

October 15, 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-0824 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Whitetail Properties, 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 Whitetail Properties, LLC for its program “Whitetail Properties TV” (the “Petition”).

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

Petitioner is a recreational and agricultural real estate marketing company that produces a weekly 30-minute whitetail deer hunting program as a medium for real estate advertising and sales. The program first aired in August 2007 and is now aired on five networks. Petitioner is a five-person organization established in 2006 that employs four people. Petitioners claim that the system for obtaining closed captions requires the program to be sent to the caption company three weeks prior to air time. Petitioner also claims that the process of having the caption company send the program to the networks has resulted in programs failing to air or airing out of sequence. Petitioner included a copy of the contract for closed captioning for 52 episodes in 2008 which shows that the cost to close caption “two (2) versions of ‘Whitetail Properties’ will be \$200 each version for a cost of \$400 per episode per week” or \$20,800 for the year. The cost for dubbing and shipping costs for airing the program on five (5) networks is \$19,325, or a total cost for closed captioning and dubbing of \$40,125 for 2008. Petitioner claims to be investigating the purchase of equipment to produce the

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

A/72667306.1

captions in-house but is unable to hire an employee at this time to produce the captions. Petitioner believes its financial outlook will be positive in 2010. Petitioner included a copy of its 2007 tax return showing gross receipts of \$268,288, expenses of \$415,902, and a net business loss of \$147,614. Petitioner also included affidavits and correspondence indicating that Petitioner sought competitive pricing from multiple sources and sought to recoup the cost of closed captioning.

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.¹ 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.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

¹ Although Commenters believe that the Petitioner may meet the undue burden standard set forth in 47 U.S.C. § 613(e) and 47 C.F.R. § 79.1(f), the Commission may not properly rely on the *Anglers Exemption Order* to determine whether Petitioner's request meets the undue burden standard. *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*"). The *Anglers Exemption Order* is not a final order and the new standard fails to incorporate an "economically burdensome" or an "undue burden" standard as mandated by 47 U.S.C. § 613(e). *See* Application for Review of Bureau Order, Docket No. 06-181, CGB-CC-0005, CGB-CC-0007 (filed October 12, 2006).

² 47 U.S.C. § 613(e).

³ *Id.*

⁴ *Id.*

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 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

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

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*").

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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.

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.

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.¹³

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

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

¹³ 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
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 /

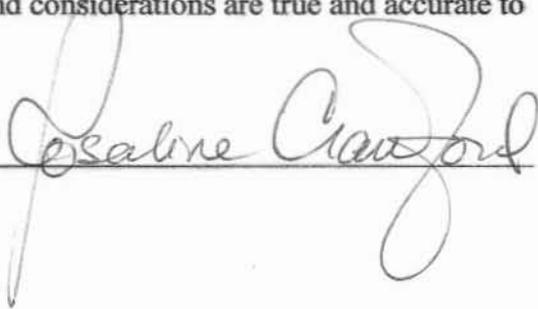
Jenifer Simpson
Senior Director, Telecommunications
and Technology Policy
American Association of
People with Disabilities
1629 K Street N.W., Suite 503
Washington, DC 20006

/ s /

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

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: October 15, 2008

CERTIFICATE OF SERVICE

I, Danielle Burt, do hereby certify that, on October 15, 2008, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by Whitetail Properties, LLC, as filed with the Federal Communications Commission in CGB-CC-0824, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

J. Andrew Merriman
Rammelkamp Bradney, P.C.
232 West State Street
P.O. Box 550
Jacksonville, IL 62651-0550

/s/

Danielle Burt