

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

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OCT 30 2006

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Anglers for Christ Ministries, Inc.)	CGB-CC-0005
)	
)	
New Beginnings Ministries)	CGB-CC-0007
)	
)	
Video Programming Accessibility)	Docket No. 06-181
)	
Petition for Exemption from Closed Captioning)	
Requirements)	

TO: THE COMMISSION

OPPOSITION TO APPLICATION FOR REVIEW OF BUREAU ORDER

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SUMMARY

National Religious Broadcasters submits that the decision and Order of the *Anglers Exemption Order* issued by the Chief of the Consumer & Governmental Affairs Bureau (hereinafter, "Bureau"), which granted exemptions from closed captioning requirements under § 713 (d)(1) of the Communications Act of 1934, as amended, does not create a new class of exempt programming; but rather, clarifies the meaning of "undue burden" in a manner that is consistent with the expressed intent of Congress that non-profit organizations be considered for exemption, and that the detrimental impact of closed captioning costs be weighed in terms of resultant potential for decrease in programming or diminution of mission-important activities. Further, when compared to another analogous area of law construing exemptions based on "undue" hardship (i.e. employment discrimination regulations) the test provided by the Bureau is reasonable and, in fact, quite rigorous by comparison.

While it has been suggested by groups that advocate for the hearing impaired that the Order at issue may violate the First Amendment (presumably the Establishment Clause), in improperly favoring requests for exemption from religious broadcasters, we do not believe that to be the case because: (a) no evidence has been submitted indicating an intent to specifically favor religious exemption seekers; (b) the terms in the Order are religion-neutral on their face; (c) Supreme Court decisions have uniformly permitted exemptions to religious organizations in similar situations, and have held that similar "benefits" incidentally accruing to religious groups do not violate the Establishment Clause, even when the preponderant percentage of beneficiaries are religious.

INTRODUCTION

National Religious Broadcasters files this Opposition to the Application for Review of Bureau Order, relating to the Application for Review of Bureau Order (hereinafter, “Application”) previously filed by Telecommunications for the Deaf and Hard of Hearing, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, National Association of the Deaf, Hearing Loss Association of America, Association of Late Deafened Adults, Inc., American Association of People with Disabilities, and California Coalition of Agencies Serving the Deaf and Hard of Hearing (hereinafter, “Applicants”), pursuant to Section 1.115 (d) and (f) of the Commission Rules; 47 C.F.R. § 1.115.

National Religious Broadcasters is a non-profit association that exists to keep the doors of electronic media open and accessible for religious broadcasters. We have more than 1400 members, many of which are television broadcasters that produce religious programming. Of those, a sizable number are non-profit religious television broadcasters.

In light of our mission, the effect of closed captioning regulations on non-profit religious broadcasters is an issue of great importance to our organization. We have urged our members, who have the financial capacity to do so, to fulfill their obligation to implement closed captioning. We consider this to be fully consistent with our mission to reach the broadest possible audience with the good news of eternal life through faith in Jesus Christ, including the hearing-impaired community.

Nevertheless, we also recognize the financial realities of the non-profit communications marketplace. We are concerned that any enforcement of closed

captioning that does not fairly and reasonably apply “undue burden” considerations to non-profit broadcasters would inevitably restrict the amount of programming that religious broadcasters could afford to produce, or in some instances, could force religious broadcasters off the air entirely.

With this as a background, we have reviewed the *Anglers Exemption Order* issued by the Chief of the Consumer & Governmental Affairs Bureau (hereinafter, “Bureau”), which granted exemptions from closed captioning requirements under § 713 (d)(1) of the Communications Act of 1934, as amended (hereinafter, “Act”); 47 U.S.C. § 613 (e).

Further, we have concluded that the Order properly reflects the intent of Congress, and represents a workable and reasonable application of the policy that recognizes exemptions for non-profit broadcasters who would otherwise incur an “undue burden” in complying with closed captioning requirements.

It should be stressed that we do not envision – nor do we advocate – a wholesale exemption for all religious television broadcasters. Rather, we contend that the terms of the Order under review in this matter represents the proper resolution of “undue burden” exemption requests.

Also significant is the fact that, as Applicants point out, many religious non-profit organizations have not sought exemption, but have fully complied with the captioning requirement.¹

To put this in a proper perspective, therefore, we submit that the issue is not whether the Bureau has opened the flood gates of exemptions for religious non-profit

¹ Application, 18, n. 57.

broadcasters; but rather, the ultimate issue is whether the Bureau's Order lawfully applies the "undue burden" exemption to non-profits, including those which are religious broadcasters.

We believe that it does, and this Opposition contains our reasons. We request that the Application be denied, and in any event that the terms of the Order in question be affirmed.

I. QUESTIONS PRESENTED

Whether the *Anglers Exemption Order*, regarding exemptions of non-profit organizations from closed-captioning requirements, violated § 713 (d)(1) of the Communications Act of 1934, as amended (hereinafter, "Act");

Whether the Order of the Bureau violated the First Amendment of the United States Constitution because of its treatment of exemption applications of religious broadcasters.²

² The Application herein opposed also cites a potential violation of the Fourteenth Amendment. Application, 19, n. 58. We presume that Applicants suggest a violation of the Equal Protection Clause, though that is not expressly argued. In any event, the test for intentional religious discrimination under an equal protection analysis is highly rigorous; the record set forth on that account by Applicants clearly does not satisfy it. *See: Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993) (utilizing an equal protection analysis in the context of a Free Exercise claim, but under facts clearly showing that the government officials were expressly targeting religion for treatment different than non-religion); *see also: LeBlanc-Sternberg v. Fletcher et al.*, 67 F. 3d 412 (2nd Cir. 1995)(applying *City of Hialeah* to a religious practice case). If applicant is not suggesting an equal protection claim, then the Fourteenth Amendment reference is superfluous, because in Religion Clause claims the Fourteenth Amendment only becomes relevant when necessary to incorporate the Religion Clauses and make them applicable to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). That is clearly not a factor here, as the Commission is a federal agency.

I. DISCUSSION

A. The Decision of the Bureau Does Not Violate the Act

The applicants argue that “[t]he Bureau adopted an unclear and unworkable standard for a new class of exempted programming in the *Anglers Exemption Order*.” Application, 17.

The standard adopted by the Bureau exempts any group that qualifies as:

... a non-profit organization that does not receive compensation from video programming distributors from the airing of its programming, and that, in the absence of an exemption, may terminate or substantially curtail its programming, or curtail other activities important to its mission.

Anglers Exemption Order at ¶ 11, cited at Application, 17.

First, it should be noted that while the Order does provide an exemption framework specifically for “non-profit” organizations, that focus, in itself, should not be viewed as troublesome, arbitrary, discriminatory, or even unexpected.³ Congress had expressly contemplated such an occurrence.⁴

The real problem articulated by applicants is that Bureau’s standard, according to them, “neither incorporates an ‘economically burdensome’ or an ‘undue burden’ standard as mandated by the Act ...” *Id.*

³ Applicants argue that this constitutes a “new class of exempt programming.” Application, 10. To the contrary, this standard, applicable to non-profit groups, simply illustrates how one category of exemption seekers (non-profits) would go about showing the existence of an “undue burden;” i.e., by demonstrating the impact on critical services (e.g. programming) rather than an impact on intrinsically commercial factors such as decreased profitability.

⁴ In evaluating the response from commenters, the Commission was informed “that Congress specifically enumerated nonprofit status as a factor we should consider in crafting our exemptions.” *In the Matter of 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, ¶ 95 (1997) (“Report and Order”).

We would submit, however, that the Bureau's standard is simply a logical clarification of the "undue burden" test. The Bureau has, in its language, refined the economic impact requirement. It has made clear that the financial detriment caused by compliance with closed captioning must be shown to likely produce a central interference, a mission-critical intrusion onto the non-profit organization's "programming" or "other activities important to its mission."

This "impact-oriented" test by the Bureau is in line with Congressional intent. Section 713(e) of the Act states, in part, that:

The term "undue burden" means *significant difficulty or expense*. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include –

- (1) the *nature and cost* of the closed captions for the programming;
- (2) the *impact* on the operation of the provider or program owner;

Communications Act of 1934, as amended; 47 U.S.C. § 613(e) (emphasis added).

Thus, the Bureau's criteria for non-profit exemptions corresponds directly to the guidelines set forth by Congress: that the "difficulty" or "expense" created by the captioning requirement be "significant" and not trivial; and that not only the raw "cost" expenses be weighed, but also the "impact" of those costs on the overall operations of the non-profit broadcast provider or owner.

The Commission has noted the lack of an exact legal paradigm for the "undue burden" concept utilized by Congress in the context of closed captioning exemptions; nevertheless, the Commission has also rightly noted that the critical question is ultimately whether the costs of captioning for individual broadcasters or owners will result in a diminishing of the amount of programming:

The “undue burden” concept has its origins in provisions of the Americans with Disabilities Act of 1990 and the other related legislation. Although there has been a considerable amount of litigation and scholarly discussion of the appropriate methodology for evaluating this issue as a consequence of these earlier laws, no readily adaptable formulation that could be transferred to this proceeding has been found in that history either. The *analytical problem* is exacerbated by the difficulty of knowing in what circumstances the costs may be directly passed on to consumers or shared with other entities in the program creation and distribution chain. There are also differences between services that are likely to have relatively fixed costs, such as those that are involved daily in the direct creation of programming and those that purchase programming and may have a more flexible cost structure in terms of program inputs. Clearly, when the burden involved would result in a *reduction of programming output* rather than an increase in captioned material, the statutory test would be met. The legislative history suggests the need to balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.⁵

Thus, the Bureau’s Order, which emphasizes the potential negative impact on the amount of programming available from a particular broadcaster if that broadcaster would have to incur the expense of closed captioning, is an accurate reflection of the legislative history surrounding the issue of exemptions from closed captioning rules.

As for the “analytical problem” facing the Commission in construing and applying the “undue burden” test (*Report and Order, supra*), we believe it is instructive to compare the “undue burden” test here to the “undue hardship” test applied in Title VII religious discrimination in employment cases, where employers are exempted from accommodating the religious practices of employees if such accommodation would work an “undue hardship” on the company. See: 29 CFR § 1605.1 (1968), and similar language

⁵ Report and Order at ¶ 168. (emphasis added).

adopted by Congress in the 1972 amendments to Title VII, 42 U.S.C. § 2000e(j) (1970 ed., Supp. V).

There are several commonalities between the regulations for closed captioning, and the provisions of Title VII: (1) both seek to minimize or eliminate disadvantages to discrete, protected groups; (2) both impose general requirements on both commercial and non-profit enterprises; and (3) both provide exemptions based on the impact of the regulations upon the operations of the entity involved.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) the Supreme Court applied the “undue hardship” rule where an employee was discharged for refusing to work on Saturdays due to his religious beliefs. The employee’s demands for Saturdays off was initially accommodated by TWA, but when his job position changed, the employer claimed it would work an operational hardship on the company if it was forced to “accommodate” the religious practices of the worker pursuant to Title VII regulations.

The Court rejected the conclusion of the Court of Appeals that various methods of accommodation of the religious practices of Mr. Hardison, the employee, were available to TWA and were reasonable; and in so doing, the Supreme Court articulated the low threshold necessary to prove entitlement to the exemption of “undue hardship:”

The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would

involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.

To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.

Trans World Airlines, Inc. v. Hardison, supra, at 432 U.S. 84 (emphasis added).

Viewed through this prism, the Bureau's Order is sizably more stringent in applying the "undue burden" test to closed captioning exemption seekers, than the Supreme Court was in imposing a mere "de minimis cost" threshold in the "undue hardship" context of employment regulations.⁶ Admittedly Congress has indicated, in our context, that "undue burden" would involve "significant ... expense," which is obviously something different than the idea of "de minimis" cost.⁷ Yet, by comparison, the Bureau's application of the "undue burden" policy in the area of closed captioning exemptions seems eminently reasonable, and highly rigorous.

B. The Decision of the Bureau Does Not Violate the First Amendment

Applicants have suggested that the "true purpose" of the Bureau's action may be "to exempt religious programming from the captioning rules." Application, 19, n. 58. They argue that the exemption provided to religious broadcasters, if it "is intended to benefit religious programmers," would thereby violate the First Amendment. *Id.*⁸

⁶ The "de minimis cost" construction of "undue hardship" is still being followed. *See: Baker v. The Home Depot*, 445 F.3d 541, 548 (2nd Cir. 2006).

⁷ The Supreme Court noted, in *Hardison*, that the dividing line between the duty to accommodate under Title VII and the right to be exempt because of an "undue hardship," nevertheless "has never been spelled out by Congress or by EEOC guidelines." *Trans World Airlines, Inc. v. Hardison, supra* at 75.

⁸ Applicants have not, however, submitted any evidence in their Application to support this assertion, other than the bare fact that some (but far from all) religious broadcasters under the jurisdiction of the Commission have been exempted.

Presumably the applicants mean to say that the Bureau's action would necessarily violate the Establishment Clause of the First Amendment.

We submit that no such violation has occurred by reason of the Bureau's actions, and that applicants' have misconstrued the parameters of the Establishment Clause.

In *Walz v. Tax Commission of City of New York*, 397 U.S. 644 (1970), the Supreme Court faced a claim that tax exemptions for religious bodies constituted "sponsorship" of religion, and thus infringed the "neutrality" requirements of the Religion Clauses. In soundly rejecting that notion, the Court reviewed numerous incidental benefits that have accrued to religious groups by reason of government actions, but which nevertheless are permissible under the First Amendment, including the provision of public bus transportation for parochial school students, supplying textbooks and teaching materials to religious schools. *Walz, supra* at 397 U.S. 671-72.

The Supreme Court noted that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to the churches but simply abstains from demanding that the church support the state." *Id.* At 675.

In a similar vein, the actions of the Bureau here does not constitute unconstitutional "sponsorship" of those religious groups to whom "undue burden" exemptions are granted; rather, the F.C.C. is simply providing a mechanism for avoiding devastating economic hardship to *some* programmers and broadcasters, based on neutral, objective criteria. The fact that the application of those criteria may have resulted in an incidental benefit to those religious groups which are unable to afford the costs of closed captioning does not make it constitutionally suspect.

The granting of exemptions to religious groups, even when it has occurred *because* they are religious (as distinct from the situation here, where exemptions are granted *because* the groups are *non-profit*, and will also suffer an undue burden), or, alternatively, the providing of incidental benefits to religious organizations, have both been routinely held not to constitute a violation of the Establishment Clause.

The cases in this respect are numerous: *Walz, supra* (tax exemptions); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (exemptions from otherwise applicable requirements for unemployment compensation benefits); *Zobest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (public funded special education translator utilized in a private religious school) *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (use of public university facilities by religious groups); *Zelman v. Simon-Harris*, 536 U.S. 639 (2002) (public funds used to provide tuition aid to students of private schools, most of whom attend religious institutions).

Zelman v. Simon-Harris, supra is particularly pertinent, because some 82% of the private schools eligible for tuition aid were religious; however the Supreme Court rejected any *per se* rule that the Establishment Clause is violated merely by the sheer overwhelming percentage of religious recipients who were benefited from the application of a facially religion-neutral rule. *Zelman* at 657-58.

Thus, Applicants' argument that "[o]f the 297 exemptions granted, 296 were to religious programmers" (Application, 19, n.58) is of no constitutional import; rather it is a reflection of (a) the fact that a high percentage of non-profit broadcasters are religious in nature, and (b) of those, many, due to the cost of operations and limitations of donation-driven finances, are unable to afford closed captioning.

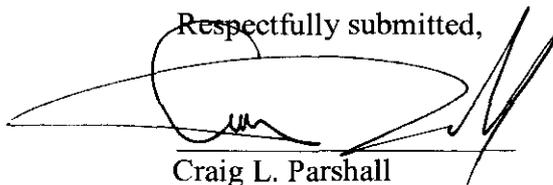
Finally, it must be emphasized again that Applicants have conceded the point that “many religious and non-profit programs are already captioned in compliance with Section 713 of the Act and the Commission’s rules.” Application, 18, n. 57. This underscores the point that the Bureau’s Order has not worked a wholesale evisceration (or even a mitigation) of the closed captioning requirements for the benefit of religious broadcasters.

Rather, the Bureau’s action has simply recognized the economic market realities that exist for some non-profit organizations, many of whom are religious broadcasters.

II. CONCLUSION

For the foregoing reasons, we contend that the Application should be denied, and in any event, the *Anglers Exemption Order*, and all exemptions granted pursuant to it, should be affirmed.

Respectfully submitted,

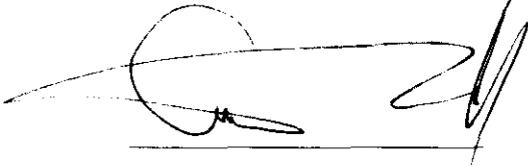


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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has, pursuant to 47 C.F.R. 1.115 (f), been served on the parties seeking review in this matter (Telecommunications for the Deaf and Hard of Hearing, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, National Association of the Deaf, Hearing Loss Association of America, Association of Late Deafened Adults, Inc., American Association of People with Disabilities, and California Coalition of Agencies Serving the Deaf and Hard of Hearing), together with their counsel of record, and has further served a copy on the other parties to this proceeding (Anglers for Christ, Ministries, Inc., and New Beginning Ministries) by depositing the same in the U.S. mail service, postage pre-paid, first-class, and properly addressed to the record address of each of the parties and their counsel, if any.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a series of smaller, connected strokes.