

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-0588 – Opposition to the Petition for Exemption from
Closed Captioning Requirements Filed by Mission Broadcasting, Inc.**

Dear Ms. Dortch:

On behalf of the 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”), attached hereto is an amended version of the opposition previously filed on March 13, 2007 to the petition for exemption from the Commission’s closed captioning requirements filed by Mission Broadcasting, Inc., for its program WYOU-TV News (the “Petition”). Please substitute this amended version for the previously filed version. As the due date for filing comments has not yet passed, Commenters respectfully submit that acceptance of this amended opposition should not cause any prejudice or harm to the petitioner, and should therefore be accepted.

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Respectfully submitted,

/ s /

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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-0588 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Mission Broadcasting, 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 Mission Broadcasting, Inc., for its program WYOU-TV News (the “Petition”).

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

Mission Broadcasting, the licensee of television station WYOU, is requesting exemption for an “experimental news program;” aired Monday through *Friday at 5:00 pm, 6:00 pm, and 11:00pm*; 15 minutes of the news will be closed captioned through the “electronic newsroom” method; the other half is the portion they wish to be exempted from closed captioning; 15 minutes of “open mic/talk show” format with “live” *discussions covering topics of interest on a local, state, and national and international level*; unscripted in-studio guests, interviews, and viewer input by e-mail or phone call; will include graphics and crawls with the essence of the topic under discussion, and relevant facts about the topic; to

the extent possible, Mission will include a text of a viewer e-mail on-screen as it is read aloud. Locally produced and of no repeat value, local public interest and electronic newsroom technique will be used for half, but is not available for second half. If the Commission determines that Section 79.1(d)(8) does not apply to this new experimental portion, petitioner requests that the commission review request under 79.1(f), because closed captioning the new, experimental portion of WYOU's news programming would be unduly expensive while Mission determines the viability of this new format. Estimates closed captioning costs \$100,000 per year; or voice recognition equipment for \$10,000 - \$15,000 plus a person to repeat everything said into the system. Included signed declaration. No financial information provided.

The Petition does not meet the statutory requirements necessary to support an undue burden 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 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.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

¹ 47 U.S.C. § 613(e).

² 47 U.S.C. § 613(e).

³ *Id.*

⁴ *Id.*

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 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

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*

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

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*").

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.

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

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

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*

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

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.

Captioning Requirements, 16 FCC Rcd 13611 (2001) (reviewing sufficiency of information provided with respect to the four factors).

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.

III. 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.²⁰ 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."²¹

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."²² However, it is not clear whether the 15-minute "experimental" part of the program will be a new segment produced for each of the air times, and not simply a repeat of the 5:00 version on the 6:00 and 11:00 broadcasts. If Petitioner produces a new segment for each broadcast, that means three "open mic/talk show . . . live" discussions three times a day, five days a week, or 15 different segments each week. Because of this uncertainty, it is not clear whether the program has "repeat value." In addition, the program is not of or limited to "local public interest," because, according to Petitioner, the program covers topics of interest on a local, state, national, and international level. 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."²³ Furthermore, Section 79.1(d)(8) applies to

²⁰ 47 C.F.R. § 79.1(d)(8).

²¹ 47 C.F.R. § 79.1(d)(8).

²² 47 C.F.R. § 79.1(a)(1).

²³ 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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“non-news” programs. Petitioner calls this an “experimental *news* program” (emphasis added) or an experimental portion of its *news* programming. Thus, for the reasons stated above, Petitioner’s program does not qualify for an exemption under Section 79.1(d)(8).

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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.²⁴

Respectfully submitted,

/ s /
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²⁴ 47 C.F.R. §79.1(f)(9).

/ s /

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CERTIFICATION

I, Claude L. Stout ^{Exec Dir -} ^{Deaf & Hard of Hearing} _{Telecom - for}, 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 23, 2007, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Mission Broadcasting, Inc., as filed with the Federal Communications Commission in CGB-CC-0588, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Mission Broadcasting, Inc.
c/o Elizabeth A. Hammond
Drinker Biddle & Reath L.L.P.
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_____/s/_____
Ivonne J. Diaz