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September 26, 2014

Via ECFS

DOCKET FILE COPY ORIGINAL

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: Closed Caption Quality, CGB Dkt. No. 05-231
Closed Caption Exemptions, CGB Dkt. No. 06-181

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), through counsel, along with Deaf and Hard of Hearing Consumer Advocacy Network, Cerebral Palsy and Deaf Organization, Association of Late-Deafened Adults, Inc., American Association of the Deaf-Blind, Hearing Loss Association of America, National Association of the Deaf, and California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc., collectively "Consumer Groups," write to draw the Commission's attention to a recent closed-captioning exemption claim made by a sophisticated broadcast station that demonstrates why the categorical exemptions should be eliminated or significantly narrowed in the pending rulemaking. The claim by Los Angeles Unified School District (LAUSD) that the broadcast station it owns qualifies for a categorical exemption shows that rather than protecting modest, nascent programmers, the exemptions now shield entities that plainly have the resources to caption.[1]

[1] *See* Letter from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to Marlene H. Dortch, Secretary, FCC, CGB Dkt. No. 06-181 (Aug. 21, 2014) ("LAUSD Letter"). A copy of the letter is attached as Exhibit A.

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Consumer Groups respectfully request that the Commission act quickly to eliminate the exemption claimed by LAUSD and other exemptions that have outlived their purpose.[2]

I. Background

Under the Communications Act and the Commission's rules, all video programmers must caption their programming unless they qualify for a categorical exemption or petition for an exemption to the rules on grounds that captioning would be economically burdensome.[3] The categorical exemption recently claimed by LAUSD states that "[n]o video programming provider shall be required to expend any money to caption any channel or stream of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year."[4] The Commission created the exemption in 1997 "to address the problems of *small* providers that are not in a position to devote significant resources towards captioning (i.e., those who would find it economically burdensome)."[5]

The difference between the categorical and individual exemptions is stark: while programmers seeking an individual exemption must provide detailed financial statements and captioning cost estimates before the Commission will consider their petition, programmers relying on a categorical exemption may simply claim a particular exemption and not caption.[6] Although the method of obtaining a categorical or individual exemption may differ, the purpose for both is the same: exempting programmers where paying for captioning would be economically burdensome.[7]

In 2011 Consumer Groups petitioned the Commission to eliminate or significantly narrow the categorical exemptions, arguing that amendments to the Communications Act and the dramatic reduction in captioning costs undercut the original purposes of the exemptions.[8] The Commission granted the Petition and sought comment on eliminating the "self-implementing exemptions from the closed-captioning rules."[9] In the pending rulemaking, Consumer Groups demonstrated that the categorical exemptions have outlived their initial purposes since being adopted in 1997 and that there is no concrete evidence that warrants "the continuation of any of the categorical exemptions under examination."[10]

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[2] *See* Comments of Consumer Groups 14-18, CGB Dkt. No. 05-231 (July 9, 2014).
[3] 47 U.S.C. § 613(d); 47 C.F.R. §§ 79.1(d), (f). The economically burdensome petition exemption is often called the individual exemption.
[4] 47 C.F.R. § 79.1(d)(12).
[5] *Closed Captioning Order*, 13 FCC Rcd 3272, 3350 at ¶ 164 (1997) (emphasis added).
[6] For a detailed discussion of the economically burdensome standard, see *First Lutheran Church of Albert Lea Petition for Exemption from the Closed Captioning Requirements*, Order, Dkt. 06-181, DA 14-1095 (July 30, 2014) ("*Albert Lea Order*").
[7] 47 U.S.C. §§ 613(d)(1), (3).
[8] Consumer Groups 2011 Petition for Rulemaking, CGB Dkt. No. 05-231 (Jan. 27, 2011) ("2011 Petition").
[9] *Closed Captioning of Video Programming*, Further Notice of Proposed Rulemaking at ¶ 159, Dkt. 05-231 (Feb. 24, 2014).
[10] Reply Comments of Consumer Groups 11, (CGB Dkt. No. 05-231 (Aug. 8, 2014).

Although there is a complicated history regarding LAUSD's efforts to avoid captioning programming on its Noncommercial Educational Station KLCS, the basic facts are as follows.[11] For more than eight years, LAUSD sought an individual exemption from the Commission's closed captioning rules and Consumer Groups consistently opposed it. Because the Commission never acted on LAUSD's request, it was able to avoid captioning during that time.[12] The situation concerns Consumer Groups because KLCS is the main educational channel for the second largest television market in the country, a region that includes more than 800,000 individuals who are deaf and hard of hearing.[13] The station not only broadcasts educational programs for LAUSD's students, it also provides important programming for the general public, including airing LAUSD Board of Education meetings.

Despite LAUSD having an operating budget of $7.27 billion in 2014, it maintains that captioning all programming on KLCS would be economically burdensome.[14] Earlier this year, Consumer Groups opposed the most recent version of LAUSD's exemption petition, arguing that with a budget of several billion dollars, LAUSD could easily afford to caption all of its programming.[15] Before the Commission could act on LAUSD's petition, the district withdrew it and claimed that KLCS qualified for a categorical exemption for channels producing revenue of under $3 million.[16] On September 5, the Commission dismissed LAUSD's economically burdensome petition, noting that it was now moot because LAUSD had claimed a self-implementing categorical exemption.[17] As a result, LAUSD does not have to caption its programming.

II. LAUSD Shows that the Categorical Exemptions Have Outlived their Purpose

LAUSD's reliance on a categorical exemption to avoid captioning its programming is a prime example of why the Commission should eliminate or significantly narrow the categorical exemptions in the pending rulemaking. As LAUSD's conduct proves, well-financed video

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[11] A more detailed history of LAUSD's efforts is discussed in *Notice of Dismissal of Closed Captioning Exemption Petition*, CGB Dkt. 06-181 (Sept. 5, 2014) ("*LAUSD Public Notice*"). A copy of the Public Notice is attached as Exhibit B.

[12] Because 47 C.F.R. § 79.1(f)(11) grant petitioners an exemption from the closed-captioning requirements during the pendency of their waiver petition, LAUSD did not have to caption its programming until the Commission ruled on it.

[13] *See* Greater Los Angeles Agency on Deafness, Inc., *Resources*, http://www.gladinc.org/information-center/resources (last visited Sept. 11, 2014).

[14] *See LAUSD Public Notice*; Superintendent's 2014-2015 Final Budget at 16 (June 24, 2014) ("LAUSD Budget"), http://bit.ly/1stsUY8. Although some programming on KLCS is captioned, 22 programs are not, including broadcasts of the LAUSD board meetings. *Los Angeles Unified School District's Petition for Exemption from the Commission's Closed Captioning Rules*, Case No. CGB-CC-0269, Dkt. 06-181 (Nov. 27, 2013) ("LAUSD's 2013 Exemption Petition").

[15] Consumer Groups Opposition to LAUSD, CGB Dkt. No. 06-181 (Mar. 12, 2014) ("2014 LAUSD Opposition").

[16] LAUSD Letter; 47 C.F.R. § 79.1(d)(12).

[17] *LAUSD Public Notice*.

programmers are improperly using the categorical exemptions originally designed to help small programmers and in-development networks to avoid captioning obligations that they can easily afford to meet.

LAUSD is not the type of programmer the categorical exemptions were designed to assist. As the Communications Act makes clear, the purpose of any categorical exemption is to exempt certain programming where the Commission has determined it would be economically burdensome to caption.[18] The purpose of the Section 79.1(d)(12)'s categorical exemption is to help small programmers who lack the ability to caption, with the $3 million revenue cap serving as a crude proxy for whether captioning would be economically burdensome.[19] LAUSD is a massive organization that has an operating budget of more than $7 billion, which in and of itself demonstrates it is not a small provider and has significant resources to caption programming on KLCS.[20] Yet LAUSD claims that KLCS qualifies for a categorical exemption under Section 79.1(d)(12), an assertion that renders the district's $7.27 billion budget irrelevant for purposes of assessing whether the station can afford to caption.

Should the Commission not act to eliminate or significantly narrow the categorical exemptions, it will create perverse results. In effect, allowing categorical exemptions to continue enables large, sophisticated programmers such as LAUSD to avoid their captioning obligations based on self-implementing categorical exemptions.[21] Indeed, LAUSD's reliance on the exemption demonstrates the hollowness of claims by NAB that stations with revenue of less than $3 million "are small stations" that "cannot afford to caption."[22] LAUSD's station may be noncommercial, but it is neither small nor lacking in resources to afford captioning.

Moreover, LAUSD's actions show how sophisticated programmers can avoid their captioning obligations if they look hard enough. LAUSD first sought an individual waiver and argued that captioning would be economically burdensome. But after Consumer Groups demonstrated that LAUSD had a multi-billion dollar budget that could fund captioning, its petition would have been dismissed.[23] To avoid that outcome, LAUSD claimed the categorical exemption in Section 79.1(d)(12). The result sends an unfortunate signal regarding the importance of complying with the Commission's closed-captioning rules.

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[18] 47 U.S.C. § 613(d)(1).

[19] *Closed Captioning Order*, 13 FCC Rcd 3272, 3350 at ¶ 164 (1997).

[20] LAUSD Budget at 16.

[21] Because categorical exemptions are self-implementing, the Commission cannot check to see whether programmers qualify unless there is an investigation in response to a captioning complaint. Therefore, should the Commission keep certain categorical exemptions, it should at minimum require programmers claiming them to notify the Commission and give the public an opportunity to challenge the determination.

[22] NAB Comments at 22, CGB Dkt. No. 05-231 (July 9, 2014).

[23] As recent Orders by the CGB indicate, when a petitioner has additional revenues greater than its captioning costs, the Commission will require programmers to caption. *See Albert Lea Order* at ¶ 15; 2014 LAUSD Opposition at 5-6.

Although LAUSD clearly can afford to caption its programming, it relies on an exemption written more than 15 years ago to avoid its obligations to the detriment of hundreds of thousands of LA residents who are deaf and hard of hearing. LAUSD is therefore benefitting from an outdated exemption when it would otherwise have to comply with Commission rules and provide access to all of its programming. Consumer Groups respectfully request that the Commission eliminate the exemption LAUSD relies upon as well as the other categorical exemptions that have long outlived their purpose.

Sincerely,

Aaron Mackey
Counsel for TDI

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Encs.

EXHIBIT A

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August 21, 2014

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
ATTN: Disability Rights Office -- Room 3-C438

In Re: Petition for Closed Captioning Exemption (CGB-CC-0269)
Docket No. 06-181

Dear Ms. Dortch

The Los Angeles Unified School District (LAUSD) licensee of noncommercial television station KLCS-TV, Los Angeles, California filed an Exemption Request pertaining to the Commission's Closed Captioning Rules. In Reply to an Opposition the Commission was advised that KLCS operated on Channel 41; that KLCS operates on three multicast channels; that total revenue (as revenue is defined by the Disability Rights Office) for the fiscal years ending June 30, 2014 totaled $3,780,868; and that no channel provided or received $3,000,000[1]. Consequently, pursuant to Section 79.1(d)(12) of the Commission's rules, as amended, LAUSD/KLCS hereby withdraws its Exemption Request.

Yours Very Truly,

Robert B. Jacobi

cc: Suzy Rosen Singleton
Aaron Mackey
Claude Stout

[1] As is reflected in the April 1, 2014 Reply, the total revenue for the fiscal year ending June 30, 2013 also was less than $3,000,000.

EXHIBIT B

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PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 14-1237
Released: September 5, 2014

NOTICE OF DISMISSAL OF CLOSED CAPTIONING EXEMPTION PETITION
CG Docket No. 06-181

By this *Notice,* the Federal Communications Commission's (FCC's or Commission's) Consumer and Governmental Affairs Bureau (Bureau) announces the dismissal of the Petition of Los Angeles Unified School District (LAUSD) for exemption from the Commission's closed captioning requirements.[1]

The Commission's closed captioning rules allow video programming providers, producers, or owners to obtain an exemption from the closed captioning requirements if they demonstrate that providing captions on their programming would be "economically burdensome."[2] In 2005, LAUSD filed a Petition for a closed captioning exemption under these rules, and LAUSD supplemented the Petition in March 2006 and July 2006.[3] The Bureau then placed the Petition on Public Notice.[4] In 2012, the Bureau notified LAUSD of the need to file updated information with respect to its pending Petition.[5] In response, LAUSD updated the Petition on July 5, 2012, and supplemented it further on July 24, 2012.[6] The Bureau again placed the Petition on Public Notice for comment on October 26, 2012.[7] Consumer Groups jointly

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[1] 47 C.F.R. § 79.1.

[2] 47 C.F.R. § 79.1(f).

[3] Petition for Exemption from Lawrence N. Cohn, Cohn and Marks LLP, on behalf of LAUSD, to Office of Secretary, Federal Communications Commission (Dec. 23, 2005); Supplement to Petition for Exemption from Lawrence N. Cohn, Cohn and Marks LLP, on behalf of LAUSD to the Office of Secretary, Federal Communications Commission (Mar. 17, 2006); Statement for the Record from Lawrence N. Cohn, Cohn and Marks LLP, on behalf of LAUSD to the Office of the Secretary, Federal Communications Commission (Jul. 25, 2006).

[4] *See Request for Exemption from Commission's Closed Captioning Rules*, Public Notice, 21 FCC Rcd 1613 (CGB 2006). After the Bureau received supplemental materials, it issued a second Public Notice seeking comment on the supplemented Petition. *See Request for Exemption from Commission's Closed Captioning Rules*, Public Notice, 21 FCC Rcd 3009 (CGB 2006).

[5] *See Notice of Need to File Updated Information with Respect to Pending Petitions for Exemption from Commission's Closed Captioning Rules, Which Were Filed Prior to October 2010*, Public Notice, 27 FCC 3106 (CGB 2012) (alerting petitioners of the need to affirm that information previously provided is still accurate and up-to-date, to update that information, or to withdraw their petitions); *see also* Letter from Kris Anne Monteith, Acting Chief, Consumer and Governmental Affairs Bureau, to Cohn and Marks LLP (Apr. 5, 2012).

[6] *See* Petition for Exemption from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to Office of Secretary, Federal Communications Commission (Jul. 5, 2012); *see also* Addendum to Petition for Exemption from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to Office of Secretary, Federal Communications Commission (Jul. 24, 2012).

[7] *Request for Comment/Request for Exemption from Commission's Closed Captioning Rules*, Public Notice, 27 FCC Rcd 13403 (CGB 2012).

filed an opposition to the Petition, and LAUSD filed a reply to Consumer Groups' opposition.[8] Subsequently, the Bureau determined that it required additional and updated information to enable it to determine whether the programming that was the subject of the Petition should be exempt from the Commission's closed captioning obligations.[9] In response to a letter from the Bureau, LAUSD supplemented the Petition.[10] The Bureau again placed the Petition on Public Notice for comment on February 10, 2014.[11] Again, Consumer Groups jointly opposed the Petition, and LAUSD filed a reply to the Consumer Groups' opposition.[12]

Before the Commission could determine whether to grant or deny the Petition, on August 21, 2014, LAUSD submitted a request to withdraw the Petition. LAUSD asked to withdraw the Petition because it asserts that the video programming that is the subject of the Petition meets the criteria for the self-implementing exemption from the Commission's closed captioning requirements under section 79.1(d)(12) of the Commission's rules,[13] thereby rendering the Petition moot.[14]

This *Notice* serves to inform the public that this Petition has been dismissed without prejudice as of August 21, 2014.[15]

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[8] *See* Opposition of Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, the Association of Late-Deafened Adults, California Coalition of Agencies Serving the Deaf and Hard of Hearing, and Cerebral Palsy and Deaf Organization (collectively, Consumer Groups) (Nov. 26, 2012); Reply to Consumer Groups Opposition to Exemption Petition from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to the Office of the Secretary, Federal Communications Commission (Dec. 17, 2012).

[9] *See* Letter from Cheryl J. King, Attorney, Disability Rights Office, Consumer and Governmental Affairs Bureau, to Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD (Sept. 27, 2013).

[10] *See* Letter from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to Office of the Secretary, Federal Communications Commission, Attention: Cheryl J. King (Nov. 27, 2013) (Petition 2013 Supplement).

[11] *Request for Comment/Request for Exemption from Commission's Closed Captioning Rules*, Public Notice, 29 FCC Rcd 1248 (CGB 2014).

[12] *See* Opposition of Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, Deaf and Hard of Hearing Consumer Advocacy Network, Cerebral Palsy and Deaf Organization, and California Coalition of Agencies Serving the Deaf and Hard of Hearing (collectively, Consumer Groups) (Mar. 12, 2014); Reply to Georgetown Law Opposition to Exemption Request from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to the Office of the Secretary, Federal Communications Commission (Apr. 1, 2014).

[13] 47 C.F.R. § 79.1(d)(12) exempts channels and streams that produce annual gross revenues of less than $3,000,000 during the previous calendar year. Such channels and streams remain obligated to pass through closed captioning of already captioned programs.

[14] Letter from Robert B. Jacobi, Cohn and Marks LLP, on behalf of LAUSD, to Office of the Secretary, Federal Communications Commission, Attention: Suzy Rosen Singleton (Aug. 21, 2014).

[15] We note that LAUSD describes itself as an entity that operates the elementary and secondary public school system in Los Angeles in the State of California, and the licensee of, and operator of KLCS-TV, a "noncommercial educational television station." Petition 2013 Supplement at 4. Although we dismiss herein LAUSD's instant petition based on its assertion that it qualifies for a self-implementing exemption, as we have previously noted, "entities that qualify for an exemption under Section 713 may be obligated under other federal statutes, such as the ADA, to make their services and programs, including video programming services, accessible to an individual with disability upon request. We do not intend our rules to preclude or supersede the operation of any other federal laws that may require an entity exempt from Section 713 to make its video programming services accessible to people with disabilities." *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility,* Report and Order, 13 FCC Rcd 3272, 3342, n. 534 (1997).

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). This *Public Notice* can also be downloaded in Word and Portable Document Format at http://www.fcc.gov/encyclopedia/economically-burdensome-exemption-closed-captioning-requirements.

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