

May 7, 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-0116 – 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 KVMD Licensee Co., LLC

Dear Ms. Dortch:

KVMD Licensee Co., LLC ("KVMD"), the permittee of Station KVMD-DT, Twentynine Palms, California (the "Station"), hereby replies to the opposition ("Opposition") of Telecommunications for the Deaf and Hard of Hearing, Inc. et al ("TDI") to KVMD's petition ("Petition") seeking exemption from the one hundred percent (100%) closed captioning requirements for new English-language programming set forth in Section 79.1(b)(1) of the Commission's Rules, as well as from any one hundred percent (100%) requirements applicable to bilingual and multilingual programming.<sup>1</sup>

On December 27, 2005, KVMD submitted its Petition for exemption from the Commission's closed captioning requirements pursuant to the undue burden standard in Section 79.1(f) of the Commission's Rules ("Undue Burden Exemption"). In its Petition, KVMD submitted two separate requests for exemption. First, KVMD requested exemption **from** the one hundred percent (100%) new English-language programming requirement, based on equipment construction and training delays experienced by KVMD in its efforts to meet the 100% requirement. Based on the unresolved nature of these issues as of January 1, 2006, KVMD requested temporary waiver of the 100% new English-language requirements until April 1, 2006.<sup>2</sup>

Second, KVMD informed the Commission that the Station's programming includes Spanish-language programs **and** mixed Spanish/English-language programs in addition to English-language programs. As noted in the Petition, the Commission's closed captioning rules

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<sup>1</sup> 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).

<sup>2</sup> See Petition at Attachment 1 at 1.

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do not specifically address the regulatory treatment appropriate for such bilingual Stations. KVMD submitted Reply Comments in *Closed Captioning of Video Programming*, CG Docket No. 05-231 (the "Closed Captioning Rulemaking"), requesting clarification of the regulatory classifications assigned to bilingual programming, specifically English-Spanish-language programming, and to Stations that broadcast separate English and Spanish-language programs.<sup>3</sup> As stated in KVMD's Reply Comments, the Commission's current benchmark approach to Captioning assumes that English and Spanish-language programming are strictly either/or in nature. The inclusion of English and Spanish-language segments within the same program, or separate English and Spanish-language programs on the same Station, present novel captioning issues that should properly be addressed by the Commission before the 100% new programming deadline is applied to bilingual and multilingual Stations. Accordingly, KVMD respectfully requested that the Commission waive the 100% closed captioning deadline vis-à-vis the Station's bilingual programming until such time as the Commission concludes the Closed Captioning Rulemaking and determines how to treat such Stations.

At this time, and in response to TDI's Opposition, KVMD wishes (1) to update the Commission concerning KVMD's ability to meet the one hundred percent (100%) new English-language programming closed captioning requirements, and (2) to reaffirm KVMD's request for exemption from one hundred percent (100%) closed captioning requirements with respect to mixed English/Spanish-language programming until such time as the Commission determines the regulatory classification applicable to Stations offering bilingual and multilingual programming.

First, KVMD has resolved all equipment, construction and training issues and its temporary waiver request with respect to the Commission's one hundred percent (100%) new English-language programming requirement is now moot. See Declaration of Francis X. Wilkinson, Vice President of KVMD, attached hereto as Exhibit A.

Second, KVMD wishes to reiterate that its efforts to close caption its bilingual programming have been frustrated by the lack of clear regulations combined with underdeveloped markets for the closed captioning of Spanish-language and mixed English-Spanish-language programming. Marketplace realities and regulatory uncertainty continue to support KVMD's request for an Undue Burden Exemption. The Commission has previously cited the "logistical difficulties" associated with Spanish-language captioning and the extra time necessary for the Spanish-language captioning market to develop as reasons for the longer

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<sup>3</sup> KVMD's Reply Comments are available electronically on the Commission's website in CG Docket No. 05-231. A copy of KVMD's Reply Comments was attached to the Petition as Exhibit A to Attachment 1.

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transition period for the captioning of Spanish-language programming previously cited by the Commission. *See* Order on Reconsideration, 13 FCC Rcd 19973, 20015-20016 (1998). These reasons apply with equal or greater force to bilingual and multilingual captioning. Bilingual and multilingual captioning requires double the efforts of individual English or Spanish-language captioning, and the market for bilingual and multilingual captioning is less developed than either the individual English or Spanish-language captioning markets. And given the relaxed deadlines for closed captioning of new Spanish-language programming set forth in Section 79.1(b)(3) of the Commission's Rules, many Spanish-language video program providers do not close caption all their programming fully. KVMD has found that Spanish-language video providers are not willing to close caption programs for single Stations when other Stations not required to meet the 100% requirement do not require such efforts of them. Closed captioning services are thus not available for many Spanish-language programs that KVMD would broadcast.

KVMD submits that its description of the current economic and regulatory conditions facing bilingual programming providers satisfies the required showing for an Undue Burden Exemption.<sup>4</sup> 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) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner.<sup>5</sup> 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.<sup>6</sup>

TDI's boilerplate Opposition alleging KVMD'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 – KVMD indicated that closed captioning services are not readily available for English-Spanish language programs given an underdeveloped market for Spanish-language closed captioning services and an even less developed closed captioning market for bilingual and

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<sup>4</sup> 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.*

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

<sup>6</sup> *See* 47 C.F.R. §§ 79.1(f)(2)-(3), 79.1(f)(9).

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multilingual programming. Spanish-language programming is subject to relaxed closed captioning deadlines,<sup>8</sup> and hence many Spanish-language video providers are not willing to close caption for a single Station when other Stations do not require such captioning efforts of them at this time.<sup>8</sup> With regard to the second and third factors – the impact on the program provider's operations, and the financial resources of the program provider, respectively – KVMD explained that given the scarcity of available Spanish-language and bilingual captioning services, closed captioning its English/Spanish-language programs is not a realistic option, irrespective of KVMD's financial capabilities.<sup>9</sup> With respect to the fourth factor – the type of operation of the program provider – again, KVMD noted the bilingual nature of its programming, and the limited availability of closed captioning services for such programming. Finally, as required by the Commission's Rules, KVMD's showing was supported by the Declaration of KVMD's President, Ronald L. Ulloa.<sup>10</sup>

As demonstrated in KVMD's Petition, and as set forth above, current marketplace and regulatory conditions amount to a "significant difficulty," as that term is used in Section 79.1(f)(2) of the Commission's Rules,<sup>11</sup> and KVMD should therefore be exempt from any closed captioning obligations it may have with respect to its bilingual programming. While KVMD 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.<sup>12</sup> TDI's decision to file a mass-produced, form Opposition in the instant proceeding – scarcely heeding the substance of KVMD's claims, the nature of KVMD's programming and the limited captioning market available for such programming – is fundamentally misguided. No matter how laudable its motives, TDI's volume-over-substance tactics represent an abuse of Commission process. Notwithstanding TDI's boilerplate claims, KVMD qualifies for an exemption under the Commission's Undue Burden Exemption and TDI's ill-advised Opposition must therefore be dismissed.

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See 47 C.F.R. § 79.1(b)(3).

<sup>8</sup> See Petition at Attachment 1 at 2.

<sup>9</sup> See *id.*

<sup>10</sup> See Petition at Attachment 2.

<sup>11</sup> See 47 C.F.R. § 79.1(f)(2).

<sup>12</sup> TDI has submitted a slew of oppositions to various parties' requests for exemptions from the Commission's closed captioning requirements, including the Opposition to KVMD's Petition.

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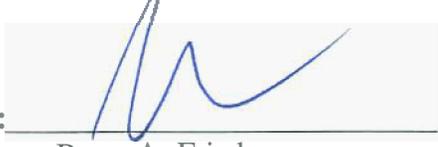
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Should there be any questions in regard hereto, please communicate with the undersigned.

Respectfully submitted,

KVMD Licensee Co., LLC

By:



Barry A. Friedman

### DECLARATION

I, Ronald L. Ulloa, declare under penalty of perjury that the following is true and correct:

1. I am the President of KVMD Licensee Co., LLC ("KVMD"), the permittee of Station KVMD-DT, Twentynine Palms, California (the "Station").

2. The Station has resolved the equipment, construction and training issues that necessitated the Station's request for temporary waiver of the Commission's one-hundred percent (100%) new English-language closed captioning requirements, and that request is now moot.

3. The Station's programming includes Spanish-language programs, mixed Spanish/English-language programs and English-language programs. KVMD has encountered significant difficulty in obtaining closed captioning services for its bilingual English-Spanish-language programming. Given the relaxed deadlines for closed captioning of new Spanish-language programming set forth in Section 79.1(b)(3) of the Commission's Rules, many Spanish-language video program providers do not close caption all *their* programming fully. KVMD has found that Spanish-language video providers are **not** willing to close caption program for single Stations when other Stations not required to meet the 100% requirement do not require such efforts of them. Closed captioning services **are** thus not available for many Spanish-language segments and programs that **KVMD would** broadcast.

3. Executed at Los Angeles, California **this** 7<sup>th</sup> day of May, 2007.



Ronald L. Ulloa

## CERTIFICATE OF SERVICE

I, **Barry A. Friedman**, do hereby certify that, on May 7, 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 **KVMD Licensee Co., LLC**, as filed with the Federal Communications Commission in **CG Docket No. 06-181**, CGB-CC-0116, was served by first class U.S. mail, postage prepaid, upon the following:

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**Barry A. Friedman**