

January 16, 2009

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-0837 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by WSBS Licensing, Inc.

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 WSBS Licensing, Inc. (the “Petition”).

Commenters oppose Petitioner’s undue burden exemption request and refrain from addressing, at this time, any self-implementing exemption for which Petitioner may qualify or seek to apply. The following is a summary of pertinent program, financial, and other information provided in the Petition:

Petitioner is the licensee of two television stations, WSBS-TV and WSBS-CA, and seeks an undue burden captioning exemption for all non-exempt programming aired on WSBS-TV and WSBS-CA. Petitioner is also a subsidiary of Spanish Broadcasting System, Inc. and an affiliate of MEGA TV, a producer and distributor of Spanish language programming. Petitioner receives 33.5 hours of programming each week from MEGA TV. Petitioner claims that MEGA TV qualifies as a network and that its programming qualifies for a self-implementing captioning exemption until October 17, 2011.

Although Petitioner infers that WSBS-TV and WSBS-CA do not qualify for the 4-year exemption that may apply to MEGA TV, Petitioner claims that neither WSBS-TV nor WSBS-CA are required to spend more than 2% of gross revenues received from each channel for captioning pursuant to a self-implementing

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exemption. Petitioner also claims neither WSBS-TV nor WSBS-CA should be required to spend *any* amount up to 2% of gross revenues (approximately \$237,221 in 2007) as it would impose an undue burden. Petitioner provides Spanish Broadcasting System, Inc. financial statements showing annual revenue of approximately \$12 million for the television division and calculates total operating losses in 2006, 2007 and part of 2008 up to \$37 million for WSBS-TV and WSBS-CA as well as MEGA TV. Petitioner claims captioning must be outsourced because of the complexity of captioning Spanish language programming and estimates captioning would cost \$120 for each hour or \$840,540 a year (excluding MEGA TV programming).

Petitioner also asserts that spending 2% of gross revenues (approximately \$237,221 in 2007) would provide less than 5 hours a day of captioned programming, that Petitioner would “necessarily” use these funds to caption paid programming because of MEGA TV’s self-implementing exemption, and these funds would be better spent producing new Spanish language programming.

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 failed to demonstrate that compliance with the closed captioning requirements would impose an undue burden. Petitioner did not provide any indication that Petitioner sought competitive pricing from multiple sources or sought to recoup the cost of closed captioning. Requiring Petitioner to spend 2% of *\$12 million gross revenues* for captioning non-exempt WSBS-TV or WSBS-CA programming should not constitute an undue burden. Commenters also disagree that applying a self-implementing exemption to MEGA TV would cause Petitioner to use 2% of gross revenues to caption infomercials or paid programming. Petitioner may choose to caption any of its programming and to prioritize captioning news and prime time television programming to provide *some access* for deaf and hard of hearing viewers. Commenters urge the Commission to require that Petitioner comply with the closed captioning rules within 90 days.

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

¹ 47 U.S.C. § 613(e).

² 47 U.S.C. § 613(e).

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 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

³ *Id.*

⁴ *Id.*

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).

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.

II. Petitioner Fails to Demonstrate 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 fails to demonstrate 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

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).

¹³ 47 C.F.R. § 79.1(f)(2).

- (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 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

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).

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.

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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 shown that an undue burden would result under the above four factors.

III. 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.

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.²⁰

Respectfully submitted,

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

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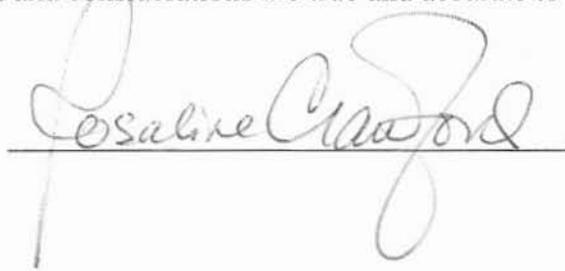
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CERTIFICATION

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 that reads "Rosaline Crawford". The signature is written in black ink and is positioned above a solid horizontal line. The signature is somewhat stylized, with large loops and a long vertical stroke extending downwards from the end of the name.

Date: January 16, 2009

CERTIFICATE OF SERVICE

I, Danielle Burt, do hereby certify that, on January 16, 2009, a copy of the foregoing Opposition to the Petition for Exemption from Closed Captioning Requirements Filed by WSBS Licensing, Inc., as filed with the Federal Communications Commission in CGB-CC-0837, was served by first class U.S. mail, postage prepaid, upon the Petitioner:

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/s/

Danielle Burt