

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-0749 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by A&S Media, LLC

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 A&S Media, LLC for its program “The Remax Showcase of Homes (60 minute version)” (the “Petition”).

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

Petitioner produces a weekly 60-minute program that airs on WAFF. Petitioner, a company with two employees, claims that the program is produced and aired in the same week. Petitioner estimates that the cost to close caption the program, within a 36 to 48 hour deadline, would be \$400 to \$500 per episode. Petitioner claims that it charges \$1,800 per episode, that the cost of captioning would represent about 20% of its billable revenues, and that this cost “is beyond what any of our sponsors are willing to absorb.” Petitioner claims the alternative to outsourcing closed captions would be to purchase captioning equipment for \$11,000 to \$13,000. However, petitioner further claims that this (one-time) expense represents approximately 12% of its annual gross revenue and would be a “serious problem” for the company. Petitioner further claims that closed captioning “would be detrimental to the hearing impaired” because the captions would cover up information provided in text on-screen; information that is not included in the audio script. Petitioner included a sample audio script and screen shots, an affidavit, and a 2006 tax forms showing gross receipts of \$94,070 and ordinary business income of \$48,482. Petitioner did

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not provide any indication that the company sought competitive pricing from multiple sources for captioning, or sought to recoup the cost of closed captioning.

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 failed to demonstrate that compliance with the closed captioning requirements would impose an undue burden. Commenters urge the Commission to require that Petitioner comply with the closed captioning rules within 90 days.

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)(4), Section 79.1(d)(8), and 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 these sections 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 the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources 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 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 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).

II. Petitioner Fails to Demonstrate 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 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 petitioner must also

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).

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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 shown that an undue burden would result under the above four factors.

(Footnote continued from Previous Page.)

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)(4), Section 79.1(d)(8) and Section 79.1(d)(12) of the Commission's rules. Section 79.1(d)(4) pertains to primarily textual programming,²⁰ and Petitioner's programming does not qualify as being primarily textual. Section 79.1(d)(8) pertains to locally produced programming;²¹ and 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.²² However, Petitioner cannot qualify for these exemptions because it is not a "video programming distributor."²³

A. Exemption Criteria Under Section 79.1(d)(4)

Petitioner asserts that its video program is exempt from the closed captioning requirements pursuant to Section 79.1(d)(4) of the Commission's Rules, which provides an exemption for primarily textual programming.²⁴ The Commission rejected classifying several types of programming as primarily textual because "critical portions of the information conveyed is lost if captioning is absent."²⁵ For example, the Commission determined that home shopping programming is not eligible for the exemption even though textual information is visually displayed about a product, quantity, price, and ordering information.

Here, Petitioner's real estate sales program may include related and/or required information displayed on screen in text, such as property descriptions (i.e., address, locations, area, MLS number, details, and amenities), price, incentives, available financing, disclaimers, and seller/agent's information (i.e., photo, name, agency, logo, address, phone number, and/or website address). Providing text or visual displays of what the seller believes to be pertinent, relevant, or most information is not sufficient. Audio or voiceover information, sometimes characterized as "verbiage" or "banter" and often unscripted, ad lib, or improvised, provides commentary and information, and describes, supplements, or highlights features or details of visual displays such as pictures

²⁰ 47 C.F.R. § 79.1(d)(4).

²¹ 47 C.F.R. § 79.1(d)(8).

²² 47 C.F.R. § 79.1(d)(12).

²³ 47 C.F.R. § 79.1(a)(2).

²⁴ 47 C.F.R. § 79.1(d)(4).

²⁵ *Report and Order*, 13 FCC Rcd at 3344 (rejecting a primarily textual exemption for sports, weather, home shopping, and game show programming.)

or video, which is not displayed on screen as text. Presentation of text and visuals can be designed to accommodate the inclusion of closed captions without blocking important visual information. Primarily textual programming exists only when everything the spokesperson says actually appears on screen as text. Therefore, Petitioner does not qualify for the exemption set forth in 79.1(d)(4) because the programming at issue is not primarily textual.

B. Exemption Criteria Under Section 79.1(d)(8)

Petitioner implies or expressly claims that its video program is exempt from the closed captioning requirements pursuant to Section 79.1(d)(8) of the Commission's Rules. 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."²⁶ A "video programming distributor" is defined in Section 79.1(a)(2) as "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."²⁷ Commenters respectfully submit that Petitioner is not a video programming distributor as defined under Section 79.1(a)(2). Thus, Petitioner does not qualify for the exemption set forth in 79.1(d)(8).

C. Exemption Criteria Under Section 79.1(d)(12)

Petitioner suggests that its video program is 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.²⁸ 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

²⁶ 47 C.F.R. § 79.1(d)(8).

²⁷ 47 C.F.R. § 79.1(a)(1).

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

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programming to residential homes.²⁹ 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 is not a video programming distributor as defined under Section 79.1(a)(2). Thus, Petitioner does not qualify for the exemption set forth in 79.1(d)(12).

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.³⁰

Respectfully submitted,

_____/ s /_____
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²⁹ *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”).

³⁰ 47 C.F.R. §79.1(f)(9).

/ s /

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CERTIFICATION

I, Rosaline Crawford, Director, NAD Law and Advocacy Center, 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.

A handwritten signature in cursive script, reading "Rosaline Crawford", is written over a horizontal line. The signature is fluid and somewhat stylized, with the first letter 'R' being particularly large and looping.

Date: November 15, 2007

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 A&S Media, LLC, as filed with the Federal Communications Commission in CGB-CC-0749, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Steven E. Pope, Owner
A&S Media, LLC
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/s/

Danielle Burt