BINGHAM McCUTCHEN

March 26, 2007

VIA ECFS – CG Docket No. 06-181

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

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

202.373.6000
202.373.6001 fax

bingham.com

Boston
Hartford
London
Los Angeles
New York
Orange County
San Francisco
Silicon Valley
Tokyo
Walnut Creek
Washington

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-0577 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Community Television 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 Community Television Inc. (CTI), for its programs "Babbie's House" and "Friends & Neighbors" (the "Petition").

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

> Non-profit corporation; licensee of non-commercial educational TV station WATC in Atlanta, GA; WATC produces revenues of under $3,000,000. Requests exemption for 2 weekly ½ hour programs CTI produces that air on WATC and the Sky Angel DBS. "CTI's sole 'business' is the operation of WATC, including production of some of its programming." "The shows that are provided to Angel One and other requesting television stations are provided free of charge. The increased viewership . . . allows CTI to build name recognition . . .." Claims CC an undue burden, in the midst of $500,000 investment of $350,000 digital transmitter to comply with commission's DTV schedule. "In order to

> better serve the public, it is CTI's intention, once the digital transmitter and related transition costs are covered, and additional monies are raised, to invest in closed captioning equipment even though it is doubtful that WATC, its station, will exceed the $3,000,000 threshold anytime in the near future and be required to provide closed captioning."

Bingham McCutchen LLP
Bingham McCutchen LLP
bingham.com

The Petition does not meet the statutory requirements necessary to support an exemption from the closed captioning rules.[1] Commenters oppose grant of the Petition because Petitioner has provided insufficient information to demonstrate and/or for the Commission to determine that it meets the undue burden standard for granting the Petition. Commenters recommend that the Petitioner be given 180 days either to comply with the closed captioning rules or to re-apply with sufficient information to allow the Commission and the public to determine whether the Petitioner's request meets the legal standard for granting a waiver.

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)(12) 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.[2] 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.[3] Congress defined "undue burden" to mean "significant difficulty or expense."[4]

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.[5] 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

---

[1] 47 U.S.C. § 613(e).

[2] 47 U.S.C. § 613(e).

[3] *Id.*

[4] *Id.*

[5] 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.[6]

Bingham McCutchen LLP
Bingham McCutchen LLP
bingham.com

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

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.[11] 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.[12] 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.

---

[6] *Id.*

[7] 47 C.F.R. § 79.1(f).

[8] 47 C.F.R. § 79.1(f)(2).

[9] 47 C.F.R. § 79.1(f)(9).

[10] 47 C.F.R. § 79.1(f)(3).

[11] *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*").

[12] *See* Application for Review of Bureau Order, Docket No. 06-181, CGB-CC-0005, CGB-CC-0007 (filed October 12, 2006).

Bingham McCutchen LLP
Bingham McCutchen LLP
bingham.com

II. Petitioner Has Presented Insufficient Information to Demonstrate or Determine that Compliance with the Captioning Requirement Would Impose an Undue Burden

Petitioner requests an exemption from the closed captioning requirements, asserting that compliance would impose an undue burden on Petitioner. However, the Petition offers insufficient evidence to demonstrate or determine that compliance would impose an undue burden under the four statutory exemption factors. The Petition therefore does not meet the legal standard for granting a request for exemption of the closed captioning rules and should be denied.

Commenters respectfully submit that the Petition is not supported by sufficient evidence to demonstrate that compliance with the closed captioning requirements would impose an undue burden upon Petitioner as required by the statutory factors set forth under Section 79.1(f)(2) of the Commission's rules.[13]

First factor: The nature and cost of the closed captions. In judging the sufficiency of information filed to support a claim that the cost of implementing closed captioning will impose an undue burden, the Commission looks to whether the petitioner:

(1) sought competitive pricing from multiple sources;
(2) submitted copies of the correspondence received from such captioning companies, indicating a range of quotes;
(3) provided details regarding its financial resources; and
(4) sought any means to recoup the cost of closed captioning, such as through grants or sponsorships.[14]

Moreover, the Commission has stated that petitioners must make an effort to solicit captioning assistance from the distributors of its programming.[15] A

[13] 47 C.F.R. § 79.1(f)(2).

[14] *Outland Sports, Inc., Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, 16 FCC Rcd 13605 (2001) ("*Outland Sports*") (advising that entities seeking a waiver of the captioning requirements seek cost quotes from multiple sources and provide correspondence evidencing the quotes obtained, provide detailed financial information, and discuss whether any efforts were made to recoup the cost of closed captioning). *See also The Wild Outdoors, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, 16 FCC Rcd 13611 (2001) (reviewing sufficiency of information provided with respect to the four factors).

petitioner must also provide the Commission the distributor's response to its solicitation.[16] Failure to provide the foregoing information and to establish that the Petitioner pursued other possible means of gaining captioning hinders the Commission's assessment of the impact of the cost of captioning on Petitioner.[17]

Bingham McCutchen LLP
Bingham McCutchen LLP
bingham.com

Second factor: The impact on the operation of the provider or program owner. A petition must provide sufficient information to indicate that compliance with closed captioning requirements will adversely affect the Petitioner's operations.

Third factor: the financial resources of the provider or program owner. Commission rule 79.1(f)(2) provides that a petition for exemption "must be supported by sufficient evidence to demonstrate that compliance with the requirements would cause an undue burden."[18] Additionally, in determining whether the closed captioning requirements impose an undue burden, the Commission must consider the resources that the petitioner has chosen to devote to the program in the context of the overall budget and revenues of the petitioner – and not merely the cost of captioning in relation to a particular program.[19]

Fourth factor: The type of operation of the provider or program owner. In order for the Commission to determine whether the Petition is supported under the fourth factor, Petitioner must provide detailed information regarding its operations and explain why or how complying with the closed captioning requirements would result in significant difficulty for Petitioner because of the type of operations involved.

Here, Petitioner has not provided sufficient financial information to determine whether an undue burden would result under the four factors above.

Moreover, in the unlikely event that the Commission upholds the new standard that was improperly adopted in the *Anglers Exemption Order*, the Petition fails to satisfy that standard and should nonetheless be denied. Petitioner has neither shown that its programming would be terminated or substantially

---

[15] *Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*, Report and Order, 13 FCC Rcd 3272, 3366 (1997) ("*Report and Order*").

[16] *Commonwealth Productions, Video Programming Accessibility, Petitioner for Waiver of Closed Captioning Requirements*, CSR 5992, Memorandum Opinion and Order, ¶ 3 (Mar. 26, 2004).

[17] *Outland Sports*, ¶ 7.

[18] 47 C.F.R. § 79.1(f)(2).

[19] *Report and Order*, 13 FCC Rcd at 3366.

Bingham McCutchen LLP
Bingham McCutchen LLP
bingham.com

curtailed by providing closed captioning nor that closed captioning would curtail other activities important to Petitioner's mission. Unsubstantiated, self-serving statements that programming would be terminated or substantially curtailed or that Petitioner's mission would be curtailed are not evidence and do not justify an exemption. Additionally, Petitioner produces and airs its programming in furtherance of its mission and that mission will be furthered still when its programming is captioned to reach people who are deaf and hard of hearing. Accordingly, the Petition provides insufficient information to determine whether it is entitled to an exemption under the *Anglers Exemption Order*, to the extent that exemption is upheld.

III. Petitioner does not Qualify for Self-Implementing Exemptions

Petitioner also argues that it qualifies for an exemption pursuant to Section 79.1(d)(12) of the Commission's rules. Section 79.1(d)(12) pertains to a video programming channel that produced annual gross revenues less than $3 million during the previous calendar year.[20]

Exemption Criteria Under Section 79.1(d)(12)

Petitioner suggests or claims that its video programs are exempt from the closed captioning requirements pursuant to Section 79.1(d)(12) of the Commission's rules. In Section 79.1(d)(12), the Commission exempted owners of channels, not individual video producers, by applying the exemption to entities that are required to caption a channel of video programming in order to meet the captioning benchmarks established by the Commission.[21] The entities that are responsible for meeting the benchmarks are video programming distributors, which include television broadcast stations, multi-channel video programming distributors and other entities that directly distribute video programming to residential homes.[22] Pursuant to the rule, these entities are not required to caption any channel of video programming that produced annual gross revenues of less than $3 million during the previous calendar year. Although not required to expend any money to caption a channel with such revenues, the video programming distributor remains obligated to pass through video programming that is already captioned. Commenters respectfully submit that Petitioner may be

[20] 47 C.F.R. § 79.1(d)(12).

[21] 47 C.F.R. §79.1(12); *Report and Order*, 13 FCC Rcd at 3350; *Maranatha Fellowship Church*, CSR 6308 at ¶ 4.

[22] *Report and Order*, 13 FCC Rcd at 3350, 3280, 3286 (adopting benchmarks specified as a number of hours of required captioning and placing responsibility for compliance with benchmarks on video programming distributors). *See also*, 47 C.F.R. § 79.1(a)(2) (defining the term "video programming distributor").

a video programming distributor as defined under Section 79.1(a)(2) with respect to programs aired on WATC. However, Petitioner is not a video programming distributor with respect to programs it produces and/or provides to be aired on channels or stations other than WATC. Thus, Petitioner does not qualify for the exemption set forth in 79.1(d)(12).

Bingham McCutchen LLP
Bingham McCutchen LLP
bingham.com

IV. Conclusion

For the reasons discussed above, Petitioner's request for exemption from the closed captioning requirements fails to demonstrate that compliance with the requirements would cause an undue burden within the meaning of Section 713 of the Act. Accordingly, it should be denied.

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.[23]

Respectfully submitted,

/ s /

Paul O. Gagnier
Troy F. Tanner
Danielle C. Burt
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20007

Counsel to TDI

[23] 47 C.F.R. §79.1(f)(9).

Bingham McCutchen LLP
bingham.com

_____/ s /_____
Claude L. Stout
Executive Director
Telecommunications for the
Deaf and Hard of Hearing, Inc.
8630 Fenton Street, Suite 604
Silver Spring, MD 20910

_____/ s /_____
Nancy J. Bloch
Chief Executive Officer
National Association of the Deaf
8630 Fenton Street, Suite 820
Silver Spring, MD 20190-4500

_____/ s /_____
Cheryl Heppner
Vice Chair
Deaf and Hard of Hearing
Consumer Advocacy Network
3951 Pender Drive, Suite 130
Fairfax, VA 22030

_____/ s /_____
Brenda Battat
Associate Executive Director
Hearing Loss Association of America
7910 Woodmont Avenue, Suite 1200
Bethesda, MD 20814

_____/ s /_____
Edgar Palmer
President
Association of Late-Deafened Adults, Inc.
8038 Macintosh Lane
Rockford, IL 61107

_____/ s /_____
Jenifer Simpson
Senior Director, Telecommunications
and Technology Policy
American Association of
People with Disabilities
1629 K Street N.W., Suite 503
Washington, DC 20006

_____/ s /_____
Ed Kelly
Chair
California Coalition of Agencies
Serving the Deaf and Hard of Hearing
6022 Cerritos Avenue
Cypress, CA 90630

CERTIFICATION

I, Claude L. Stout, Exec. Dir. Telecom. for Deaf & Hard of Hearing, 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.

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

Date: March 26, 2007

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 Community Television Inc., as filed with the Federal Communications Commission in CGB-CC-0577, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Community Television Inc.
c/o Mark A. Balkin
Hardy, Carey, Chautin & Balkin, LLP
110 Veterans Boulevard, Suite 300
Metairie, LA 70005

_____/s/_____
Ivonne J. Diaz