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November 15, 2007

Via ECFS

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

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-0748 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Behind The Rack

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 Behind The Rack (the "Petition").

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

> Petitioner produces 13 episodes per year of a 30-minute outdoor (hunting) program that is aired on Fox 12 KTRV. Petitioner estimates the cost of closed captions would be $225 plus $100 for a transcript for each new episode, plus $100 for each of 39 reruns due to changing advertising spots; or $8,125 per year. Petitioner is soliciting advertisers to cover the cost of closed captions. Petitioner claims it is a start-up company in its first year of production, is "struggling to make the show profitable," and plans to be profitable by its third year. Petitioner "understands the importance of Closed Captioning requirements for all programs, including their own, and will endeavor to comply as soon as possible." Petitioner requests an exemption for a period of three to five years. Petitioner claims that, because it is a new company, it has no existing tax records. Petitioner included an affidavit; however, Petitioner did not provide any information or details about its financial resources, or any indication that the organization sought competitive pricing from multiple sources for captioning.

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The Petition does not meet the statutory requirements necessary to support an exemption from the closed captioning rules.[1] 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 exemption from the closed captioning rules. Therefore, Commenters recommend that the Petitioner be given three years, the time period specified in its exemption request, or until October 17, 2010, to comply with the closed captioning 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 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

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[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).

[6] *Id.*

[7] 47 C.F.R. § 79.1(f).

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.

II. Petitioner Fails to Demonstrate or 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 fails to demonstrate or offers insufficient evidence to demonstrate or determine that compliance would impose an undue burden under the four statutory exemption factors. The Petition

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[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).

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 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

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[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).

[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).

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.

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 three years, the time period specified in its exemption request, or until October 17, 2010, to comply with the closed captioning rules.

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[17] *Outland Sports*, ¶ 7.

[18] 47 C.F.R. § 79.1(f)(2).

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

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.[20]

Respectfully submitted,

/ s /

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[20] 47 C.F.R. §79.1(f)(9).

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CERTIFICATION

I, Rosaline Crawford, Director, NAD Law and Advocacy Center, hereby certify that to the extent three 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.

Rosaline Crawford

Date: November 15, 2007

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CERTIFICATE OF SERVICE

I, Danielle Burt, do hereby certify that, on November 15, 2007, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Behind The Rack, as filed with the Federal Communications Commission in CGB-CC-0748, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Tim Burnett, Producer/Editor/Host
Behind The Rack
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Meridian, ID 83646

/s/
Danielle Burt