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March 3, 2016
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: Comment on Dove Broadcasting's Petition for Exemption from the
Commission's Closed Captioning Rules
CGB Docket No. 06-181

Dove Broadcasting, Inc.
CGB-CC-1367

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), Cerebral Palsy and Deaf Organization (CPADO), Association of Late Deafened Adults (ALDA), Deaf Seniors of America (DSA), American Association of the Deaf-Blind (AADB), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), collectively, "Consumer Groups," submit for filing in the above-captioned proceeding their comment on the petition for exemption from the Commission's closed captioning requirements filed by Dove Broadcasting, Inc. ("Dove"), for its two television programs "Nite Line" and "Beverly Exercise."

* DC bar membership pending. Practice supervised by members of the DC bar.

** Admitted to bars of Washington State, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court of the District of Columbia.

Because Dove has experienced net losses with insufficient cash assets to cover both these losses and the cost of captioning its programs, Consumer Groups do not oppose the granting of a short waiver to Dove.

I. Background

Dove produces two television programs, "Nite Line" and "Beverly Exercise."¹ Nite Line is a live, 2 hour program, that airs twice daily and is distributed primarily to WGGG-TV in the Greenville, Spartanburg, Asheville, Anderson DMA in South Carolina.² WATC-DT in Atlanta, Georgia and WBPI-CD in Augusta, Georgia are secondary outlets that may air non-synchronous episodes at each station's discretion.³ Dove estimates that it produces approximately 524 hours of Nite Line programming per year.⁴

Beverly Exercise is a 30 minute program focusing on exercise, motivation, and healthy living habits for senior adults. It is broadcast on WGGG-TV in Greenville, South Carolina, WRXY-TV in Tice, Florida, WHBR(TV) in Pensacola, Florida, WLLA(TV) in Kalamazoo, Michigan, WYKE-CD in Inglis/Yankeetown, Florida, WGGN-TV in Sandusky, Ohio, KSCE(TV) in El Paso, Texas, WFRZ-TV in Montgomery, Alabama, and WTLW(TV) in Lima, Ohio.⁵ Dove estimates that it produces around 30 Beverly Exercise episodes each year.⁶ According to the Petition, Dove and these stations also maintain libraries of approximately 70 archived episodes of Beverly Exercise, which the stations re-air at their own discretion.⁷

Dove submitted a petition for exemption from captioning on September 14, 2015 (the "Petition").⁸ The Consumer and Governmental Affairs Bureau (the "Bureau") requested supplemental information on September 29, 2015.⁹ Dove filed a supplement

¹ *Dove Broadcasting Petition for Exemption*, Dkt. No. 06-181, pg. 1 (Sep. 14, 2015) [hereinafter *Petition*].

² *Id.*

³ *Id.*

⁴ *Petition* at 2.

⁵ *Id.* at 1.

⁶ *Id.* at 3.

⁷ *Id.* at 3-4.

⁸ *Petition*.

⁹ *Consumer and Governmental Affairs Bureau Request for Supplemental Information*, Dkt No. 06-181 (Sep. 29, 2015).

on October 27, 2015¹⁰ and the Bureau placed the Petition on Public Notice on February 2, 2016.¹¹

II. Legal Standard

Under Section 613(d)(3) of the Communications Act of 1934, as amended, a video programming provider may petition the Commission for a full or partial exemption from the Commission's closed captioning requirements if compliance would be "economically burdensome."¹² The Commission considers several factors on a case-by-case basis when determining whether a petitioner has made the required showing under the economically burdensome standard.¹³ An economically burdensome waiver is appropriate when a petitioner has demonstrated that compliance with the closed captioning rules would likely result in the cancellation of its programming.¹⁴

III. Consumer Groups Do Not Oppose a Short Captioning Exemption for Dove's New Programming

Consumer Groups do not oppose granting a short exemption for Dove's production of new programming. Based on Dove's submissions and Consumer Groups' own information and knowledge regarding costs associated with captioning, Consumer Groups agree that it would currently be economically burdensome for Dove to pay for captioning of new episodes of Nite Line and Beverly Exercise. Consumer Groups believe this to be the case even taking into consideration flaws in Dove's estimate of captioning costs. However, Consumer Groups urge the Bureau to make clear that any issued captioning exemption applies only to Dove's production of new programming, and not to archived, already-produced episodes of programs distributed outside of Dove's direction or control.

¹⁰ *Dove Broadcasting Supplement*, Dkt. No. 06-181 (Oct. 27, 2015) [hereinafter *Supplement*].

¹¹ *Request for Comment on Request for Exemption from Commission's Closed Captioning Rules*, Dkt. No. 06-181 (Feb. 2, 2016).

¹² 47 USC 613(d)(3).

¹³ 47 USC 613(e).

¹⁴ First Baptist Church, Jonesboro, Arkansas, 29 FCC Rcd 12833, ¶¶13-14 (2014); 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).

A. Dove does not currently have the resources to pay for the captioning of its new episodes

Of the quotes provided, the lowest total annual captioning cost for new Nite Line and Beverly Exercise episodes would be \$57,055.¹⁵ Dove has demonstrated that it would not have been able to afford these captioning costs in either 2014 or 2013, when it experienced net losses of \$14,114¹⁶ and \$2,573¹⁷, respectively. Dove has also demonstrated that it could not have covered these caption costs with its cash assets. In 2014, Dove had \$34,420 in cash and \$3,183 in liabilities.¹⁸ In 2013, Dove had \$41,616 in cash and \$2,537 in liabilities.¹⁹ Neither the remaining \$31,237 in 2014 nor \$39,079 in 2013 would have been enough to cover both Dove's losses and captioning costs in each year.

B. Consumer Groups do not oppose the Petition even taking into consideration Dove's flawed estimate of captioning costs

Consumer Groups note that it would be economically burdensome for Dove to caption new programming even accounting for Dove's erroneous inclusion of two unnecessary expenses in its estimated captioning costs: purchase of a closed captioning encoder, and a part-time employee tasked with caption-related activities.

First, contrary to the Petition, Dove has not demonstrated that it would need to purchase an encoder to live caption Nite Line. Dove claims that it would need to purchase a closed captioning encoder for \$7,792 in addition to hiring a company to provide live captioning.²⁰ An encoder is used to integrate captioning into the video so that a person has the ability to turn on and off the closed captioning.²¹ Dove has not

¹⁵ *Supplement* at 2-4. The lowest cost for live captioning new episodes of Nite Line is from Aberdeen for \$52,600 (\$100 per hour, times 524 hours, plus a \$200 set up fee) and the lowest cost for captioning new episodes of Beverly Exercise is from VITAC for \$4,455 (\$147.50 per episode, times 30 new programs per year) for a total of \$57,055 annual caption costs. Consumer Groups note that Dove calculated additional costs of purchasing an encoder and hiring an additional employee into its claimed captioning costs. For the reasons explained *infra*, these costs should not be considered.

¹⁶ *Petition* at 10.

¹⁷ *Id.* at 15.

¹⁸ *Petition* at 9.

¹⁹ *Id.* at 14.

²⁰ *Petition* at 2.

²¹ See Jan Ozer, *How to Deploy Closed Captions*, Streaming Media (Sep. 2014), <http://www.streamingmedia.com/Articles/Editorial/Featured-Articles/How-to-Deploy-Closed-Captions-99435.aspx>.

demonstrated that closed captioning companies require that programmers obtain their own encoder.²² In this case, specifically, Dove's lowest estimated captioning cost from Aberdeen does not mention that Dove would have to provide an encoder.²³ Therefore, purchasing an encoder is an unnecessary expense and should not be counted towards the cost of captioning.

Second, contrary to its claims, Dove has not demonstrated that it would need to hire an additional part-time employee in order to comply with captioning requirements. Because Nite Line is a live and unscripted show, Dove states that captioning the show would require it to hire an additional employee tasked with organizing programs to conform to a more strictly scripted format such that proper vocabulary and terminology lists could be generated and provided to a captioning company. Dove estimates that an additional employee performing such tasks would cost \$7,860 per year.²⁴ Although Nite Line may use biblical terms that require accurate spelling in captioning,²⁵ Dove could easily create a single document that includes common terminology meanings and spellings. Any terminology that comes up could be identified from this material, and would unlikely be made up on the spot. Therefore, providing a captioning company with information to ensure caption quality would not require Dove to hire an additional employee. Even if an additional labor from an existing or new employee was needed, such tasks are small and ancillary to providing captioning, and should not be factored into the costs. Moreover, Consumer Groups are concerned that allowing programmers to attribute ancillary labor to their cost of captioning would enable inflation of the necessary costs.

²² In one quote, Captionmax asks Dove, "What type of encoder do you have?" Without context, however, this question does not necessarily mean that Dove must own an encoder in order for Captionmax to provide services. This question was more likely asking what type of encoder the *stations* have. *Petition* at 22. In any event, Captionmax was not the lowest estimate for Nite Line.

²³ *Petition* at 19. To the contrary, Aberdeen states that Dove would have to provide "2 analog phones (one for the encoder and one for audio connection)," but it does not state that Dove would have to provide the encoder itself. *Id.* If Dove was required to purchase an encoder, Aberdeen would have explicitly said so here.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 19. Aberdeen states that Dove would have to provide "a show rundown and/or a list of uncommon words and acronyms, glossary terms, names of presenters and topic of content via e-mail a day before captioning is schedule." Aberdeen is asking for a standard "cheat sheet" in order to provide captioning accuracy. Dove has not demonstrated that hiring a part-time employee is needed in order to provide this document.

IV. Any Exemption Granted Should Only Cover Dove's Production of New Programming

Although Consumer Groups do not oppose the granting of a short captioning exemption for production of Dove's new programming, the Bureau should make clear that any such exemption does not extend to Dove's "library" of archived episodes of Beverly Exercise (the "Beverly library"), and that estimated costs associated with the Beverly library are irrelevant to the consideration of a petition for an exemption. To include these archived episodes under a captioning exemption based on the economically burdensome standard would be inconsistent with the Communications Act and associated regulations. Moreover, it would set a troubling precedent at odds with the intent of the exemption program.

A. Where the Beverly library is concerned, Dove is no longer a link in the "distribution chain" that the exemption provision aims to preserve

Section 613(d)(3) was designed to serve as the basis for a captioning exemption necessary to preserve programming production and distribution. This provision was not intended to serve as the basis to exempt a program owner that has already produced and passed on control of the content at issue, as Dove's submissions indicate it has done with the Beverly library.

As Congress explained when it crafted the provision, "the Commission shall balance the need for closed captioned programming against the potential for hindering the *production and distribution* of programming."²⁶ But where the Beverly library is concerned, the episodes at issue have already been produced, and have already been passed through from Dove to other distributors. According to Dove, "Stations to which Dove Broadcasting provides Beverly Exercise maintain their own libraries of the program, and air these programs on schedules determined by the local station."²⁷ Thus with respect to the Beverly library, Dove is no longer "[a]ny party within the . . . distribution chain" eligible to file an exemption petition.²⁸ Dove's Petition should therefore be dismissed insofar as it seeks an exemption for archived episodes no longer

²⁶ Conference Report on the 1996 Telecommunications Act at 183, <https://www.gpo.gov/fdsys/pkg/CRPT-104hrpt458/pdf/CRPT-104hrpt458.pdf> (emphasis added)

²⁷ *Petition* at 3.

²⁸ 1997 Report and Order, Closed Captioning and Video Description of Video Programming, MM Docket No. 95-176 at ¶ 199.

under its control, and the Bureau should make clear that any issuing exemption extends only to new production.

B. In addition, the granting of an exemption to already-produced archived episodes of a program would set a troubling precedent

Additionally, the Bureau should bar consideration of the Beverly library in this exemption determination because to include the Beverly library would set a troubling precedent. Factoring in the cost to a petitioner of captioning a backlog collection of archived episodes of a program for which new content continues to be produced could seed a vicious cycle, in which granting a petitioner a temporary exemption in one year could cause that petitioner's future captioning costs to increase, thus decreasing the likelihood that a petitioner would ultimately "graduate" from requiring captioning exemptions. To illustrate, imagine that a petitioner produces 10 episodes of a program each year, and in Year 1 she cannot afford to caption her program. If the cost of captioning archived episodes were considered in later years' exemption determinations, then in Year 2 her captioning costs would increase and would encompass 20 episodes (the 10 old plus the 10 new). In Year 3, she would need to caption 30 episodes, 40 in Year 4, and so on. The ever-increasing captioning costs could, essentially, create indefinite exemptions for all of a petitioner's new and archived programming. This could also foster a perverse incentive for some entities to stockpile collections of uncaptioned content before petitioning for exemptions, thereby essentially manufacturing an "economic burden" for themselves.

For these reasons, the Bureau should not extend any captioning exemption to content in the Beverly library. The economic burden petition process is not meant to provide incentives or opportunities for programmers to avoid captioning costs that should be accepted along with other routine programming costs.

V. Conclusion

Consumer Groups do not oppose the FCC granting a temporary waiver to Dove's new programming. Any waiver, however, should be limited to one year as the economically burdensome waiver process "is not designed to perpetually relieve a petitioner of its captioning obligation."²⁹ Moreover, given the evolution of technology, potential drops in the cost of captioning over time, and the possibility that the financial status of a petitioner may change, the Commission should refrain from granting lengthy

²⁹ Anglers, 26 FCC Rcd at 14953, ¶23.

or open-ended exemptions. A short waiver will give Dove time to identify financial resources to bring its programming into compliance with the Commission's closed captioning rules.

Sincerely,

/s/

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/s/

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CERTIFICATION

Pursuant to 47 C.F.R. §§ 1.16 and 79.1(f)(9), I, Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), hereby certify under penalty of perjury that to the extent there are any facts or considerations not already in the public domain which have been relied on in the foregoing document, these facts and considerations are true and correct to the best of my knowledge.



Claude Stout
March 3, 2016

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on March 3, 2016, 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 Petitioners at the address listed below.

Dante Thompson
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3409 Rutherford Rd. Ext.
Taylors, SC 29687

/s/

Niko Perazich
Institute for Public Representation

March 3, 2016