

COMMUNICATIONS LAW UPDATE

September 16, 2005

Proposed Fines and Far-Reaching Rule Changes Signal Increased FCC Focus on Closed Captioning and Other Hearing-Disability Issues

In August of 2004, Hurricane Charley ripped through Southwestern Florida, causing billions of dollars in damages and dozens of fatalities. Local television coverage, which ran 24 hours a day during the storm, was likely the foremost source of emergency information for terrified residents. Last month, only days before the far worse disaster of Hurricane Katrina, the FCC proposed fines of \$24,000 for two Florida television stations for failing to make key information available to the hearing-impaired, as required by FCC rules. This enforcement action is the latest in a series of vigorous FCC efforts to ensure that those with hearing disabilities have equal access to communications technologies. In addition to stepped-up enforcement, this summer the FCC initiated a closed-captioning rulemaking that could require dramatic changes in how television distributors—from broadcast stations to networks to cable operators to telecommunications companies that distribute video programming—manage their operations.

New Enforcement of Captioning Rules

Whether or not it strengthens its rules in the future, the FCC is clearly intent on stepping up closed-captioning enforcement efforts now. In particular, it has pursued several broadcasters for failure to comply with

the emergency captioning rules and warned licensees that it is watching their operations closely for future violations. The rules require broadcasters to make any “emergency information” they broadcast, such as evacuation orders and road closures, available to the hearing impaired by visual means—whether through captioning, text crawls or even handwritten placards.

When Hurricane Charley approached the Florida coast in 2004, two local television stations preempted normal programming to offer joint 24-hour storm coverage. The FCC determined, however, that in doing so the stations failed to make several pieces of emergency information available in visual form, including:

- News that the only bridge to an island community was closed—and thus “the only way to get off the island [was] to swim off”;
- Information that certain low-lying areas must be evacuated; and
- Official word that evacuation was too dangerous for another area’s residents, who should instead “hunker down” and try to wait out the storm.

The stations vehemently contested the fines. They argued that they should have been able to determine what is “emergency in-

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formation” that must be shown visually, and, alternatively, that hearing-impaired persons could easily conclude where to evacuate or what roads would be closed based on the displayed path of the storm and general information in onscreen “crawls.” More fundamentally, the stations plead that their “sorely strained news staffs were operating in circumstances approaching a war zone” during the storm, and that their compliance with the rules was laudable given the circumstances. The FCC has so far held firm, and has proposed fines of \$8000 per violation—\$24,000 total—against each station. The stations have asked the FCC to vacate the proposed fines.

Similar actions this past May against three television stations in the Washington, DC, area relating to severe thunderstorms led to proposed fines of \$16,000 per station. The stations gave verbal warnings to stay inside and away from windows, but did not make that information available in written form. Even in the devastating aftermath of Hurricane Katrina, the FCC is still cracking down. While noting on the heroic efforts of Gulf Coast broadcasters simply to remain on the air during the nation’s worst-ever natural disaster, it nevertheless issued a notice reminding broadcasters that “[t]here are no exceptions to [the emergency captioning rules], and all video programming distributors that air emergency information are required to make it accessible.”

These decisions and warnings indicate that the FCC is not disposed toward adoption of a “Good Samaritan” policy that might give more leeway to broadcasters who relay emergency information. Because production standards for 24-hour, ad-hoc emergency broadcasts cannot match those of day-to-day operations, broadcasters that offer as-available emergency information to viewers in crisis situations are subjecting themselves to the greatest liability—even though the public benefit of such broadcasts is very high. Moreover, at \$8000 per violation, fines could become very large very quickly, since the number of violations can quickly add up in emergency situations. Finally, the focus on emergency captioning enforcement may

well signal that the FCC intends to enforce the general closed-captioning rules—which affect all broadcasters and video distributors at all times—more strictly.

Closed-Captioning Rulemaking

Perhaps the strongest signal of the FCC’s focus on disability rights issues is a notice of proposed rulemaking, also issued this summer, requesting comment on proposals for a number of new substantive and procedural requirements for provision of video closed captioning. Derived in large part from a petition filed by Telecommunications for the Deaf, Inc. (TDI), a hearing-disability advocacy group, the notice seeks comment on proposals to:

- Establish, for the first time, standards for the technical integrity and substantive accuracy of captions;
- Require program distributors to monitor their programming for incomplete captions and file detailed compliance reports;
- Prohibit the use of cost-saving (but often incomplete) electronic newsroom captioning; and
- Create a system of stiff fines for non-compliance.

The proposals in the notice would force the video distribution industry, including new entrants like telecommunications carriers, to face the tricky problems of managing caption quality and assigning blame for failures.

Since the early 1990s, all televisions 13 inches or larger have been equipped to display closed-caption information. In response to the mandate of the 1996 Telecommunications Act, the FCC adopted rules in 1997 requiring all over-the-air broadcasters and multichannel video programming distributors—including any telecommunications companies who offer such programming—gradually to increase the amount of captioned programming. By January 1, 2006, all analog and digital

television programming first published after 1997 must be captioned. By 2008, 75% of any remaining, older programming must also be captioned. (For Spanish-language programming, the corresponding dates for these requirements are 2010 and 2012.)

The notice makes clear that its purpose is to ensure that these captions are reliable and effective. It proposes replacing the existing self-regulatory approach with substantive standards for accuracy, spelling and readability, and seeks comment on proposals to improve the technical reliability of closed captions. While the FCC currently requires only that video programming distributors “pass through” the captions provided with the content by programmers, TDI and others have complained that the pass-through rule does not prevent significant technical problems, such as missing, illegible or sporadic captions.

Although the notice does not offer specifics, any substantive or technical standards would undoubtedly make video distributors responsible for captioning problems. In fact, the notice specifically seeks comment on proposals to require distributors to monitor captions and file detailed quarterly reports on compliance. Currently, the FCC also allows distributors to accept the certifications of their content providers regarding captions rather than verify caption content themselves, since many providers are broadcasting or streaming hundreds of channels at once, 24 hours a day, in real time. While real-time monitoring may turn out to be the only means of assuring that caption content accurately reflects the words spoken, it is far from clear at this point how distributors can technically verify that captions even exist, let alone guarantee they are error-free.

Adding to this problem is a related issue of accountability. Analog captioning, which uses the “vertical blanking interval” to transmit the caption text, can become corrupted or incomplete in the course of transmission. Current analog distribution

mechanisms do not allow distributors to determine where in the distribution chain the captions were lost or corrupted. The problem may originate with the original programming, with human or mechanical error at a broadcast station, with a cable provider, or in any number of other places. Should the FCC adopt rules creating liability for substantive and technical errors, distributors may be forced either to accept blame for any failure—even if not their own—or establish new monitoring mechanisms across their entire analog distribution infrastructure.

The notice also seeks comment on TDI’s proposal to prohibit a cost-saving but controversial method of captioning news broadcasts. “Electronic newsroom captioning” allows live news broadcasts to use pre-written news scripts for captioning. While this method can cut the costs of closed captioning dramatically, it fails to capture unscripted material—including emergency broadcasts, breaking news, and even many sports and weather reports. Current rules already prevent affiliates of the four major networks (ABC, CBS, Fox and NBC) from counting electronic newsroom captioning toward their closed-captioning requirements in the 25 largest television markets. Suggesting that the costs of real-time captioning have fallen in recent years, the notice contemplates extending this ban to all markets.

To add teeth to these proposed new rules and increase compliance with existing rules, the notice further discusses proposals for new, stronger penalties for closed-captioning violations. TDI suggests automatic fines of \$8,000 per hour of non-captioned programming. This proposal could lead to enormous fines for multichannel distributors who broadcast hundreds of hours of programming per day. As this proposal indicates, the FCC appears concerned about lack of compliance with the closed-captioning rules—particularly in digital television programming. A recent study by the National Center for Accessible Media, cited by the FCC, found that only 20% of local digital television

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stations were in compliance with existing closed-captioning rules and that 35% provided no closed captioning at all.

Regardless of whether the FCC strengthens its existing enforcement mechanisms, its recent actions evince a clear determination to step up compliance with existing captioning rules. Comments are due 45 days after publication of the notice in the Federal Register (which has not yet occurred).

Other New Hearing-Disability Rules

Further demonstrating its renewed interest in hearing-disability issues, the FCC has also strengthened its rules relating to telephone services for the deaf and hard of hearing, known as telecommunications

relay services (TRS). A specific type of TRS, called video relay service (VRS), has proven very popular. It allows a sign-language translator—connected via a live video feed—to facilitate conversations between the hearing impaired and those they call on the telephone. The new rules, which will be phased in during 2006, require providers to make these services available within two minutes of receiving a request at least 80% of the time, on a 24 hours-a-day basis. The FCC will also allow providers of this service, as well as American Sign Language-to-Spanish VRS translation services and VRS “voice mail” services, to be compensated out of the general TRS fund—effective immediately. As with the proposed closed-captioning rules, these orders further the FCC’s goal of providing nondiscriminatory service to the hearing impaired.

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