They add that even if Congress’s intent was ambiguous, the Commission’s interpretation is reasonable and furthers the purposes of the Act and the CVAA to maximize the availability of closed captioned programming while allowing for individual exemptions where providing captions would impose a “truly untenable burden.”¹⁹ Interpreting section 202(c) of the CVAA to require a change in the four-factor “undue burden” standard used for individual exemption petitions, they say, would risk restricting the scope of programming accessible to consumers who are deaf or hard of hearing and thereby contravene the overall purpose of the Act and the CVAA.²⁰ Finally, Consumer Groups suggest that the purpose of section 202(c) of the CVAA, as a “conforming amendment,” was to “harmonize[] the language of section 713(d)(1) of the Act, which refers to “economically burdensome,” section 713(d)(3) of the Act, which refers to “undue burden,” and

¹² The *Interim Standard Order* was part of a multi-part Commission decision containing a Memorandum Opinion and Order, an Order, and a Notice of Proposed Rulemaking. See *Anglers for Christ Ministries, Inc., New Beginning Ministries, Petitioners Identified in Appendix A, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, CG Docket Nos. 06-181 and 11-175, 26 FCC Rcd 14941 (2011) (*Interim Standard Order* when referring to the Order portion, and *NPRM* when referring to the NPRM portion).

¹³ *Interim Standard Order*, 26 FCC Rcd at 14958, ¶ 32.

¹⁴ *Interim Standard Order*, 26 FCC Rcd at 14961, ¶ 37. This provisional guidance applied to all exemption petitions filed or re-filed subsequent to October 8, 2010, the date on which the CVAA became law. *Interim Standard Order*, 26 FCC Rcd at 14961, ¶ 37.

¹⁵ *NPRM*, 26 FCC Rcd at 14961, ¶ 38.

¹⁶ *NPRM*, 26 FCC Rcd at 14961-62, ¶ 39.

¹⁷ Consumer Groups Comments (Dec. 1, 2011).

¹⁸ Consumer Groups Comments at 1, 6, *citing*, S. Rep. No. 111-386 at 14.

¹⁹ Consumer Groups Comments at 1 and 6.

²⁰ Consumer Groups Comments at 8.

section 713(e) of the Act, which interchangeably refers to “undue burden” and “undue economic burden.”²¹

III. DISCUSSION

7. For purposes of evaluating individual exemptions under section 713(d)(3) of the Act, we determine that Congress intended the term “economically burdensome” to be synonymous with the term “undue burden” as defined by section 713(e) of the Act and as interpreted and applied in Commission rules and precedent. This conclusion is supported by the CVAA itself, which preserves, unchanged, the language in section 713(e) defining an “undue burden” and enumeration of the factors to be considered in an “undue economic burden” analysis, and by the CVAA’s legislative history, which affirms that the Commission should continue using these factors in assessing individual exemption requests.²² As explained in the *Interim Standard Order*, the CVAA described the change in nomenclature as a “conforming amendment,” without further elaboration.²³ Thus, because Congress did not specifically define the term “economically burdensome,” but instead retained the “undue burden” factors identified in section 713(e)²⁴ and “encourage[d] the Commission, in its determination of ‘economically burdensome’ to use the factors listed in section 713(e),”²⁵ we believe Congress did not intend to make a substantive change in the standard for evaluating individual exemption petitions under section 713(d)(3) of the Act, but rather simply to change the nomenclature in section 713 from “undue burden” to “economically burdensome.”²⁶

8. Accordingly, for the reasons set forth in the *Interim Standard Order* and *NPRM*, reiterated herein, and supported by the record,²⁷ we conclude that Congress did not intend any substantive change to the criteria that the Commission consistently has used for individual closed captioning petitions when, in adopting the CVAA, Congress amended section 713(d)(3) of the Act to replace the term “undue burden” with the term “economically burdensome.” We therefore will interpret the term “economically burdensome” in section 713(d)(3) as being synonymous with the term “undue burden” as defined in section 713(e) of the Act. We note that this interpretation is consistent with the manner in which the Commission has interpreted the term “economically burdensome” in the Commission’s recently adopted video description rules²⁸ and in our rules governing the delivery of closed captioning on video programming delivered using Internet protocol,²⁹ both of which were adopted pursuant to the CVAA.

²¹ Consumer Groups Comments at 8-9.

²² 47 U.S.C. § 613(e).

²³ *Interim Standard Order*, 26 FCC Rcd at 14958, ¶ 32, *citing*, Pub. L. No. 111-260 § 202(c).

²⁴ 47 U.S.C. § 613(e).

²⁵ Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 111-386, 111th Cong., 2nd Sess. at 14 (2010) (S. Rep. No. 111-386).

²⁶ *Interim Standard Order*, 26 FCC Rcd at 14958, ¶ 32.

²⁷ As noted above, we received no objection to our interim ruling or proposed rule change and, indeed, the sole commenter in this proceeding supports this interpretation and rule change.

²⁸ *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, 26 FCC Rcd 11847, 11868 at ¶ 44 (2011) (“[W]e intend to ‘use the same factors as applied to the undue burden standard’ . . . to determine whether the rules are economically burdensome (*i.e.*, whether they impose significant difficulty or expense).”) (citation omitted).

²⁹ *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 55 Communications Reg. (P&F) 205, 2012 WL 122407 at ¶ 64 (2012) (“[W]e disagree with any suggestion that the Commission should apply the broader standards applicable to categorical exemption requests to our consideration of individual exemption requests in the IP closed captioning context. Rather, we interpret the term ‘economically burdensome’ in Section 713(d)(3)

(continued....)

Accordingly, the Commission, and CGB under delegated authority, will continue to evaluate individual exemption petitions filed under section 713(d)(3) of the Act³⁰ using the four factors set forth in section 713(e) of the Act.³¹

9. As proposed in the *NPRM*, we further amend sections 79.1(d)(2)³² and 79.1(f)(1), (2), (3), (4), (10), and (11) of our rules to replace all current references to “undue burden” with the term “economically burdensome” to conform our rules to the new language in the CVAA.³³

IV. PROCEDURAL MATTERS

10. *Regulatory Flexibility Act Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA),³⁴ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”³⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³⁶ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.³⁷ 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 Small Business Administration (SBA).³⁸

11. In this *R&O* we are conforming the terminology used in section 79.1(f) of the Commission’s rules to the requirements of section 202 of the CVAA. Under the rule amendments adopted herein, a petitioner seeking a waiver of closed captioning requirements will have to demonstrate that compliance with such captioning requirements would be “economically burdensome” as mandated by the CVAA. Prior to this amendment, the Act and our rules required a petitioner to show that complying with the captioning requirements would constitute an “undue burden.” In mandating this change of

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of the Act, as amended by the CVAA, to be synonymous with the term ‘undue burden’ as this section was originally drafted.”) (citation omitted).

³⁰ 47 U.S.C. § 613(d)(3). *See also* 47 C.F.R. § 79.1(f).

³¹ 47 U.S.C. § 613(e). *See also* 47 C.F.R. § 79.1(f)(2).

³² The *NPRM* did not propose to amend section 79.1(d)(2) of the rules. *See NPRM*, 26 FCC Rcd at 14961-14962, ¶ 39 and Appendix B. Nevertheless, the amendment to section 79.1(d)(2) adopted herein is consistent with the amendments to replace all current “undue burden” references to “economically burdensome” in section 79.1(f) as well as the proposal to “make clear that petitioners seeking individual exemptions from the captioning rules must now show that providing captions on their programming would be “economically burdensome.” *NPRM*, 26 FCC Rcd at 14961-14962, ¶ 39.

³³ *See NPRM*, 26 FCC Rcd 14989-90 proposed rule changes in Appendix B at 47 C.F.R. §§ 79.1(d)(2) and 79.1(f)(1), (2), (3), (4), (10), and (11).

³⁴ 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).

³⁵ 5 U.S.C. § 605(b).

³⁶ 5 U.S.C. § 601(6).

³⁷ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

³⁸ 15 U.S.C. § 632.

terminology, we conclude that Congress intended no substantive change to the factors used to evaluate individual petitions for closed captioning exemptions. Because no substantive changes to our rules or procedures were contemplated by the *NPRM*, we concluded in the *NPRM* that the proposed change in our rules to reflect the terminology adopted by Congress in section 202 of the CVAA would have no economic impact on small business entities or consumers and included in the *NPRM* an Initial Regulatory Flexibility Certification.

12. No comments were received concerning the Certification, and we find no reason to change our conclusions as contained in that Certification. Therefore, we certify that the rule amendments adopted in this *R&O* will not have a significant economic impact on a substantial number of small entities. They contain no new obligations or prohibitions. Nor do they remove any requirements or have substantive implications of any sort. They simply change the nomenclature utilized by our rules to describe the showing that must be made by petitioners submitting individual closed captioning exemption requests to warrant waiver of the captioning requirements, as mandated by Congress in section 202 of the CVAA. The Commission will send a copy of this *R&O*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.³⁹ In addition, the *R&O* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.⁴⁰

13. *Paperwork Reduction Act.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

14. *Congressional Review Act.* The Commission will send a copy of this *R&O* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

15. 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 *R&O* IS ADOPTED and the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix A.

16. IT IS FURTHER ORDERED that the *R&O* SHALL BE EFFECTIVE 30 days after publication in the *Federal Register*.

17. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

18. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

³⁹ *See* 5 U.S.C. § 801(a)(1)(A).

⁴⁰ *See* 5 U.S.C. § 605(b).

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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 is amended by revising paragraph (d)(2), the heading to paragraph (f), and paragraphs (f)(1), (f)(2), (f)(3), (f)(4), (f)(10), and (f)(11) to read as follows:

§ 79.1 Closed captioning of video programming.

* * * * *

(d) * * *

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(2) *Video programming or video programming provider for which the captioning requirement has been waived.* Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning is economically burdensome on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

* * * * *

(f) *Procedures for exemptions based on economically burdensome standard.*

(1) A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider upon a finding that the closed captioning requirements will be economically burdensome.

(2) A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would be economically burdensome. The term “economically burdensome” means significant difficulty or expense. Factors to be considered when determining whether the requirements for closed captioning are economically burdensome include:

- (i) The nature and cost of the closed captions for the programming;
- (ii) The impact on the operation of the provider or program owner;
- (iii) The financial resources of the provider or program owner; and
- (iv) The type of operations of the provider or program owner.

(3) In addition to these factors, the petition shall describe any other factors the petitioner deems relevant to the Commission’s final determination and any available alternatives that might constitute a reasonable substitute for the closed captioning requirements including, but not limited to, text or graphic display of the content of the audio portion of the programming. The extent to which the provision of closed captions is economically burdensome shall be evaluated with regard to the individual outlet.

(4) An original and two (2) copies of a petition requesting an exemption based on the economically burdensome standard, and all subsequent pleadings, shall be filed in accordance with § 0.401(a) of this chapter.

* * * * *

(10) The Commission may deny or approve, in whole or in part, a petition for an economically burdensome exemption from the closed captioning requirements.

(11) During the pendency of an economically burdensome determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements.

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APPENDIX B
List of Commenters

1. Telecommunications for the Deaf and Hard of Hearing, Inc., the National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, the Association of Late-Deafened Adults, the Hearing Loss Association of America, and the Cerebral Palsy and Deaf Organization (Consumer Groups)