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April 13, 2015
via electronic filing

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

Re: Opposition to Petition for Exemption from the Commission's Closed Captioning Rules
CGB Dkt. No. 06-181

Spanish Broadcasting System, Inc.
CGB-CC-1333

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), American Association of the Deaf-Blind (AADB), Cerebral Palsy and Deaf Organization (CPADO), National Association of the Deaf (NAD), Deaf Seniors of America (DSA), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Association of Late Deafened Adults (ALDA), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), collectively, "Consumer Groups," respectfully submit this opposition to the petition of Spanish Broadcasting System, Inc. (SBS, MegaTV, or

*Admitted to the Washington bar only;
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Petitioner), for exemption of its programming from the Federal Communications Commission's (Commission) closed captioning rules.

I. Background

SBS is the largest publicly traded, Hispanic-controlled media and entertainment company in the United States with a market capitalization of $20.83 million.[1] SBS's television network, MegaTV, produces original Spanish-language video programming and reaches nearly 6.5 million households, covering about 30 percent of the Hispanic market.[2] SBS has national distribution through DirecTV and AT&T U-verse and currently owns and operates WSBS-TV in Miami and KTBI-TV in Houston. MegaTV video programming is also available through affiliates in Fresno and Orlando and through Verizon Fios in Florida, California, Texas, and New York.[3] In addition to its MegaTV network, SBS owns and operates 20 popular radio stations in New York, Los Angeles, Miami, Chicago, Sans Francisco, and Puerto Rico.[4]

In August 2008, SBS sought a waiver of the Commission's closed captioning rules for all programming distributed by the MegaTV network.[5] In its 2008 Petition, SBS stated that it "is committed to providing closed captioning for its programming in the not-too-distant future."[6] In February 2014 the Consumer and Governmental Affairs Bureau (CGB or Bureau) dismissed SBS's 2008 Petition without prejudice because Petitioner failed to submit two documented closed captioning quotes and other specific information about the costs associated with captioning its programming.[7]

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[1] Spanish Broadcasting System, http://www.spanishbroadcasting.com/aboutus.html (last visited April 10, 2015); Market Watch, http://www.marketwatch.com/investing/stock/sbsa (last visited April 10, 2015).
[2] PR Newswire, *Mega TV Continues to Expand in New Markets*, http://www.prnewswire.com/news-releases/mega-tv-continues-to-expand-in-key-markets-83573982.html (last visited April 10, 2015).
[3] MegaTV Coverage Map, http://www.spanishbroadcasting.com/megatv_coveragemap.html, (last visited April 10, 2015) (*See* Exhibit A attached).
[4] Spanish Broadcasting System, http://www.spanishbroadcasting.com/aboutus.html (last visited April 10, 2015).
[5] Letter from Allan G. Moskowitz, Kaye Scholer LLP, to Office of the Secretary, FCC (Aug. 8, 2008) (2008 Petition).
[6] 2008 Petition at 9.
[7] Letter from Roger Holberg, Disability Rights Office, CGB, to Nancy Ory, Lerman Senter PLLC (Feb. 11, 2014.)

In March 2014, nearly six years after SBS filed its 2008 Petition, SBS again filed a petition for exemption for all programming distributed by the MegaTV network.[8] The Bureau then sought additional information from Petitioner about its financial resources.[9] SBS responded to the Bureau's request and completed its application when it provided supplemental information in April 2014.[10] On March 12, 2015, the Bureau placed the 2014 Petition on Public Notice for comment.[11]

II. Legal Standard

Section 713 of the Communications Act of 1934, as amended, requires that all non-exempt English and Spanish language programming be captioned.[12] The Commission has explained that Section 713 of the Communications Act of 1996 "is intended to create a new programming norm where programming is generally accessible to the persons with hearing disabilities through closed captioning."[13] Recognizing that captioning could be burdensome, Congress drafted Section 713(d). That section directed the Commission to create categorical exemptions for certain classes of programs and to enable individual programmers to petition the Commission for a full or partial exemption from the Commission's closed captioning requirements if compliance would be "economically burdensome."[14]

The categorical, self-implementing exemptions the Commission adopted included exempting new networks from captioning obligations during their first four years of operation.[15] In creating a new network exemption, the Commission stated that

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[8] Letter from Nancy Ory, Lerman Senter PLLC, to Office of the Secretary, FCC (Mar. 24, 2014) (2014 Petition).
[9] Letter from Suzy Rosen Singleton, Disability Rights Office, CGB, to Nancy Ory, Lerman Senter PLLC (Mar. 28, 2014).
[10] Letter from Nancy Ory, Lerman Senter PLLC, to Office of the Secretary, FCC (Apr. 28, 2014).
[11] *Request for Comment, Request for Exemption from Commission's Closed Captioning Rules*, Public Notice, Dkt. No. 06-181, DA 15-319 (Mar. 12, 2015).
[12] 47 U.S.C. § 613(b).
[13] *Closed Captioning and Video Description*, Report and Order, 13 FCC Rcd 3272, 3342, ¶143 (1997) (*97 Captioning Order*).
[14] 47 U.S.C. § 613(d)(3). The Commission interpreted the term "economically burdensome" as being synonymous with the term "undue burden" as defined in Section 713(e) of the 1934 Act, and ordered the Bureau to continue to evaluate all exemption petitions using the "undue burden" standard pursuant to Rule 79.1(f)(2)-(3). *Interpretation of Economically Burdensome Standard*, 27 FCC Rcd 8831, 8834 ¶7 (2012).
[15] 47 C.F.R. § 79.1(d)(9); *97 Captioning Order*, 13 FCC Rcd at 3346, ¶154.

"[a] network must comply with the closed captioning rules once its exemption expires."[16] The rationale behind the exemption was that "[a] network will be able to prepare for the required amount of captioning during the period it is exempt, and we do not believe that meeting the required levels of captioning will be an economic burden at that time."[17]

Under the Commission's individual economically burdensome waiver, programmers can seek an exemption upon a showing that providing captioning would be economically burdensome.[18] When determining whether a petitioner has made the required showing under the economically burdensome standard, the Commission considers the following factors on a case-by-case basis: (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.[19] The Commission will assess the overall financial resources available to a petitioner by looking at a petitioner's current assets, current liabilities, revenues, expenses, and other documentation "from which its financial condition can be assessed."[20]

III. SBS is ineligible for an economically burdensome waiver.

A. SBS is ineligible because it has already taken advantage of the new network exemption under Section 79.1(d)(9).

SBS's reliance on the new network exemption makes it ineligible to seek an economically burdensome waiver after its four-year grace period ended. In its 2008 Petition, SBS stated that because it had just launched the new network MegaTV, it was eligible for an exemption under Section 79.1(d)(9) and would not have to caption its programming for four years.[21] After the four-year period for the new network exemption expired in 2011, MegaTV continued to seek an economically burdensome waiver under Section 79.1(f).[22]

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[16] *97 Captioning Order*, 13 FCC Rcd at 3346, ¶154.
[17] *Id*.
[18] 47 C.F.R. § 79.1(f).
[19] *First Baptist Church, Jonesboro, Arkansas*, 29 FCC Rcd 12833, ¶3 (2014).
[20] *Id.* at ¶¶ 13-14; *see also First United Methodist Church of Tupelo*, Dkt. No. 06-181, DA 15-154, ¶13 (Feb. 3, 2015); *Curtis Baptist Church*, 29 FCC Rcd 14699, ¶14 (2014); *First Lutheran Church of Albert Lea*, 29 FCC Rcd 9326, ¶¶14-15 (2014).
[21] 2008 Petition at 6.
[22] Letter from Nancy Ory, Lerman Senter PLLC, to Office of the Secretary, FCC (March 28, 2012).

The Commission should deny SBS's waiver because it should not be allowed to exploit the FCC's closed captioning waiver rules and avoid providing accessible programming to the detriment of Spanish speakers who are deaf and hard of hearing. As discussed above, the very purpose of the exemption in Section 79.1(d)(9) was to give new networks time to prepare to caption all of their programming. Indeed, that is why the Commission stated that "[a] network must comply with the closed captioning rules once its exemption expires."[23] By operation of the rule, when the four-year period ended, SBS was required to caption all of its programming. Thus, SBS is ineligible for an economically burdensome waiver under the Commission's rules.

SBS has had more than enough time to devote some of its significant resources to captioning. Indeed, SBS has not captioned for almost eight years—nearly twice as long as the new network exemption allows. In that time, it does not appear as though Petitioner has made any effort to caption its programming and has thus benefitted financially from not having to comply with the Commission's rules. This is a far cry from SBS's initial promise that it would provide "closed captioning for its programming in the not-too-distant future."[24] Instead, Petitioner has exploited the waiver rules to shirk its captioning obligations. The Commission should not allow SBS to game the rules in this manner and it should therefore deny its waiver petition.

B. SBS is ineligible because it is not the type of programmer that the economically burdensome waiver was designed to benefit.

Additionally, the Commission should deny SBS's petition because the economically burdensome waiver was not created to benefit sophisticated, publicly traded commercial media companies. Since the Bureau began reviewing economically burdensome waiver petitions under the standards created by the full Commission in *Anglers for Christ*, the agency has granted only four petitions: *Gerald Bryant TV*, *Outdoorsmen Productions*, *Gray Publishing*, and *SJTV*.[25] In each case, the petitioner was a very small entity that produced a weekly 30 or 60-minute television program and had meager financial resources. For example, Gray Publishing, Inc. is owned by Paul Gray, who single-handedly films, edits, and produces the 30-minute program "Exploring

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[23] *97 Captioning Order*, 13 FCC Rcd at 3346, ¶154.
[24] 2008 Petition at 9.
[25] *Gerald Bryant TV, Inc.*, 29 FCC Rcd 9335 (2014); *Outdoorsmen Productions, LLC*, 29 FCC Rcd 13844 (2014); *Gray Publishing, Inc.*, 30 FCC Rcd 307 (2015); *SJTV, LLC*, Dkt. No. 06-181, DA 15-232 (Feb. 19, 2015).

Alaska Native Voices."[26] In 2012 Gray Publishing reported net income of $33,204, but Mr. Gray did not receive any salaries or wages during that year.[27]

In contrast, SBS has 439 employees, produces a long list of original programming, and paid CEO Raúl Alarcón $1,784,265 in 2013.[28] SBS is publicly traded on NASDAQ and, as will be discussed below, has annual revenues of roughly $150 million. It is the largest publicly traded, Hispanic-controlled media company in the United States and it reaches 30 percent of the Hispanic market.[29] In short, SBS is one of the most successful producers of television programming in the country. Given SBS's enormous resources, its for-profit corporate status, and its penetration of the television market, it is nothing like any entity that has previously received an economically burdensome waiver.

The Commission's grant of waivers to Gray Publishing and similar programmers demonstrates that the economically burdensome waiver is reserved for entities that truly lack significant financial resources to afford to caption their programming. SBS has immense financial resources that it could devote to captioning while maintaining its profitable status as the largest Hispanic-controlled media company in the country. Its vast resources and other characteristics make it ineligible for an economically burdensome waiver. The Commission should therefore deny the petition and reinforce that the waiver should only benefit entities that truly cannot afford to caption their programming.

IV. Even if SBS were eligible for an economically burdensome waiver, the Commission should deny SBS's petition.

Even if the Bureau determines that SBS is eligible for an economically burdensome waiver, its petition should nonetheless be denied because requiring Petitioner to caption would not be economically burdensome. SBS has failed to demonstrate that captioning its programming would be economically burdensome for two main reasons. First, when SBS's "overall financial resources" are analyzed,

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[26] *Gray Publishing*, 30 FCC Rcd 307, ¶7.
[27] *Id.* at ¶13 n.51.
[28] Yahoo Finance, https://finance.yahoo.com/q/pr?s=SBSA+Profile (last visited April 10, 2015); Spanish Broadcasting System, Inc., Proxy Statement 17 (2014) (2014 Proxy Statement), *available at* http://www.spanishbroadcasting.com/2014%20Proxy%20Final.PDF.
[29] *See supra* notes 1-4 and accompanying text.

captioning would not be economically burdensome.[30] Second, the impact of closed captioning on SBS's operation is negligible.

A. An analysis of SBS's overall financial resources indicates that captioning would not be economically burdensome.

SBS's captioning costs per hour are quite modest when compared to other economically burdensome waiver petitioners. SBS has obtained documented captioning quotes ranging from $250,796 to $449,540 annually.[31] SBS states in its petition that it would have to caption more than 91 hours of programming per week, meaning that it would need to caption at least 4,732 hours of programming annually.[32] Using the lower quote of $250,796, that means it would cost SBS about $53 per hour to caption its programming. Thus, although SBS has a large amount of programming, its quoted captioning costs would be among the lowest Consumer Groups has reviewed.[33]

Before analyzing SBS's financial resources, however, the Commission must focus on Petitioner's annual net revenues and its operating budget. Although the Commission usually focuses its analysis on a petitioner's net income and net current assets, a departure is in order here. In particular, because SBS is a large, publicly traded corporation, its reported net losses and net current assets are the result of financing, stock buy-backs, and paying dividends.[34] Including these items in any analysis grossly inflates SBS's reported losses while distracting from the reality that it has the operating income to pay for captioning. Consumer Groups therefore ask the Commission to

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[30] *First United Methodist Church of Tupelo*, Dkt. No. 06-181, DA 15-154, ¶13 (Feb. 3, 2015).
[31] 2014 Petition at 3 n.6. Consumer Groups were unable to verify SBS's captioning costs because SBS requested confidentiality and thus the details of the quotes were withheld from public inspection. Although Consumer Groups do not believe that they have been given sufficient information to challenge SBS's captioning costs, we nonetheless believe that even if the costs are inflated, they do not represent an economic burden.
[32] 2014 Petition at 6.
[33] *See e.g.*, *First Lutheran Church of Albert Lea*, 29 FCC Rcd 9326, ¶8 ($105 per hour); *First Baptist Church, Jonesboro, Arkansas*, 29 FCC Rcd 12833, ¶8 ($110 per hour); *Curtis Baptist Church*, 29 FCC Rcd 14699, ¶8 ($500 per hour).
[34] In 2013, SBS reports net loss of $88,352,000 and net current liabilities of $101,258,000. The dramatic increase in net loss "was primarily due to the increase in interest expense, Series B preferred stock adjustment to contract settlement value at reporting date classified as interest expense and dividends on Series B preferred stock classified as interest expense." Accounting rules allow SBS to report the transaction as a liability, which dramatically overstates the company's losses. Spanish Broadcasting, Inc., Annual Report (Form 10-K) 41-3, 59-60 (Feb. 15, 2014).

disregard SBS's reported losses, which are largely the result of the company being allowed to write a stock buy-back off as a loss.

When SBS's annual captioning costs are compared to its operating budget, requiring Petitioner to caption would not be economically burdensome. Between 2012 and 2013, SBS's consolidated net revenue increased from $139,522,000 to $153,774,000.[35] Largely due to this increase in net revenue, SBS's consolidated operating income increased from $37,250,000 in 2012 to $38,356,000 in 2013.[36] Thus, in just one year, SBS's net revenue increased by $14,252,000 and its operating income was up by $1,106,000. The increase in operating income could have paid for multiple years of captioning by itself. Moreover, captioning costs of $250,796 would amount to less than 0.2 percent of its 2013 net revenue or less than 0.7 percent of its 2013 consolidated operating income.

Given how small of a percentage captioning costs would be when compared to SBS's net revenues and operating income, requiring it to caption its programming would not be economically burdensome. Moreover, the cost to SBS is much smaller than the 2 percent cap the Commission established as a proxy for what it believed would constitute an economic burden. The Commission believed that programmers could devote up to 2 percent of their revenue to closed captioning and that those costs could "be absorbed without adverse consequences to the product output of video service provider."[37]

Even if the Commission considers SBS's net losses and net current liabilities, those records indicate that captioning would still not be economically burdensome. Although SBS reported net loss and net current liabilities in 2012 and 2013, in 2011 SBS reported net income of $23,791,000 and net current assets of $19,370,000.[38] SBS's substantial net income and net current assets in 2011 could have covered the cost of closed captioning for years to come. Given the fact that SBS's captioning costs represent roughly 1.2 percent of its 2011 net income and net current assets, captioning would not be economically burdensome.

B. Captioning would not be economically burdensome because the potential impact of captioning costs on SBS's operation is negligible.

Regardless of SBS's recent reports of net loss and net current liabilities, the potential impact of the provision of closed captioning on SBS's television operation is

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[35] *Id.* at 41.
[36] *Id.* at 41, 43.
[37] *97 Captioning Order*, 13 FCC Rcd at 3351, ¶168.
[38] Spanish Broadcasting, Inc., Annual Report (Form 10-K) 73-4 (Feb. 12, 2013).

negligible. Requiring Petitioner to spend less than 0.2 percent of its 2013 net revenue or less than 0.7 percent of its operating income on closed captioning would not constitute an economic burden.[39] This minimal financial impact of requiring SBS to caption demonstrates that captioning would not be economically burdensome.

Despite the negligible financial impact captioning would have, SBS's claim that it would be harmed if required to caption are not credible. Specifically, SBS claims that if it were required to spend $250,796 to provide closed captioning its television operating segment budget would be significantly reduced and "the amount of new originally produced Spanish-language programming would decline."[40] Yet in the same petition, SBS states that it would first cut other areas of its operating budget to pay for captioning.[41] Given SBS's conflicting statements and the reality that its captioning costs are extremely small when compared to its financial resources, Petitioner's claims are not credible.

SBS's claim that captioning would detrimentally impact its television operation is even less credible in light of Petitioner recently paying its top three executives $2,777,098. In 2013, CEO Raúl Alarcón received $1,784,265, COO Albert Rodriguez received $423,659, and CFO Joseph García received $569,174.[42] SBS's captioning costs of $250,796 equal merely 9 percent of Petitioner's executive compensation in 2013, demonstrating once more that captioning would barely impact SBS's operation and that captioning would not be economically burdensome.

V. Alternatively, any waiver should be extremely short and limited to MegaTV's original, non-scripted programming.

Should the Commission decided not to deny SBS's petition, Consumer Groups respectfully ask that the Bureau only grant an extremely short waiver that is narrowly tailored to MegaTV's original, non-scripted programming. Because SBS has not had to caption its programming for almost eight years, Consumer Groups believe that Petitioner should not be given any significant additional time to bring its programming

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[39] As stated above, the Commission has advised that "the use of a revenue base and a 2% exemption level should result in captioning expenditure levels that can be absorbed without adverse consequences to the product output of video service provider." *97 Captioning Order*, 13 FCC Rcd at 3351, ¶168.
[40] 2014 Petition at 4.
[41] *Id.*
[42] 2014 Proxy Statement at 17.

into compliance. Thus, we ask that any waiver be limited to less than six months, as it "is not designed to perpetually relieve a petitioner of its captioning obligation."[43]

VI. Conclusion

SBS has already benefitted from the new network exemption and has not had to caption since 2007. Moreover, SBS is not the type of programmer that the economically burdensome waiver was designed to benefit. SBS is therefore ineligible for an economically burdensome waiver. Allowing a major television network such as MegaTV to perpetually skirt a relatively small annual cost of closed captioning would gravely undercut the purpose of the Commission's captioning rules. Even if SBS were eligible for an economically burdensome waiver, it has failed to illustrate that the provision of closed captioning would in fact be economically burdensome. Thus, Consumer Groups ask the Commission to deny SBS's petition and require it to caption its programming immediately. Alternatively, if the Commission does conclude that SBS has demonstrated that its financial situation makes even its modest captioning costs economically burdensome, Consumer Groups ask that the Commission approve an extremely short, narrow exemption.

Sincerely,

/s/

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[43] *Anglers for Christ Ministries, Inc.*, 26 FCC Rcd 14941, 14953, ¶23 (2011).

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EXHIBIT A

Source: http://www.spanishbroadcasting.com/megatv_coveragemap.html

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on April 13, 2015, pursuant to the Commission's aforementioned Public Notice, a copy of the foregoing document was served by first class U.S. mail, postage prepaid, upon the Petitioner at the address listed below.

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Counsel to Spanish Broadcasting System, Inc.

/s/

Niko Pezarich
Institute for Public Representation

April 13, 2015