

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Closed Captioning and Video Description Of Video Programming	)	RM-11065
	)	
Petition for Rulemaking	)	

**OPPOSITION OF  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its opposition to the Petition for Rulemaking filed in the above-captioned proceeding. NCTA represents cable operators, programmers, equipment suppliers, and others interested in or affiliated with the cable television industry.

**INTRODUCTION**

The Petition for Rulemaking, filed on behalf of Telecommunications for the Deaf, Inc., National Association of the Deaf, Self Help for Hard of Hearing People, Inc., the Association of Late Deafened Adults, and the Deaf and Hard of Hearing Consumer Advocacy Network, seeks several changes to the FCC’s rules governing closed captioning.<sup>1</sup> In particular, Petitioners ask the Commission to initiate a rulemaking to overhaul the policies and procedures for filing captioning complaints and to impose new recordkeeping requirements and rules governing the technical and non-technical quality of captions. The Petition provides no cause for the Commission to revisit its captioning rules. These rules established a careful balance of interests

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<sup>1</sup> 47 C.F.R. § 79.1.

which has resulted in an enormous increase in the amount of captioned programming over the last several years.

NCTA's cable programmer and cable operator members take their captioning responsibilities very seriously. Cable programmers have invested significant resources to ensure that they can provide high quality captions for their programming. A number of cable networks go beyond what the rules require, exceeding the benchmark requirements for hours of captioned programming to reach audiences that benefit from captioning. Cable operators, too, are very aware of their captioning obligations and have worked to expeditiously resolve any captioning issues that might arise at the local level.

This is not to say that this process – like any process that involves the transmission of thousands of hours of programming each week – is mistake-free. As the Petition points out, captioning is still not perfect, and technical glitches and mistakes in captioning can and do occur. Improvements can always be made, and the cable industry is committed to working to improve these processes to better serve its deaf and hard of hearing customers. But the Petition fails to make the case that new FCC rules are the solution to any perceived problems.

Discussions with NCTA's operator and programmer members suggest that captioning complaints appear to be rare indeed and are corrected as quickly as possible. Over the four years that the FCC's rules have been in place, the agency has adjudicated only two violations of the rules. While the Petition points to a handful of instances in which problems have arisen with cable's provision of captioned programming, these incidents fall far short of demonstrating a problem that warrants the significant changes in the rules and increased burdens on programmers and operators that the Petition proposes.

The Commission has already considered and rejected many of the specific rule changes sought by the Petition. As demonstrated below, the Petition fails to provide evidence that the agency's judgments were in error or that circumstances have changed so dramatically that these previously dismissed proposals should now be adopted.<sup>2</sup>

## ARGUMENT

### **A. The Commission Should Not Adopt the Additional Compliance and Enforcement Measures Proposed by Petitioners**

The Petition urges several changes in the procedures for processing complaints. The Petition asserts that “based on communications that Petitioners have received from their constituents, it appears that deaf and hard-of-hearing consumers generally have little confidence in the ability of the current captioning enforcement and compliance provisions to bring about the resolution of captioning problems in a timely and efficient manner.”<sup>3</sup> Accordingly, the Petition proposes that the FCC require each operator to identify on bills and post on their website the name of the person responsible for resolving captioning issues.<sup>4</sup> But this is an impractical solution to whatever problem Petitioners perceive.

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<sup>2</sup> Section 1.407 of the Commission's rules provides for the institution of rulemaking petitions only when the petitioners provide “sufficient reasons in support of the action requested to justify the institution of a rulemaking.” Otherwise, the rulemaking will be denied. In order to establish “sufficient reasons” on an issue the Commission has previously considered, a petitioner must show there has been a change in circumstances from when the FCC last addressed the issue, or must put forth new or novel arguments. See Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts, 56 RR2d 625, 631-32 (1984) (declining to initiate rulemaking proceeding because circumstances had not changed from previous Commission consideration of the matter); Amendment of Section 90.611 (d) of the Commission's Rules Governing the Application Processing Procedures for the 900 MHz Private Land Mobile Radio Band, 4 FCC Rcd 511 (1989) (declining to consider rulemaking petition because no new or novel arguments put forth by petitioners).

<sup>3</sup> Petition at 12.

<sup>4</sup> Petition at 13.

Cable systems operate 24 hours a day, and most television viewing occurs in the evening. Even if a name is provided, the likelihood of that person being available to instantaneously resolve a captioning problem is not high. But that does not mean that cable operators ignore captioning issues. To the contrary, a mechanism already exists that is more likely to lead to the rapid resolution of captioning problems. Cable operators have customer service representatives (CSRs) – often times, operating 24/7 – that can assist customers in resolving captioning issues. For cable customers, there is no need to provide a separate point of contact outside the normal course since all cable customers have easy access to information about how to contact their cable operator and resolve complaints.<sup>5</sup> And if those problems cannot be resolved by the CSRs, many operators have routine procedures for ensuring that the issue is directed to the appropriate person at the system level for resolution. Cable operators, in turn, can contact the program network if the operator determines that the problem arises at the network level. In addition, many programming networks have various methods in place by which subscribers can convey their comments and questions about closed captioning directly to the networks.

**B. The FCC Should Not Impose Burdensome Recordkeeping Requirements**

When the FCC adopted captioning requirements, it examined, and rejected, a proposal to enforce its captioning rules through a reporting obligation.<sup>6</sup> The Commission decided not to adopt recordkeeping requirements or require the filing of periodic reports, “believ[ing] that specific recordkeeping or filing requirements would be unnecessarily burdensome and

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<sup>5</sup> See 47 C.F.R. § 76.1602 (customer service requirements).

<sup>6</sup> Closed Captioning and Video Description of Video Programming, 13 FCC Rcd. 3272 at ¶ 244 (1997) (hereinafter “Captioning Report and Order”).

administratively cumbersome.”<sup>7</sup> The FCC upheld this decision on reconsideration.<sup>8</sup> The Petition for the third time asks the FCC to adopt these burdensome requirements.

Petitioners argue that these requirements are needed because they “fear that the lack of benchmark reporting requirements has created a situation where many providers are unaware that they are out of compliance with the benchmarks.”<sup>9</sup> But the Petition provides no proof for that sweeping assertion – nor are we aware of any basis for crediting it. Indeed, the Annenberg Public Policy Center found, in an assessment of closed captioning, that “professionals at cable networks also had a good working knowledge of the [captioning] regulations, particularly those regulations pertaining to new networks and their captioning requirements.”<sup>10</sup> That is consistent with NCTA’s experience. Cable operators and program networks are well-aware of their captioning obligations and have worked diligently to achieve high-level compliance.<sup>11</sup>

As the Commission’s orders contemplate, cable networks are typically contractually obligated in their relationships with cable operators to comply with the captioning obligations. The FCC allows cable operators to “rely upon certifications of compliance from the various networks they carry.”<sup>12</sup> Many operators, indeed, ask programmers to furnish certifications of

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<sup>7</sup> Id.

<sup>8</sup> Closed Captioning and Video Description of Video Programming, 13 FCC Rcd. 19,973 at ¶ 118 (1998) (hereinafter “Reconsideration Order”).

<sup>9</sup> Petition at 18. The Petition’s suggestion that recordkeeping and reporting are necessary to enable consumers to file complaints about compliance ignores the leniency already embodied in the FCC’s rules, which permit complaints to be filed based on a representative sampling of programming. See Report and Order, 13 FCC Rcd. at ¶ 241.

<sup>10</sup> “The State of Closed Captioning in the United States,” Annenberg Public Policy Center at 31 (2003) (hereinafter “Annenberg Report”).

<sup>11</sup> Petitioners point to only a single instance in which a violation has been found. Even then, the cable network and operator mistakenly believed that they were in compliance with the rules. This isolated honest mistake does not show the widespread non-compliance that forms the underpinning of Petitioners’ burdensome recordkeeping request.

<sup>12</sup> Captioning Report and Order at ¶ 244.

compliance, and that is, in fact, still the only practical way for a cable operator to confirm that the several hundred channels it carries comply with the rules. And it provides a significant incentive for program networks to self-police to confirm that they are adhering to the captioning benchmarks. Programmers go to substantial lengths to ensure that they are in compliance every quarter.

The prospective burdens of recordkeeping and reporting requirements for cable have not abated since the initial captioning orders. With the accelerated, widespread roll-out of digital tiers since that time, the number of cable networks carried by the average cable system has increased significantly. Cable operators now carry on average over 100 program networks and often many times more. Maintaining and posting captioning reports on a quarterly basis would impose a significant paperwork and recordkeeping burden. At the same time, the need for any such measure has decreased and will decrease even further. Beginning in 2006, all new non-exempt programming must be captioned. Therefore, determining whether a program is exempt from captioning – or should have been captioned – will be a simpler undertaking for viewers.

Petitioners also suggest that the FCC conduct benchmark compliance audits.<sup>13</sup> The FCC on reconsideration had announced that it would “conduct random audits of captioning similar to the audits we use to monitor compliance with other rules, such as the children’s programming requirement.”<sup>14</sup> Thus, the Commission already has ample tools to assure that the cable industry is fulfilling its captioning obligations.

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<sup>13</sup> Petition at 20.

<sup>14</sup> Reconsideration Order at ¶ 118.

**C. The FCC Need Not Modify its Complaint Procedures**

Existing rules provide cable operators 45 days after a quarter ends or a complaint is filed, whichever is later, to respond to a captioning complaint.<sup>15</sup> Petitioners ask that the FCC shorten that complaint period and establish a new timeframe of 30 days in which a cable operator must respond to complaints about captioning issues other than compliance with the captioning benchmarks.<sup>16</sup>

It is reasonable to expect a timely response to a captioning complaint, and the frustration in obtaining a rapid answer to the question why a particular program lacks captions is understandable. However, the Petition provides no evidence that adopting a new rule is either a necessary or appropriate response. Rather, so far as we are aware (and the Petition provides no evidence to the contrary), neither cable operators nor programmers have waited until the end of the calendar quarter to respond to complainants. In fact, operators have procedures in place to address captioning concerns as quickly as possible – in some cases, instantaneously and in other cases the next day.<sup>17</sup> Programmers in many cases also routinely respond to captioning questions received directly from viewers.

In the normal course, then, captioning questions can be quickly resolved. As the Commission understood in adopting these longer timetables, though, it may require time to determine why a particular show is not captioned. The problem may not lie at the system level. A cable operator must have time to investigate the reason for the captioning issue – time that enables the operator to contact the program network and allows the network to determine why a

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<sup>15</sup> 47 C.F.R. § 79.1(g)(3).

<sup>16</sup> Petition at 21-22.

<sup>17</sup> In fact, cable's customer service rules contain aggressive guidelines for resolving service interruptions and responding to customer inquiries. 47 C.F.R. § 76.309.

program was not captioned as well.<sup>18</sup> The FCC's rules, therefore, reasonably provide sufficient time to investigate and resolve the issue.

**D. There is No Reason to Adopt Punitive Measures**

The Petition asks the FCC to “establish a system of punitive penalties,” with a base forfeiture amount of \$8,000 per violation, for violations of the captioning benchmarks. According to Petitioners, “such a forfeiture would create a financial incentive for video programming distributors or providers to comply with the Commission’s benchmarks.”<sup>19</sup> These punitive measures are not warranted.

When it established closed captioning rules, the Commission announced that “if a violation has occurred, we may impose appropriate penalties, including, for example, forfeitures, or in the instances of flagrant rule violation, we may require that the video programming distributor deliver captions in excess of the established benchmarks.”<sup>20</sup> The rules thus already contain forfeiture authority.

Fines may be appropriate in the case of willful or repeated failure to comply with the rules. But the Petition provides no evidence that any such violations are occurring. Occasional glitches may occur with captioning, as they may occur with the video or audio portion of cable service generally. But inadvertent mistakes or occasional technical problems provide no basis for assuming each program that fails to provide required captions merits a fine.

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<sup>18</sup> Of course, a program may not be captioned because it is exempt or not necessary to meet the quarterly benchmark.

<sup>19</sup> Petition at 23.

<sup>20</sup> Captioning Report and Order at ¶ 243 (emphasis supplied).

**E. Petitioners Provide No Evidence that Rules are Needed to Ensure Technical Quality**

Petitioners also urge the FCC to adopt rules to maintain the technical quality of captions. They argue that “based on the communications Petitioners continue to receive from deaf and hard of hearing individuals, such technical problems (including, but not limited to the same problems highlighted in the 1997 report and order) continue to occur, and technical quality has not been ensured or noticeably improved by virtue of the pass-through requirement in Section 79.1(c).”<sup>21</sup> Section 79.1, like earlier rules, requires cable operators (and now other video programming distributors) to “deliver all programming received from the video programming owner or other origination source containing closed captioning to receiving television households with the original closed captioning data intact in a format that can be recovered and displayed by decoders meeting the standards of part 15 of this chapter unless such programming is recaptioned or the captions are reformatted by the programming distributor.” The Petition contains no evidence that cable operators are ignoring this rule or that the technical quality issues they cite are at all related to cable’s failure to comply with the “pass-through” rules.

The Petition, though, urges the FCC to require continuous monitoring of equipment to prevent those “technical quality” issues. But that onerous step is neither necessary nor practical. Cable operators pass captions through when the programming is received at the headend from the program network or broadcaster. Cable operators routinely monitor their equipment to ensure high quality transmissions of each signal’s video, audio and line 21 closed captioning material. Program networks also monitor their network transmissions to ensure the quality of each

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<sup>21</sup> Petition at 25. The Petitioners cite to several “technical quality” issues, including captions disappearing from national network programs ten minutes before the program’s end or one hour into a two hour movie, TV listings that indicate the program is captioned when it is not, illegible captions, and captions appearing on a program in one area and not another. *Id.* at 26.

program's technical specifications, including video, audio and closed captions. In fact, so far as we are aware, the availability of captions in any particular program from its creation to the transmission to cable operators and other multi-channel distributors is routinely checked, either through active monitoring or spot checks.

The Commission's captioning rules were adopted with the recognition that it is simply not feasible for an operator to monitor in real-time the captions on every one of the hundred channels it offers customers. And it struck a careful balance of interests to ensure that responsibility for captioning would not be unduly burdensome. In its captioning Report and Order, the Commission made clear that cable operators and other video programming distributors are

responsible for any corrective measures necessary to ensure that the captioning is consistently included with the video programming delivered to viewers. With respect to [cable operator's] concern about the need to monitor the simultaneous transmission of 500 channels of digital programming, we note that the video programming distributors' responsibility is to ensure that the equipment used to transmit these channels to viewers is capable of passing the captioning through along with the programming and is in proper working order. They may rely on certifications from video programming suppliers that the programming contains captions and will not need to actually review every program before distribution to consumers.<sup>22</sup>

These rules should not be modified.

**F. The Commission Should Not Modify the Rules Regarding Reformatting**

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Certain programming may be captioned when aired on one network but not captioned when aired on another network. This frequently happens when a previously-captioned programming is edited, among other reasons, for content or to insert commercial advertising. Viewers may be confused when captions do not appear on a program that was previously

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<sup>22</sup> Captioning Report and Order at ¶ 212 (emphasis supplied).

captioned. But there are significant costs involved in reformatting captions – costs that led the FCC to determine that “a requirement, in addition to the other requirements of our rules, that every program that has previously been captioned have its captions reformatted before it is redistributed to consumers could be economically burdensome in some cases because of the type or amount of editing that is done.”<sup>23</sup> The FCC did commit to review this decision to see whether “its expectation that reformatting will become an industry practice is fulfilled.”<sup>24</sup> But when it did reexamine this issue on reconsideration, it reaffirmed its previous decision.<sup>25</sup> Reformatting is only required when necessary to achieve a particular network’s quarterly captioning benchmark.<sup>26</sup>

Petitioners urge the Commission to revise this rule to require that reformatted programming be captioned, even if the programmer already has reached its captioning benchmark. But the Petition provides no reason to reopen the Commission’s rational and reasonable decisions other than its assertion that “if distributors are not required to reformat edited or compressed programming until 100% captioning is required in 2006, they may be more likely to claim that they are not able to comply with the 100% captioning requirement on January 1, 2006.”<sup>27</sup> Programmers today must recaption reformatted programming if necessary to meet their existing benchmarks and need no additional incentive to comply with future rules.

Equally unsupported in the Petition is the claim that “it seems likely that providers may improperly count mislabeled reformatted programming toward making the benchmark

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<sup>23</sup> Captioning Report and Order at ¶ 86.

<sup>24</sup> Id.

<sup>25</sup> Reconsideration Order at ¶ 82.

<sup>26</sup> Id.

<sup>27</sup> Petition at 32.

numbers.”<sup>28</sup> If a programmer is intentionally violating the benchmarks, then the solution is to file a complaint – not to change the rule to increase the burdens on all program networks.

Finally, Petitioners argue that “technology has progressed to the point that it is not problematic or cumbersome for providers to be required to caption edited or compressed video.”<sup>29</sup> But there are several problems with that unproven assertion. Costs are still high for high quality reformatting. While technology may have progressed, so far as we are aware quality control issues still arise with these software-based solutions.

By 2006, all new programming will be captioned, and reformatting will be the rule for “new” programming. The Commission was right to carve out reformatted programming from a requirement up until that point. Its reasoning for doing so remains valid today.

**G. Temporary Loss of Captions Should Not Disqualify Programming from Counting Toward the Benchmark**

The Petition seeks an FCC rule change that would penalize program networks for providing “substandard captioning” by not counting those efforts toward compliance with the benchmarks if there is a temporary loss of captions.<sup>30</sup> Tracking captioning to determine the amount of captioned minutes on an on-going basis would be a significant new undertaking for both cable operators and programmers. Cable networks, much more than broadcast networks, may provide 24-hour live programming that presents particular challenges for captioning and significant monitoring burdens.

In rare instances, a technical glitch in the distribution of programming from program network to operator to consumer could cause the temporary loss of captions, just as technical

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<sup>28</sup> Petition at 32.

<sup>29</sup> *Id.* at 32.

<sup>30</sup> *Id.* at 33.

glitches could result in the occasional loss of video and audio on one of the networks delivered by operators to their customers. But as explained above, even if that were to occur, cable operators cannot supply additional captioning for the programming they deliver. Thus, even if an operator detected a technical glitch in the distribution chain that caused captions to be garbled or cut-off, it would have no ability to compensate for the temporary loss of captioning.

Cable operators and programmers both strive to deliver satisfactory captioning to their viewers. We agree that if substantially all of a program's captioning is garbled, that program should not be counted. But there is no evidence that these instances are frequent or that excluding these would bring an operator below a benchmark for a particular network.

#### **H. Electronic News Room Captioning Should be Permitted**

The FCC already requires cable programmers with widespread distribution (and larger broadcasters in the top 25 DMAs) to rely on captioning other than "electronic newsroom captioning" to achieve their benchmarks. While not specific as to how their proposal would affect cable networks, petitioners ask the FCC to expand the number of markets beyond the top 25 DMAs in which electronic newsroom ("ENR") captioning may not count toward the captioning benchmark. ENR captioning can only provide captions for prerecorded material and not reports from outside the studio or ad-libbed dialogue. But it allows many more live newscasts to be captioned than might otherwise be affordable.

Again, the Commission has already examined this issue twice and rejected attempts to require live, non-ENR captioning. Petitioners claim, without any evidence, that "technology has developed" since the FCC's orders.<sup>31</sup> But short of live captioning, with the significant attendant

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<sup>31</sup> Petition at 34.

costs, we are unaware of any technological fix to this issue. The costs still remain significant, particularly for local cable news operations that often operate 24 hours a day.

Moreover, there is a significant shortage of captioners today, particularly real time captioners. It is estimated that there are only about 300 who “can consistently write 180 words per minute with an accuracy rate of at least 98.5 percent.”<sup>32</sup> With costs still high and real time captioners scarce, now is not the time to impose additional live captioning obligations on cable networks.

### **I. Non-Technical Standards are Unworkable**

Finally, Petitioners argue that the FCC should adopt “non-technical” standards for captioning. The Commission was right to reject this proposal the last time. The agency understood that there are

vast amounts of programming that will need to be captioned and those responsible for captioning under our rules will need to undertake significant efforts to ensure that the programming they distribute is in compliance with our rules. By leaving the development of quality standards to the marketplace, we are allowing video programming providers to establish quality standards and quality controls for the non-technical aspects of captioning through their arrangements with captioning suppliers or as part of the requirements of their programming contracts and licensing agreements.<sup>33</sup>

The Commission also expressed concern with “the administrative burden that would be imposed on video programming providers and the Commission if millions of hours of television programming must be monitored to make sure that no more than a specified percentage of words are wrong, misspelled, or missing at the same time that mandatory captioning is being implemented.”<sup>34</sup>

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<sup>32</sup> “Caption-Makers For Live TV are Few and Far Between,” Cox News Service (Mar. 26, 2004).

<sup>33</sup> Report and Order at ¶ 222.

<sup>34</sup> Id. at ¶ 224.

While there may be no FCC mandate, that does not mean program networks ignore these concerns. The marketplace has taken steps to provide high-quality captions. Cable networks have significant competitive and branding incentives to provide their viewers with quality captions. Program networks typically have contractual arrangements with captioning agencies that specify a high level of accuracy in their finished products. We have also been told that many cable networks have captioning quality control monitoring programs in place, either through their contracts with the agencies that supply the captions or internally. The Annenberg Report confirmed that cable networks take this issue seriously: “[r]espondents working for cable networks also outlined standard procedures for making sure that the transcripts produced from their programs were accurate.”<sup>35</sup> And they also described one cable network’s operating procedure that in our view appears to be fairly common in the industry: “After a program is fully completed and ready for air, including captions, we have someone screen those programs, either spot check them or anything in primetime they’ll screen in real-time, they call it QC or quality control, and they’ll check to make sure the captions are timed correctly.”<sup>36</sup> Cable programmers may have their own quality control teams that monitor captioning after receiving programming from third party captioning vendors. These network quality control departments review programming every step along the way, ensuring the accuracy of captions throughout this process.

Sometimes accuracy can suffer – particularly when captioning must be done at the last minute in a rush to air programs during a specified time period. But every effort is made to avoid

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<sup>35</sup> Annenberg Study at 35.

<sup>36</sup> Id.

these errors. An FCC rule that regulated caption quality would be counterproductive and burdensome.

### CONCLUSION

The Petition is helpful in pointing out areas where cable operators and programmers can try to better serve their deaf and hard of hearing audiences. And it does serve as a reminder to the cable industry of the regulatory and social responsibility owed to the audiences that rely on captioning to fully participate in our cultural and political life. Cable companies are committed to pursuing new ways to improve the captioning they provide and their processes for addressing problems that may arise. But the Petition provides no reason for the FCC to revise its carefully crafted and balanced captioning rules. The Commission should deny the Petition.

Respectfully submitted,



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October 4, 2004

**CERTIFICATE OF SERVICE**

I, Mia M. White, do hereby certify that on this 4<sup>th</sup> day October 2004, I caused one copy of the foregoing *Opposition*, to be sent via first class mail, postage prepaid, to the following:

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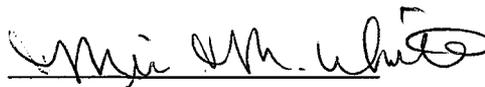
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