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May 2, 2008

Via ECFS - Docket No. 06-181

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-0788 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by The Blue Group

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 The Blue Group (the "Petition").

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

> Petitioner produces four 30-minute infomercials each month for a local car dealership and estimates it has 72 hours of production time for each program. Petitioner claims that the budget to produce each program is $3,000, with closed captioning. Petitioner estimates the cost of closed captions is $300 per program. Petitioner also claims that closed captioning requirements would make it "problematic" to complete each program on time. Finally, Petitioner indicates that closed caption text will make it difficult to see the text on the screen that will include information about the car and car dealers. Petitioner did not provide any information about its financial resources, any indication that Petitioner sought competitive pricing from multiple sources or sought to recoup the cost of closed captioning. Petitioner did not include an affidavit.

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

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 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 implies or expressly claims that its programming qualifies for an exemption under Section 79.1(d)(4) 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]

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

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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).

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.

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[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 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]

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

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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).

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.

(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 suggests 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.[20] The Commission rejected classifying several types of programming as primarily textual because "critical portions of the information conveyed is lost if captioning is absent."[21] 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 vehicle sales program may include related and/or required information displayed on screen in text, such as vehicle descriptions (i.e., year, make, model, stock number, and options), price and payment details (i.e., factory incentive, down payment, interest, scheduled payment amount and derivation), sales terms and conditions, disclaimers, and seller's information (i.e., name, address, phone number, and/or website address). Providing text or visual displays of what the seller believes to be core content, vital details, pertinent, important, or relevant 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 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.

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.

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[20] 47 C.F.R. §79.1(d)(4).

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

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.[22]

Respectfully submitted,

/ s /

Paul O. Gagnier
Danielle C. Burt
Kimberly A. Lacey
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20007

Counsel to TDI

[22] 47 C.F.R. §79.1(f)(9).

/ s /
Claude L. Stout
Executive Director
Telecommunications for the
Deaf and Hard of Hearing, Inc.
8630 Fenton Street, Suite 604
Silver Spring, MD 20910

/ s /
Nancy J. Bloch
Chief Executive Officer
National Association of the Deaf
8630 Fenton Street, Suite 820
Silver Spring, MD 20190-4500

/ s /
Cheryl Heppner
Vice Chair
Deaf and Hard of Hearing
Consumer Advocacy Network
3951 Pender Drive, Suite 130
Fairfax, VA 22030

/ s /
Brenda Battat
Associate Executive Director
Hearing Loss Association of America
7910 Woodmont Avenue, Suite 1200
Bethesda, MD 20814

/ s /
Christine Seymour, President
Association of Late-Deafened Adults, Inc.
10916 62nd Avenue Ct. E, #17-104
Puyallup, WA 98373

/ s /
Jenifer Simpson
Senior Director, Telecommunications
and Technology Policy
American Association of
People with Disabilities
1629 K Street N.W., Suite 503
Washington, DC 20006

/ s /
Ed Kelly
Chair
California Coalition of Agencies
Serving the Deaf and Hard of Hearing
6022 Cerritos Avenue
Cypress, CA 90630

CERTIFICATE OF SERVICE

I, Danielle Burt, do hereby certify that, on May 2, 2008, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by The Blue Group, as filed with the Federal Communications Commission in CGB-CC-0788, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Andy Cope
The Blue Group
1200 Barton Hills, #101
Austin, TX 78704

/s/
Danielle Burt

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.

Rosaline Crawford

Date: May 2, 2008