
FCC Grants Limited Waiver of Requirement to Publish Closed Captioning Contact Information in Local Telephone Directories

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In response to a petition for clarification filed by DISH Network, L.L.C. (“DISH”), the FCC has issued a “limited waiver” of its requirement that video programming distributors, including television stations, publish two types of information in local telephone directories—contact information for the receipt and handling of immediate closed captioning concerns, and contact information for the receipt and handling of written closed captioning complaints.

The FCC acknowledged that its telephone directory requirement would essentially force a video programming distributor operating on a nationwide basis (like DISH) to contract with local telephone directory publishers nationwide. However, the FCC did not limit the waiver to DISH or those engaged in national program distribution. As a result, local or regional entities, including local broadcast stations, may be eligible to benefit from this waiver as well, thereby avoiding the additional costs of extensive local telephone directory listings. To take advantage of this limited waiver, however, you must not currently have “contracted for” an advertisement or other paid listing in the telephone directory.

Background

The rule which DISH sought to clarify was adopted in a November 2008 Declaratory Ruling, Order and Notice of Proposed Ruling (“Declaratory Ruling”), but has not yet become effective. In the Declaratory Order, the FCC, among other things, revised its closed captioning complaint procedures by allowing complainants to file complaints with either the FCC or the video programming distributor. Under the FCC’s rules, the term “video programming distributor” includes television stations, multichannel video program providers and other distributors of video programming to the public, such as DBS, ITFS or BRS/EBS providers. Where a complaint deals with programming for which the video programming distributor is exempt from captioning requirements (such as a satellite operator with regard to programming from local television stations), the video programming distributor is required to forward the complaint to the appropriate party

and advise the FCC and the complainant that it has done so. To facilitate this process, the Commission is requiring that video programming distributors provide the following information to the public:

- A telephone number, fax number, and e-mail address where a consumer can receive informed assistance with an immediate closed captioning complaint, such as captions appearing to be garbled; and
- The name, title, telephone number, fax number, e-mail and postal addresses where a consumer can address a written closed captioning complaint that does not raise the immediate concerns identified above.

This information must be provided on the video programming distributor's website, if it has one; in billing statements, if it issues them; and in local telephone directories. The information must also be filed with the FCC.

The Request for Clarification

Because the requirement to publish closed captioning complaint contact information in local telephone directories was not limited to video programming distributors who already purchase local telephone listings, DISH asked the FCC to clarify that an entity that does not use local telephone directory listings to communicate with consumers does not have to initiate that practice merely to convey closed captioning contact information.

The FCC declined to provide the clarification requested by DISH, noting that the rule clearly does require such listings. Nevertheless, the FCC granted a "limited waiver" of the rule. Specifically, the FCC will not require a video programming distributor to publish the closed captioning complaint contact information where: the entity does not currently advertise or otherwise pay for commercial listings in a particular directory, and the video programming distributor does provide the closed captioning contact information either on its website or in billing statements.

However, the FCC took a very broad view of what constitutes paying for advertising or a listing in a telephone directory. Under the terms of the FCC's waiver, a disqualifying commercial listing includes any paid advertisement or "contracted for" expanded listing that contains more than name, address and telephone number information, or that uses a font that is larger than normal or in bold, or which includes a toll-free as opposed to a local telephone number. A video programming distributor with such an "enhanced" listing will not qualify for the directory listing waiver granted by the FCC.

Television stations and other video programming distributors may therefore be able to avoid the cost of publishing the information required by the FCC's new rule. In order to qualify, such entities must not have contracted for a paid advertisement or special listing in the directory. While not addressed in the FCC's order, it appears that television stations required by FCC rule to maintain and publish in local telephone directories a toll-free telephone number (because of the distance between their main studio and community of license) would therefore not be eligible for this waiver. As discussed above, listing a toll-free number constitutes an "expanded listing."

Other Outstanding Closed Captioning Issues

This FCC action is one of several arising out of the FCC's November 2008 Declaratory Ruling. In December 2009, the FCC announced that it has created a new electronic form by which video programming distributors can provide the required closed captioning contact information to the FCC. Video programming

distributors must provide the required information within 30 days of a Federal Register publication indicating that this “information collection” by the FCC has been approved by the Office of Management and Budget. Other acceptable methods of providing the information will include via e-mail or paper filing.

Also in December, the FCC delayed the effective date of that portion of its Declaratory Ruling requiring video programming distributors to forward complaints relating to programming for which they are not responsible to the FCC and the party responsible for the programming’s captioning. The FCC determined that video programming distributors could not comply with this requirement without violating another of the FCC’s rules which prohibits video programming distributors from disclosing personally identifiable information about a subscriber. The FCC indicates that it will soon open a new rulemaking proceeding to resolve that conflict.

Finally, there are a number of issues raised in the Declaratory Ruling from November of 2008 that are still open. Specifically, the FCC asked for comment with regard to how it should treat digital multicast streams for purposes of qualifying for exemptions from the closed captioning rules. The Commission asked whether each of a broadcaster’s multicast streams should be considered a separate “channel.” The definition of what qualifies as a channel is important since the FCC’s rules exempt a “channel” from closed captioning requirements where it generated less than \$3 million in revenues in the preceding year. If multicast streams are considered separate channels, then each would be exempt until such time as it generates \$3 million in revenues annually. Conversely, if multicast streams are not considered separate channels, then all of a station’s program streams must be captioned once the station’s overall revenues exceed \$3 million per year.

Given the FCC’s action on DISH’s request and the number of outstanding issues concerning closed captioning in the transition to a digital environment, it is clear that closed captioning regulation will be an active area in the coming year. We will keep you apprised as events occur.

Should you have any questions regarding this advisory or closed captioning in general, please contact us.

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