

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-0820 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Archery Adventures, 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 Archery Adventures, LLC for its program “Accept the Challenge” (the “Petition”).

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

Petitioner plans to produce a weekly 30-minute hunting show that will air on WXTX beginning in August 2008. Petitioner pays a contractor to assist in producing its program. Petitioner claims that it does not have in-house resources to caption its program. Petitioner estimates that closed captioning will cost \$300 per program or \$15,600 per year, or \$5,000 to purchase closed captioning equipment. Petitioner claims that its sole source of income comes from the sale of non-broadcast videos and merchandise, and that seeking grants is not an option. Petitioner states it plans to solicit advertisers to fund the production and airtime costs but claims captioning costs would “drive our [advertising] rates beyond the reach of many of our present sponsors and price us out of the competitive market.” Petitioner claims that it may be able to add captioning in the future. Petitioner included an affidavit, captioning price quotes from two sources, and tax returns for 2004-2007 showing net business losses of \$15,050, \$27,715, \$28,454, and \$20,359, respectively.

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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.

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)(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.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

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.*

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 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. Petitioner does not Qualify for Self-Implementing Exemptions

Petitioner also argues that it qualifies for an exemption pursuant to Section 79.1(d)(8) and Section 79.1(d)(12) of the Commission’s rules. Section 79.1(d)(8) pertains to locally

⁶ 47 C.F.R. § 79.1(f).

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).

produced programming;¹² 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.¹³ However, Petitioner cannot qualify for these exemption(s) because it is not a “video programming distributor.”¹⁴

A. 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.”¹⁵ 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.”¹⁶ 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).

B. 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.¹⁷ 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

¹² 47 C.F.R. § 79.1(d)(8).

¹³ 47 C.F.R. § 79.1(d)(12).

¹⁴ 47 C.F.R. § 79.1(a)(2).

¹⁵ 47 C.F.R. § 79.1(d)(8).

¹⁶ 47 C.F.R. § 79.1(a)(1).

¹⁷ 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.¹⁸ 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).

III. 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.

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.¹⁹

Respectfully submitted,

_____/ s /_____
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Counsel to TDI

¹⁸ *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").

¹⁹ 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 Archery Adventures, LLC, as filed with the Federal Communications Commission in CGB-CC-0820, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

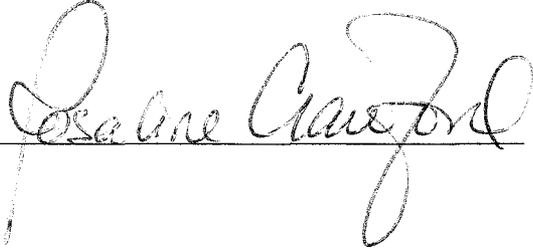
Scott Carroll, Co-Owner
Archery Adventures, LLC
589 Morgan Copeland Road
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/s/

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