

August 22, 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-0817 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by MGK Productions d/b/a Focus Outdoors

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 MGK Productions d/b/a Focus Outdoors (the “Petition”).

The following is the Petition for exemption in its entirety:

“Requiring Focus Outdoors to close caption its shows would be a tremendous strain on our revenues. Based on cost estimates we have received, closed captioning would cost us almost 15% of our gross revenues. That cost added to television time, production, acquisition costs and overhead would cause us to be in a greater negative cash flow position. We have tried to solicit a closed captioning sponsor without any luck. Attached are copies of tax returns for the past 2 years to support our request. Focus Outdoors must generate all revenues through the sale of various advertising options. That has been a challenge and difficult to do in the current economy.”

Petitioner did not include an affidavit, provide any information about the duration or frequency of its programming, any indication that Petitioner sought competitive pricing from multiple sources or supporting documentation for the claim that Petitioner sought to recoup the cost of closed captioning. Petitioner

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included copies of tax returns for the past 2 years, indicating net losses of \$17,409 for 2007 and \$41,286 for 2006.

Commenters believe that the Petitioner has provided information that suggests that compliance with the closed captioning requirements would impose an undue burden under the Commission's existing waiver standards. Commenters recommend that the Petitioner be given a temporary exemption of two (2) years 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.¹ 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.² Congress defined "undue burden" to mean "significant difficulty or expense."³

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.⁴ 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.⁵

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.⁶ A petition for an exemption from the closed captioning requirements must be supported by sufficient

¹ 47 U.S.C. § 613(e).

² *Id.*

³ *Id.*

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

⁵ *Id.*

⁶ 47 C.F.R. § 79.1(f).

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evidence to demonstrate that compliance with the requirements would cause an undue burden.⁷ Such petition must contain a detailed, full showing, supported by affidavit, of any facts or considerations relied on by the petitioner.⁸ It must also describe any available alternatives that might constitute a reasonable substitute for the captioning requirements.⁹

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.¹⁰ 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.¹¹ 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. Conclusion

Commenters agree that the Petitioner has provided information that suggests that compliance with the closed captioning requirements would in fact impose an undue burden under the Commission’s existing waiver standards. As such, Commenters recommend that the Petitioner be given a temporary exemption of two (2) years to comply with the closed captioning rules.

⁷ 47 C.F.R. § 79.1(f)(2).

⁸ 47 C.F.R. § 79.1(f)(9).

⁹ 47 C.F.R. § 79.1(f)(3).

¹⁰ *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*”).

¹¹ *See* Application for Review of Bureau Order, Docket No. 06-181, CGB-CC-0005, CGB-CC-0007 (filed October 12, 2006).

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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.¹²

Respectfully submitted,

_____/ s /_____
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¹² 47 C.F.R. §79.1(f)(9).

/ s /

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CERTIFICATE OF SERVICE

I, Danielle Burt, do hereby certify that, on August 22, 2008, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by MGK Productions d/b/a Focus Outdoors, as filed with the Federal Communications Commission in CGB-CC-0817, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

Steven L. Hammer, CEO
MGK Productions d/b/a Focus Outdoors
3333 Division Street #119
St. Cloud, MN 56301

/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.



A handwritten signature in cursive script, reading "Rosaline Crawford", is written over a horizontal line.

Date: August 22, 2008