

March 26, 2007

**VIA ECFS – CG Docket No. 06-181**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
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In re: *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*

**CGB-CC-0390 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by CivCo., Inc.**

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), National Association for the Deaf (“NAD”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), Hearing Loss Association of America (“HLAA”), Association of Late-Deafened Adults, Inc. (“ALDA”), American Association of People with Disabilities (“AAPD”), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”) (collectively, “Commenters”) submit for filing in the above-captioned proceeding their opposition to the petition for exemption from the Commission’s closed captioning requirements filed by CivCo., Inc., for its program “Inside East Texas” (the “Petition”).

The following is a summary of pertinent program, financial, and other information provided in the Petition:

CivCo licensee of KLTW and KTRE. Requests exemption for “unscripted, interview portions”; about 10 minutes of weekly ½ hour program produced by the stations; other 20 minutes scripted ENT CC; non-news; program aired Sunday and repeated Monday; claims “limited repeated value” qualifies for (d)(8); CC “entire program could result in such a sufficient economic burden that the program would not be televised at all.” Requests exemption for 8 months; and “should be deemed withdrawn on September 1, 2006 if the Commission has not acted upon it by then.”

The Petition does not meet the statutory requirements necessary to support an exemption from the closed captioning rules.<sup>1</sup> While Commenters generally oppose grant of the Petition for insufficiency or other reasons, Commenters nevertheless acknowledge that Petitioner appears committed to complying with the closed captioning rules. Petitioner requested a temporary (8-month) exemption from the closed captioning rules. Pursuant to Section 79.1(f)(11), Petitioner has already been granted a de facto extension since the Petition was filed on or about January 6, 2006. Further, Petitioner stated that its request for a temporary exemption “should be deemed withdrawn on September 1, 2006, if the Commission has not acted upon it by then.” That deadline passed without Commission action. As such, Commenters expect that Petitioner’s program is already being captioned. Therefore, Commenters recommend that the Petitioner be given an additional 90 days, if needed, to comply with the closed captioning rules.

In addition to claiming that compliance with the Commission’s closed captioning requirements would impose an undue burden on it, Petitioner implies or expressly claims that its programming qualifies for an exemption under Section 79.1(d)(8) of the Commission’s rules. For the reasons discussed below, Petitioner has failed to demonstrate that it qualifies for an exemption under this section of the Commission’s rules.

### **I. The Legal Standard for Granting a Petition for Exemption**

Section 713 of the Communications Act of 1934, as amended (the “Act”), requires that video programming be closed captioned, regardless of distribution technologies, to ensure that it is accessible to persons with hearing disabilities.<sup>2</sup> The Commission has the authority to grant a petition for an exemption from the closed captioning requirements upon a showing that the requirements would impose an undue burden on the video programming provider or video owner.<sup>3</sup> Congress defined “undue burden” to mean “significant difficulty or expense.”<sup>4</sup>

A petition seeking a waiver of the captioning rules must demonstrate that compliance would result in an undue burden within the meaning of Section 713(e) and Section 79.1(f) of the Commission’s rules.<sup>5</sup> 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

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<sup>1</sup> 47 U.S.C. § 613(e).

<sup>2</sup> 47 U.S.C. § 613(e).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 47 U.S.C. § 613(e); 47 C.F.R. § 79.1(f).

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.<sup>6</sup>

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 on the programmer.<sup>7</sup> 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.<sup>8</sup> Such petition must contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on by the petitioner.<sup>9</sup> It must also describe any available alternatives that might constitute a reasonable substitute for the captioning requirements.<sup>10</sup>

In the 2006 *Anglers Exemption Order*, the Consumer & Governmental Affairs Bureau ("CGB") improperly created a new standard that ignored the "undue burden" analysis required by the Act, the Commission's rules, and Commission precedent. Instead, the CGB stated that any non-profit organization may be granted a waiver from the closed captioning rules if the organization does not receive compensation for airing its programming and if it may terminate or substantially curtail its programming or other activities important to its mission if it is required to caption its programming.<sup>11</sup> The Commission may not properly rely on the *Anglers Exemption Order* to determine whether Petitioner's request meets the undue burden standard. Commenters have sought review of the *Anglers Exemption Order* by the Commission and, accordingly, the *Anglers Exemption Order* is not final.<sup>12</sup> Moreover, the standard announced by the CGB in the *Anglers Exemption Order* was inappropriate because it failed to incorporate an "economically burdensome" or an "undue burden" standard as mandated by the Act and fails to require Petitioner to demonstrate the four factors listed above.

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<sup>6</sup> *Id.*

<sup>7</sup> 47 C.F.R. § 79.1(f).

<sup>8</sup> 47 C.F.R. § 79.1(f)(2).

<sup>9</sup> 47 C.F.R. § 79.1(f)(9).

<sup>10</sup> 47 C.F.R. § 79.1(f)(3).

<sup>11</sup> *In the Matter of Anglers for Christ Ministries, Inc.; New Beginning Ministries; Video Programming Accessibility; Petitions for Exemption from Closed Captioning Requirements*, Memorandum Opinion and Order, DA 06-1802 (2006) ("*Anglers Exemption Order*").

<sup>12</sup> See Application for Review of Bureau Order, Docket No. 06-181, CGB-CC-0005, CGB-CC-0007 (filed October 12, 2006).

## II. Petitioner Does not Qualify for Self-Implementing Exemptions

Petitioner also argues that it qualifies for an exemption pursuant to Section 79.1(d)(8) of the Commission's rules. Section 79.1(d)(8) pertains to locally produced programming.<sup>13</sup>

### Exemption Criteria Under Section 79.1(d)(8)

Petitioner implies or expressly claims that its video program is exempt from the closed captioning requirements pursuant to Section 79.1(d)(8) of the Commission's rules. In Section 79.1(d)(8), the Commission exempted from the captioning requirements video programming "that is locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the 'electronic news room' technique of captioning is unavailable."<sup>14</sup>

The program in question appears to be "locally produced by the video programming distributor," assuming that Petitioner is a "video programming distributor" as defined in Section 79.1(a)(2): "any television broadcast station licensed by the Commission and any multi-channel video programming distributor as defined in Section 76.1000(e) of the rules, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission."<sup>15</sup> However, the program is broadcast originally on Sunday and repeated on Monday. As such, the program appears to have some repeat value or, as Petitioner characterizes it, "limited repeat value," rather than no repeat value required under the rule. Further Section 79.1(d)(8) is a narrowly focused exemption established under the FCC rules for programming of local public interest, such as local parades, local high school or nonprofessional sports or community theater productions.<sup>16</sup> Petitioner's program, "Inside East Texas," does

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<sup>13</sup> 47 C.F.R. § 79.1(d)(8).

<sup>14</sup> 47 C.F.R. § 79.1(d)(8).

<sup>15</sup> 47 C.F.R. § 79.1(a)(1).

<sup>16</sup> 62 Fed. Reg. 48487, 48489 (Sept. 16, 1997). *See also* 13 FCC Rcd. 3272, 3348 (Aug. 22, 1997) (Report and Order on Video Programming Accessibility). ("We intend, however, that [this exemption] apply only to a limited class of truly local materials, including, for example, local parades, local high school and other nonprofessional sports, live unscripted local talk shows, and community theatre productions. We would not include within this category local news, programs readily captioned through an ENR [electronic news room] process, or programs that have repeat value. The programming in question would have to be locally created and not networked outside of the local service area or market of a broadcast station or an equivalent area if produced by a cable system operator or other MVPD.")

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not appear to be a program of this genre. Thus, for the reasons stated above, Petitioner's program does not qualify for an exemption under Section 79.1(d)(8).

### III. Conclusion

As discussed above, Commenters generally oppose grant of the Peition for insufficiency or other reasons, but Commenters nevertheless acknowledge that Petition appears committed to complying with the closed captioning rules. Petitioner requested a temporary exemption from the closed captioning rules. Therefore, Commenters recommend that the Petitioner be given an additional 90 days, if needed, to comply with the closed captioning rules.

In addition, Commenters respectfully request that the Commission accept the attached certification that the facts and considerations in this filing are true and correct and waive the requirement to provide an affidavit for a responsive pleading.<sup>17</sup>

Respectfully submitted,

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<sup>17</sup> 47 C.F.R. §79.1(f)(9).

/ s /

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**CERTIFICATION**

I, Claude L. Stout <sup>Exec Dir -</sup> <sup>Deaf & Hard of Hearing</sup> <sub>Telecom - for</sub>, hereby certify that to the extent there are any facts or considerations not already in the public domain which have been relied on in the attached Opposition to the Petition for Exemption from Closed Captioning Requirements, these facts and considerations are true and accurate to the best of my knowledge.

Date: March 26, 2007

Claude L. Stout  
Executive Director  
Telecommunications for the Deaf & Hard of Hearing

## CERTIFICATE OF SERVICE

I, Ivonne J. Diaz , do hereby certify that, on March 26, 2007, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by CivCo., Inc., as filed with the Federal Communications Commission in CGB-CC-0390, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Artie L. Bedard  
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/s/  
Ivonne J. Diaz