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May 2, 2006

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445-12th Street, SW
Washington, DC 20554

Re: CG Docket No. 05-231
***Ex Parte* regarding Oppositions to Petitions for Exemption from Closed Captioning Rules**

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), through its undersigned counsel, National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, and Hearing Loss Association of America (formerly known as Self Help for Hard of Hearing People) (collectively, “Commenters”) submit for filing in the above-captioned proceeding an *ex parte* memorandum regarding Oppositions to Petitions for Exemption from Closed Captioning Rules.

Should you have any questions concerning this matter, please do not hesitate to contact us.

Respectfully submitted,

/s/

Paul O. Gagnier
Troy F. Tanner

cc (via e-mail):

Mr. Tom Chandler (CGAB)
Ms. Amelia Brown (CGAB)
Mr. Claude L. Stout (TDI)
Mr. Kelby N. Brick, Esq. (NAD)
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Memorandum

DATE: May 2, 2006

TO: Thomas Chandler, Chief, Disability Rights Office
Amelia Brown

FROM: Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc.
Brenda Battat, Deputy Executive Director, Hearing Loss Association of America
Cheryl Heppner, Vice Chair, Deaf and Hard of Hearing Consumer Advocacy Network
Kelby Brick, Director of Law and Advocacy, National Association of the Deaf

RE: **Oppositions to Petitions for Exemption from Closed Captioning Rules**

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), National Association of the Deaf, the Deaf and Hard of Hearing Consumer Advocacy Network, and Hearing Loss Association of America (formerly known as Self Help for Hard of Hearing People) (collectively, “Commenters”) have been consistent advocates before the Federal Communications Commission (“FCC”) for the promotion of equal access in telecommunications and media for the 28 million Americans who are deaf, hard of hearing, late deafened, or deaf-blind, so that they may enjoy the opportunities and benefits of the telecommunications revolution to which they are entitled. Towards this end, Commenters have often worked closely with TDI’s attorneys at Bingham McCutchen LLP¹ to present their views to the FCC. For instance, during the past several years, Bingham McCutchen has prepared and filed on behalf of TDI, and those other Commenters that have wished to join, oppositions to petitions for exemption from the FCC’s closed captioning requirements. For the reasons discussed below, however, Commenters no longer plan to use Bingham McCutchen to routinely prepare and file oppositions to those exemption petitions that are clearly deficient under existing FCC standards.

Commenters feel it is vitally important that video programming be closed captioned, regardless of distribution technologies, to ensure that it is accessible to persons with hearing loss. Commenters understand that there are cases where enforcement of the closed captioning requirements found in Section 713 of the Communications Act of 1934, as amended, and as implemented in Section 79.1 of the Commission’s Rules, might impose an undue burden on the video programming provider or video owner. But it has been Commenters’ experience that the vast majority of petitions filed with the FCC for an exemption from these rules have failed to demonstrate that such an undue burden exists. As a result, during the past several years, Commenters have asked TDI’s counsel to prepare oppositions to over 60

¹ Bingham McCutchen LLP recently merged with Swidler Berlin LLP. Prior to the merger, TDI had a long-standing relationship with Swidler Berlin LLP.

exemption petitions. Commenters gratefully note that the FCC has yet to grant a petition that Commenters have opposed.

As of January 1, 2006, 100% of all new non-exempt programming must be captioned; the ultimate captioning benchmark in the Commission's rules. As a result of reaching this benchmark, an extraordinarily large number of petitions have been filed at the FCC seeking an exemption from the closed captioning rules. Commenters understand there are well over 450 pending petitions. This has put an enormous strain on our resources and has limited our ability to review and comment on every single exemption petition filed at the FCC. Almost all of these petitions reviewed to date offer insufficient evidence to demonstrate that compliance would impose an undue burden under the four statutory exemption factors.² Therefore they do not meet the legal standard for granting a request for exemption of the closed captioning rules.

Preparing a unique opposition to each of the pending 450 petitions, no matter how routine the oppositions have become, poses a significant burden on Commenters and their limited resources. Therefore, Commenters have decided to not have Bingham McCutchen routinely prepare oppositions to closed captioning exemption petitions that are clearly deficient.

Commenters wish to emphasize that their silence in opposing any particular petition does not at all indicate their support for the petition. Further, Commenters trust in the ability of the FCC staff to use its significant experience and large body of case law it has developed to correctly deal with those deficient petitions that have already come on public notice, but have not been formally opposed due to Commenters' limited resources.

Commenters may from time to time file detailed oppositions to petition they feel raise new and novel issues that the FCC has not addressed before. However, for the vast majority of petitions, Commenters, individually or collectively, may file

² Section 713 requires the Commission to consider four factors when determining whether the closed captioning requirements will impose an undue burden: (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.

Section 79.1(f) of the Commission's rules sets forth the Commission's procedures for seeking an exemption from the closed captioning requirements on the basis that compliance would impose an undue burden. A petition for an exemption from the closed captioning requirements must be supported by sufficient evidence to demonstrate that compliance with the requirements would cause an undue burden. Such petition must contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on by the petitioner. It must also describe any available alternatives that might constitute a reasonable substitute for the captioning requirements.

general oppositions or rely upon the FCC staff to recognize these petitions as deficient.

Commenters appreciate the FCC staff's significant time and energy that has gone into enforcing the closed captioning rules, thereby helping bring the benefits of television media to the millions of Americans who are deaf, hard of hearing, late deafened, or deaf-blind. If there is any way Commenters may be of assistance to the FCC in fulfilling its mission, please let us know.