CGB-CC-0733

Before the
Federal Communications Commission
Washington, DC 20554

FILED/ACCEPTED
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Federal Communications Commission
Office of the Secretary

In the Matter of:	)	
	)	
Baerclaw Productions, L.L.C.	)	CG Docket No. 06-181
	)	CGB-CC-0733
Video Programming Accessibility	)	
	)	
Petition for Exemption of Closed Captioning Requirements	)	
	)	

To: Office of the Secretary

MOTION TO STRIKE AND PRECAUTIONARY REPLY

Baerclaw Productions, L.L.C. ("Baerclaw Productions"), by counsel, herby files this Motion to Strike and Precautionary Reply. On August 30, 2007, Baerclaw Productions filed a petition with the FCC requesting that pursuant to Section 79.1 of the Rules it be exempt from the requirement of the FCC's closed captioning rules.

On October 3, 2007, the FCC placed Baerclaw Productions' Petition, on public notice. On October 31, 2007, 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 the "Advocacy Groups") filed an Opposition to Baerclaw Productions' Petition for Exemption.

The Advocacy Groups are Not Interested Persons Within the Meaning of the FCC's Rules.

Section 79.1 (f) (6) of the FCC's rules provides that "any interested person may file comments or oppositions to the petition" for exemption.[1] The Advocacy Groups are not interested persons within the meaning to the FCC rules and the Administrative Procedure Act.[2] The Advocacy Groups do not allege that the FCC's grant of the above captioned Petition in any way would injure them or any of their members. Nor do they claim that any member regularly watches Baerclaw Productions' programs. The Advocacy Groups have not shown how the FCC's grant of the Petition for Exemption would cause them or their members harm. Without a showing of an injury-in-fact, the Advocacy Groups are not "interested persons." Therefore, they do not have standing to participate in this proceeding.

The Administrative Procedure Act provides that an "interested person" may appear before an agency for the presentation, adjustment, or determination of an issue. 5 U.S.C.A. § 555(b). The Court of Appeals has held that the injury-in-fact rule for standing of *Sierra Club v. Morton*, 405 U.S. 727, 733, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972) covers the "interested person" language of the Administrative Procedure Act. *Trustees for Alaska v. EPA*, 749 F.2d 549, 554 (9th Cir. 1984) (adopting the analysis in *Montgomery Environmental Coalition v. Costle*, 207 App. D.C. 233, 646 F.2d 568, 578 (D.C. Cir. 1980)). *Compare, In the Matter of Cox Communications, Inc.*, 14 FCC Rcd 11716 (1999) (Petitioners are not "interested persons" outside of the area where they are cable subscribers.)

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[1] 47 C.F.R. §79.1 (f)(6).
[2] 5 U.S.C.A. § 555(b).

The "irreducible constitutional minimum" for standing is that the appellant was injured in fact, that its injury was caused by the challenged conduct, and that the injury would likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); *Microwave Acquisition Corp. v. FCC*, 330 U.S. App. D.C. 340, 145 F.3d 1410, 1412 (D.C. Cir. 1998). Associations, such as the Advocacy Groups, have standing to sue on behalf of their members only if (1) at least one of the members would have standing to sue in his own right, (2) the interest the association seeks to protect is germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member participate in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Generally, the Commission accords party in interest standing to a petitioner that demonstrates either residence in the station's service area, or that the petitioner listens to or views the station regularly.[3] *Chet-5 Broadcasting, L.P.* 14 FCC Rcd 13041 (1999). In this case, Advocacy Groups should have demonstrated that at least one of their members resides in the service area of a station that broadcasts Baerclaw Productions' programming, and that the member regularly views the programming. The Advocacy Groups have not provided the statement of a single member who claims to be aggrieved or adversely affected by the grant of Baerclaw Productions' Petition for Exemption of the Closed Captioning rules. The Advocacy Groups lack standing to oppose Baerclaw Productions' Petition for Exemption of the Closed Captioning rules. Accordingly, the Commission should strike the Advocacy Groups' Opposition without consideration.

[3] 47 U.S.C. §309 (d)(1) ("Any party in interest may file with the Commission a petition to deny. . .")

Procedural Defects

The Advocacy Groups' Opposition has numerous procedural defects. Section 1.49(a) of the Commission's Rules provides that all pleadings must be double-spaced. The Advocacy Groups' Opposition is single-spaced. Further, had the Advocacy Groups properly spaced the Opposition it would have exceeded ten double spaced pages. Section 1.49(b) and (c) provide that all pleadings exceeding ten pages shall contain a table of contents and a summary. The Advocacy Groups' Opposition contains neither a table of contents nor a summary. These procedural defects provide a separate and independent reason for striking the Advocacy Groups' defective Opposition.

Precautionary Reply

A review of the filings made by the Advocacy Groups in CG Docket No. 06-181 shows that the Advocacy Groups filed numerous cookie-cutter, one-size-fits-all pleadings. It appears that they have yet to find merit with even a single petition for exemption. In the case of Baerclaw Productions, the text of the Advocacy Groups' Opposition does not match the facts as presented in Baerclaw Productions' Petition. For example, on page 5 of the Opposition the Advocacy Groups, without any explanation or correlation to the facts claim that Baerclaw Productions "has not provided sufficient financial information to determine whether an undue burden would result." Nothing could be further from the truth. As William Baer, president and C.E.O. of Baerclaw Productions stated in its Declaration,

> Baerclaw Productions produces a wide variety of television programs including documentaries, 30-minute program length commercials (commonly referred to as infomercials) as well as 30 and 60-second commercials. We also produce a number of specialty programs for our corporate clients. These programs tend to be educational in nature

and our clients do not broadcast them on television or cable stations.

Baerclaw Productions close captions all programming it produces for television or cable broadcast. Baerclaw Productions purchased closed captioning equipment in 2006 for $3,049.18. It costs Baerclaw Productions $650 ($350 closed captioning plus 2 hours in-house editing time) per half hour program to complete all of the steps necessary to close caption each program. Baerclaw Productions has produced such shows as Make Your Move, You Wish, Healthy Lifestyles, and Phoenix's Best New Homes. These programs have high production values, costing up to $50,000 per episode to shoot, produce and edit. Most of the programs, which we produce, air either locally or regionally although a few have aired nationally on various cable outlets. For these high production value programs, the cost of closed captioning is marginal and not a burden to our clients. **Baerclaw Productions is not requesting an exemption of the closed captioning requirements for these programs.**

In 2006, Baerclaw Productions started producing half-hour commercials for a Phoenix area automobile dealership and has since added a second dealership. We are attempting to get more car dealers to advertise using the half hour commercial format. These technically simple programs do no more than display a series of used cars on the television screen. For each car, state law requires the auto dealer to show in writing, the make, model, year, pricing and payments and a complete disclosure of down payments, interest and payment details for purchasing or leasing the vehicle. In addition, the program displays simultaneously on the screen, the name and telephone number of the sponsoring car dealer. Other programs we produce, such as Make Your Move, may take 2 to 3 weeks of filming, followed by several days to weeks of in-studio editing. Baerclaw Productions can videotape and edit a car dealer commercial in one and a half days. Consequently, we only charge $3,500 to produce this type of commercial. Typically the commercial airs on Saturday and Sunday mornings with a very limited life span because of the changing inventory of vehicles at car dealerships.

Car dealers have other advertising options, including newspapers, radio, and conventional 30 and 60 second

> commercials. The added cost of producing closed-captioned commercials makes them uneconomical and therefore impractical for car dealers as a means of advertising.
>
> If Baerclaw Productions is required to provide closed captioning for the commercials it produces, I believe that the net result will be that our auto clients' advertising business will migrate to radio and newspaper competitors, causing economic loss to both Baerclaw Production and the local television stations which currently air these commercials.
>
> Baerclaw Productions is asking for an exemption of the Federal Communications Commission's closed captioning rules, but only for the program length commercials it produces for auto dealers.

The Advocacy Groups fail to address Baerclaw Productions' statement that providing closed captioning would result in a net loss to Baerclaw Productions' business, yet in their cookie-cutter pleading they somehow claim that Baerclaw Productions has failed to demonstrate that an undue burden would result. The FCC should not consider such one-size-fits-all advocacy.

It would be futile to address the Advocacy Groups' Opposition point by point, since the Advocacy Groups have made no effort to connect the uncontested facts set forth in Baerclaw Production's Petition and supplement with the relevant FCC rules and regulations. By way of further example, the Advocacy Groups claim that Baerclaw Productions failed to provide sufficient information that it could not receive closed captioning assistance from the distributors of its programming. The Advocacy Groups ignore Mr. Baer's unequivocal statement in his Declaration that the, "added cost of producing closed-captioned commercials makes them uneconomical and therefore impractical for car dealers as a means of advertising." Mr. Baer further states that "If

Baerclaw Productions is required to provide closed captioning for the commercials it produces, I believe that the net result will be that our auto clients' advertising business will migrate to radio and newspaper competitors, causing economic loss to both Baerclaw Production and the local television stations which currently air these commercials."

The Advocacy Groups do not dispute Baerclaw Productions' showing that it will not be able to pass the costs of closed captioning to its advertisers. Baerclaw Productions' showing that it will suffer an undue burden is conclusive and unchallenged. Accordingly, the FCC should grant its Petition for exemption of Section 79.1 of the FCC's rules.

Conclusion

The Advocacy Groups lack standing to file an Opposition to Baerclaw Productions' Petition for Exemption. Additionally, their pleading contains numerous procedural errors. Accordingly, FCC should dismiss the Advocacy Groups' Opposition without consideration.

Even if the Commission considers their one-size-fits-all pleading, what could it make of such a disjointed document? The Advocacy Groups accept all of Baerclaw Productions' factual showings. The Advocacy Groups merely provide a legal memo which fails to connect the FCC rules with the facts of this case (or apparently any other case). What is the point of such a pleading? Apparently the Advocacy Groups have determined that no programmer, regardless how small or how deserving, should ever be granted an exemption. Without examining or challenging the facts, the Advocacy Groups have concluded that none of the over 500 pending petitions for exemption should be granted an exemption. Thus, the Advocacy Groups would rather put hundreds of small

program producers out of business, rather than concede that occasionally there is a need for an exemption of the Commission's rules. The FCC should not countenance such shameful and selfish conduct. The Advocacy Groups' Opposition, to the extent the FCC considers it at all, should be summarily denied.

Respectfully submitted,

BAERCLAW PRODUCTIONS, L.L.C.

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November 26, 2007

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Motion to Strike and Precautionary Reply" was mailed by First Class U.S. Mail, postage prepaid, this 26th day of November, 2007, to the following:

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Sherry L. Schunemann