

April 11, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility
CG Docket No. 06-181

CGB-CC-0305 – Reply to Opposition of Telecommunications for the Deaf and Hard of Hearing, Inc. et al, to Petition for Exemption from Closed Captioning Requirements filed by Equestrian Sports Media International

Dear Ms. Dortch:

Equestrian Sports Media International ("ESMI"), the producer of the program "Showjumping Unplugged!-TV" ("Showjumping Unplugged"), hereby replies to the opposition ("Opposition") of Telecommunications for the Deaf and Hard of Hearing, Inc. et al ("TDI") to ESMI's petition to exempt Showjumping Unplugged from the closed captioning requirements of § 79.1(b)(1) of the Commission's Rules pertaining to "new" English-language programming.¹

On January 9, 2006, ESMI submitted a petition ("Petition") asserting exemption from the Commission's closed captioning requirements under two self-implementing exemptions: or, in the alternative, seeking exemption under the undue burden standard in Section 79.1(f) of the Commission's Rules ("Undue Burden Exemption"). On March 2, 2007, TDI submitted a slew of oppositions to various parties' requests for exemptions from the Commission's closed captioning requirements, including the Opposition to ESMI's Petition. While ESMI understands TDI's desire to secure improved closed captioning services for deaf and hard of hearing individuals, TDI's indiscriminating campaign against all programming providers and distributors claiming an exemption is grossly over-inclusive. TDI's decision to file a mass-produced, form Opposition in the instant proceeding – scarcely heeding the substance of ESMI's claims, the nature of Showjumping Unplugged's programming and ESMI's financial limitations – is fundamentally

¹ This Reply is timely filed within 40 days of TDI's Opposition. *See Public Notice*, CG Docket No. 06-181, 21 FCC Rcd 13487 (2006).

² In its Petition, Equestrian Sports asserted the exemption for locally-produced and distributed non-news programming set forth in 79.1(d)(8) of the Commission's Rules, as well as the "revenues under \$3,000,000" exemption set forth in Section 79.1(d)(12) of the Commission's Rules. As the former exemption applies only to video programming distributors, as defined in Section 79.1(a)(2) of the Commission's Rules, and the latter applies only to entities required to caption a channel of video programming, Equestrian Sports does not qualify for the exemptions and withdraws its request for treatment under these provisions.

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misguided. No matter how laudable its motives, TDI's volume-over-substance tactics represent an abuse of Commission process. Notwithstanding TDI's boilerplate claims, ESMI qualifies for an exemption under the Commission's Undue Burden Exemption and TDI's ill-advised Opposition must therefore be dismissed.

As set forth in its Petition, ESMI is a "video programming provider," as defined in Section 79.1(a)(3) of the Commission's Rules. ESMI produces Showjumping Unplugged, a program featuring local, national and international equestrian events as well as interviews with riders and behind-the-scenes stories on events, riders and horses.³ While economic necessity precludes ESMI from closed captioning Showjumping Unplugged,⁴ ESMI believes that its programming is, by its very nature, well-suited to hearing-impaired audiences. Equestrian sports requires little in the way of audio input. The events are visual in nature and involve horses jumping over objects in an effort to achieve the fastest trip through a course with the fewest objects knocked down. The results are obvious from the time appearing on the clocks shown in the video display, and the objects knocked down are equally obvious from the visual footage. As a result, there is little that the audio portion assists those who are unable to hear.

In any event, ESMI wishes to reaffirm that it does not have the resources to support closed captioning of these programs, and that mandated compliance with the Commission's closed captioning rules would impose an undue burden on ESMI.⁵ Under Section 713 of the Communications Act of 1934, as amended, and Section 79.1(f) of the Commission's Rules, the Commission must consider the following factors when determining whether closed captioning requirements impose an undue burden on a petitioner: (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 See generally www.showjumpingunplugged.tv/.

⁴ At the present time, ESMI's limited resources are exhausted by programming production and distribution costs, and ESMI is not in a financial position to provide captioning services. As evidenced in its Petition, ESMI is well aware of the expenses of closed captioning. Computer Prompting & Captioning Co. ("CPC") of Rockville, Maryland quotes the following costs for software ESMI would need for post-production captioning: \$4,995 for Mac Caption DV and \$6,895 for CPC700 NL and C-Captioned NLE. For real-time captioning, ESMI would have to acquire an encoder with modem for approximately \$3,300. If ESMI wished to use CPC's post-production captioning services, the cost would be \$150 set-up and \$7 per minute. If ESMI wished to use CPC's real-time captioning services, the cost would be \$100 for set-up and at least \$35 per 15 minute segment. See www.cpcweb.com. This investment is especially burdensome to ESMI as ESMI provides a limited amount of programming and would have to allocate its capital investment to this limited programming. See Petition at 2, n. 1.

⁵ The Commission has authority to grant a petition for exemption from closed captioning requirements upon a showing that compliance with the requirements would impose an undue burden on the video programming provider or video owner. See 47 U.S.C. § 613(e). Congress defined "undue burden" as a "significant difficulty or expense." *Id.*

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(3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.⁶ A petitioner seeking an undue burden exemption must support its request with evidence sufficient to demonstrate that compliance with closed captioning requirements would cause an undue burden, including detailed showings, supported by affidavit, of any facts or considerations relied upon by the petitioner, and a description of any available alternatives that might constitute a reasonable substitute for the closed captioning requirements.⁷

TDI's boilerplate Opposition alleging ESMI's failure to satisfy the showing required under 79.1(f) is wide of the mark. With respect to the first factor – the nature and cost of closed captioning – ESMI provided quotes from the website of a competitive captioning service and a link to the company's website,⁸ and restated ESMI's lack of available funds to pay for such a service. ESMI also indicated that, based on the limited audience for equestrian sports, Showjumping Unplugged is not able to rely upon the support of advertisers and broadcasters.⁹ With regard to the second factor – the impact on the program provider's operations – ESMI explained that its limited resources are exhausted by production and distribution costs and that no funds are available to meet closed captioning costs.¹⁰ As for the third factor – the financial resources of the program provider – again, ESMI indicated that its entire budget goes to the production and distribution of Showjumping Unplugged, and the ESMI has no revenue stream from which to draw funds for closed captioning services.¹¹ With respect to the fourth factor – the type of operation of the program provider – ESMI demonstrated the limited nature of its operations, namely Showjumping Unplugged's limited budget to provide specialized programming for a very small niche audience.¹² As to a petitioner's obligation to consider reasonable substitutes for closed captioning, ESMI explained that equestrian sports are predominantly visual and require little in the way of audio input.¹³ Finally, as required by the Commission's Rules, ESMI's showing was supported by the Declaration of ESMI's President, Paul Petersen.¹⁴

⁶ See 47 U.S.C. § 613(e); 47 C.F.R. § 79.1(f).

⁷ See 47 C.F.R. §§ 79.1(f)(2)-(3), 79.1(f)(9).

⁸ See Petition at 2, n. 1; *supra* n. 3.

⁹ See Petition at 3.

¹⁰ See Petition at 1, 2, n. 1.

¹¹ See Petition at 1, 2, n. 1, 3.

¹² See Petition at 2-3.

¹³ See Petition at 2.

¹⁴ See Petition at Declaration of Paul Petersen, President of ESMI. As no new facts or considerations have been presented in this Reply, ESMI relies upon the Declaration submitted with its Petition to satisfy its affidavit requirement.

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As clearly demonstrated in ESMI's Petition, ESMI has never had, and, realistically, cannot expect to have, a revenue stream to support closed captioning. Simply put, ESMI's video productions are a labor of love, not a means to make a profit. Equestrian events do not rank high in the public's eye, and therefore do not provide for the same profit-making video productions as other, higher-profile sporting events. Equestrian sports are not shown on network television or on ESPN. During the Summer Olympics, they are broadcast at odd hours, usually on a cable affiliate of a major network. Generally speaking, equestrian sports (unlike horse racing) appeal only to those who ride, own horses, or have family members who do so. This is a small demographic segment and one that does not offer the viewership numbers for advertisers or broadcasters to support ESMI. At bottom, ESMI's financial capacities are stretched to the limit simply producing these programs. While closed captioning costs may constitute a minor expense to entities providing popular and profitable video programming, to ESMI, mandated compliance with the Commission's closed captioning requirements would clearly constitute a significant difficulty and expense.

Accordingly, ESMI requests an undue burden exemption under Section 79.1(f) of the Commission's Rules. As demonstrated above, the requirement to close-caption Showjumping Unplugged imposes significant costs on ESMI that ESMI is not currently in a financial position to meet. ESMI should be granted an exemption from the Commission's "new" English-language programming closed captioning requirements based on the undue burden captioning costs would impose on ESMI.

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Should there be any questions in regard hereto, please communicate with the undersigned.

Respectfully submitted,

EQUESTRIAN SPORTS MEDIA
INTERNATIONAL

By: _____ /s/

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CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that, on April 11, 2007, a copy of the foregoing Reply to the Opposition of Telecommunications for the Deaf and Hard of Hearing, Inc. et al to the Petition for Exemption from Closed Captioning Requirements filed by Equestrian Sports Media International, as filed with the Federal Communications Commission in CG Docket No. 06-181, CGB-CC-0305, was served by first class U.S. mail, postage prepaid, upon the following:

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