

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matters of |) | |
| |) | |
| Closed Captioning of |) | |
| Video Programming |) | CG Docket No. 05-231 |
| |) | |
| Closed Captioning Requirements for |) | |
| Digital Television Receivers |) | ET Docket No. 99-254 |

TO: The Office of the Secretary

COMMENTS OF TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.,
REGARDING THE NOTICE OF PROPOSED RULE-MAKING REGARDING
EXEMPTION OF CERTAIN MULTICAST PROGRAMMING CHANNELS
FROM CLOSED CAPTIONING REQUIREMENTS

February 12, 2009

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EXECUTIVE SUMMARY

Trinity Christian Center of Santa Ana d/b/a Trinity Broadcasting Network (“Trinity”) responds to the invitation to comment on the notice of proposed rule changes contemplated by the Commission in pursuit of “closed captioning requirements.” In particular, Trinity presents the Commission its views that the current framework of exemptions serve the important governmental interests in local origination of programming, in programming diversity, and in protecting the religious liberties of a select, disadvantaged group of program originators. Trinity views proposals to eliminate the Three Million Dollar revenue threshold for obligatory closed captioning, or to reduce the amount of the threshold, as an unwarranted and unwise step that is inconsistent with the Commission’s own prior evaluation of relevant issues.

The Commission, undoubtedly, will receive a diverse body of comments on the issues included in its Notice of Proposed Rulemaking. Trinity’s views offer the Commission the distinct and experienced voice of a long-time broadcast licensee, and that of a distinctly Christian, religious programming broadcaster. Trinity’s religious identity, and the religious nature of Trinity’s broadcasting service, serve to remind the Commission of its ongoing duties under federal law.

The Religious Freedom Restoration Act (“RFRA”), Title 42 USC § 2000-bb, as amended, is binding law to the Commission. Under RFRA, Trinity contends, the Commission is bound to consider and to decide whether proposed rule changes that decrease the financial threshold for mandatory closed captioning will have an adverse impact on the religious exercises of broadcasters. RFRA, by which Congress amended *all* federal law, and by which Congress imposed on *all* federal agencies a set of affirmative duties, guarantees to Trinity that the

Commission cannot and will not impose any substantial burden on its exercise of religion *except* when, in doing so, the burden serves a compelling government interest by the least restrictive means available to the government.

The Commission has a history with respect to the revenue threshold below which an exemption from closed captioning requirements alleviates broadcaster responsibilities related to such captioning. The Commission's own rule-making determination to set up the Three Million Dollar threshold and its subsequent regulatory application of that exemption framework bear on the question of whether to amend the exemption. Based on that regulatory history – of adoption and application – it is doubtful that an interest of a sufficiently compelling nature can be shown to be served by a sufficiently narrowly tailored means to justify the burden on religious exercise that a lowered threshold undoubtedly imposes. The Commission would be well-counseled to afford relief from the commands of any proposed modification of the threshold to take religious nature and identity of licensees and programmers into account.

There also are constitutional considerations – quite unrelated to the religious identity of certain licensees of the Commission – that command caution in imposing mandatory speech obligations. There is a substantial record of the deleterious impact of the closed captioning requirement on the ability of programmers to enter the broadcast television market. In another generation, access to public sidewalks for the distribution of pamphlets and leaflets was found to be “so essential to the poorly financed causes of the little people.” *Martin v. Struthers*, 319 U.S. 141, 146 (1943) (citation omitted). Here, the Commission would be well advised to consider the impact on local generation of programming and the relationship between local generation and “the poorly financed causes of the little people.” Understanding how closed

captioning requirements can effectively bar entry into the market for locally generated public interest programming, the Commission should conclude that constitutional values related to multiplication of voices rather than limitation of them, governs the question whether to lower the threshold (and thus raise higher the barrier to entry of diverse voices and ideas).

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COMMENTS OF TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.
IN RESPONSE TO CLOSED CAPTIONING
FURTHER NOTICE OF PROPOSED RULE-MAKING

I. INTRODUCTION

A. Statutory and Regulatory Background

At least since 1970, the Commission has taken note of the special needs of the hearing-impaired and deaf communities. *See The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing*, 26 F.C.C.2d 917 (FCC 1970). Then, the Commission proposed to licensees in multistation markets that competing licensees coordinate together a schedule of alternating broadcasting ventures capable of being usefully received and understood by the deaf and the hearing impaired. 26 F.C.C.2d at 918. As the Commission explained then,

The material which persons with impaired hearing need and desire to receive via telecasts falls basically into two categories -- first, rapid receipt of emergency information which concerns the safety of life or property, and second, the receipt of news, information and entertainment. In respect to the need of all citizens including the deaf and hard of hearing for information concerning emergency situations, we are convinced there can be little argument.

26 F.C.C.2d at 917.

To address the accessibility issues related to both of these important categories, the

Commission has entertained proposals and solutions that have become, in the intervening years, quite sophisticated.

Congress intervened in the accessibility debate with its enactment of the Telecommunications Act of 1996. Therein, Congress adopted the provision of law now codified at 47 U.S.C. § 613. The relevant portion of the Telecommunications Act provided for, essentially, a two step, and graduated approach to improving accessibility to video programming for the deaf and hearing impaired. First, Congress directed the Commission to ascertain current levels of closed captioning by broadcast licensees, and to report to Congress its findings:

Within 180 days after the date of enactment of the Telecommunications Act of 1996, the Federal Communications Commission shall complete an inquiry to ascertain the level at which video programming is closed captioned. Such inquiry shall examine the extent to which existing or previously published programming is closed captioned, the size of the video programming provider or programming owner providing closed captioning, the size of the market served, the relative audience shares achieved, or any other related factors. The Commission shall submit to the Congress a report on the results of such inquiry.

47 U.S.C. § 613(a).

After ascertainment of current service, the Commission was directed by Congress to roll out regulations adopting a framework for virtually universal closed captioning by broadcast licensees of all new programming, and backfilling of existing programming. The relevant statutory provisions state:

(b) Accountability criteria. Within 18 months after such date of enactment, the Commission shall prescribe such regulations as are necessary to implement this section. Such regulations shall ensure that--

(1) video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions, except as provided in subsection (d);
and

(2) video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions, except as provided in subsection (d).

47 U.S.C. § 613(b). Evidencing its earnest determination that accessibility be pursued with rigor, Congress mandated the Commission to adopt an express schedule of deadlines for provision of closed captioning, 47 U.S.C. § 613(c). Finally, Congress specifically contemplated that imposition of mandatory closed captioning requirements could have a negative impact on certain licensees and programming providers. Consequently, Congress directed that the Commission develop a program of exemptions from mandatory closed captioning:

(d) Exemptions. Notwithstanding subsection (b)--

(1) the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming;

(2) a provider of video programming or the owner of any program carried by the provider shall not be obligated to supply closed captions if such action would be inconsistent with contracts in effect on the date of enactment of the Telecommunications Act of 1996, except that nothing in this section shall be construed to relieve a video programming provider of its obligations to provide services required by Federal law; and

(3) a provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would result in an undue burden.

47 U.S.C. § 613(d).

Finally, with respect to the “undue burden” for which the Commission was directed by Congress to craft exemptions, Congress provided a statutory definition:

(e) Undue burden. The term "undue burden" means significant difficulty or expense. In determining whether the closed captions necessary to comply with the requirements of this paragraph would result in an undue economic burden, the factors to be considered include--

- (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.

Title 47 U.S.C. § 613(e).

As ordered, the Commission promulgated regulations related to closed captioning of video programming. *See* 47 C.F.R. § 79.1. As contemplated in the Telecommunications Act, the Commission promulgated a regulatory framework for exemptions from the closed captioning requirement.¹ The Commission has summarized the categories

1. 47 CFR § 79.1(d) provides for categories of exemption from the requirement of closed captioning of video programming:

(d) Exempt programs and providers. For purposes of determining compliance with this section, any video programming or video programming provider that meets one or more of the following criteria shall be exempt to the extent specified in this paragraph.

(1) Programming subject to contractual captioning restrictions. Video programming that is subject to a contract in effect on or before February 8, 1996, but not any extension or renewal of such contract, for which an obligation to provide closed captioning would constitute a breach of contract.

(2) Video programming or video programming provider for which the captioning requirement has been waived. Any video programming or video programming provider for which the Commission has determined that a requirement for closed captioning imposes an undue burden on the basis of a petition for exemption filed in accordance with the procedures specified in paragraph (f) of this section.

(3) Programming other than English or Spanish language. All programming for which the audio is in a language other than English or Spanish, except that scripted programming that can be captioned using the "electronic news room" technique is not exempt.

(4) Primarily textual programming. Video programming or portions of video programming for which the content of the soundtrack is displayed visually through text or graphics (e.g., program schedule channels or community bulletin boards).

(5) Programming distributed in the late night hours. Programming that is being distributed to

of exemption:

Exemption based on economic burden: Section 613(d)(1) permits the Commission to exempt by regulation programs, classes of programs or services for which we determine a requirement to provide closed captioning will be economically burdensome. We will exempt from our closed captioning rules several specific

residential households between 2 a.m. and 6 a.m. local time. Video programming distributors providing a channel that consists of a service that is distributed and exhibited for viewing in more than a single time zone shall be exempt from closed captioning that service for any continuous 4 hour time period they may select, commencing not earlier than 12 a.m. local time and ending not later than 7 a.m. local time in any location where that service is intended for viewing. This exemption is to be determined based on the primary reception locations and remains applicable even if the transmission is accessible and distributed or exhibited in other time zones on a secondary basis. Video programming distributors providing service outside of the 48 contiguous states may treat as exempt programming that is exempt under this paragraph when distributed in the contiguous states.

(6) Interstitials, promotional announcements and public service announcements. Interstitial material, promotional announcements, and public service announcements that are 10 minutes or less in duration.

(7) EBS programming. Video programming transmitted by an Educational Broadband Service licensee pursuant to part 27 of this chapter.

(8) Locally produced and distributed non-news programming with no repeat value. 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.

(9) Programming on new networks. Programming on a video programming network for the first four years after it begins operation, except that programming on a video programming network that was in operation less than four (4) years on January 1, 1998 is exempt until January 1, 2002.

(10) Primarily non-vocal musical programming. Programming that consists primarily of non-vocal music.

(11) Captioning expense in excess of 2 percent of gross revenues. No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2 percent of the gross revenues received from that channel during the previous calendar year.

(12) Channels producing revenues of under \$3,000,000. No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than \$3,000,000 during the previous calendar year other than the obligation to pass through video programming already captioned when received pursuant to paragraph (c) of this section.

(13) Locally produced educational programming. Instructional programming that is locally produced by public television stations for use in grades K-12 and post secondary schools.

classes of programs for which such requirements would be economically burdensome. These include non-English language programming, primarily textual programming, programming distributed between 2 a.m. and 6 a.m., interstitial announcements, promotional programming and public service announcements, advertising, certain locally-produced and distributed programming, non-vocal musical programming, ITFS programming and programming on new networks. We further exempt any video programming provider from closed captioning requirements where the provider has annual gross revenues of less than three million dollars. In addition, we will not require any video programming provider to spend more than 2% of its annual gross revenues on closed captioning. Under this provision, we minimize the economic burden of captioning video programming while at the same time requiring efforts to increase video accessibility by as many entities as possible.

Exemptions based on existing contracts: We will exempt any programming subject to a contract in effect on February 8, 1996, for which compliance with the closed captioning requirements would constitute a breach of contract.

Exemptions based on undue burden: Under Section 713(d)(3), the Commission is required to consider petitions for exemption from the closed captioning rules if the requirements would impose an undue burden, which is defined as a significant burden or expense. Parties shall file requests for exemption based on the undue burden standard. A petition may be submitted by any party in the programming distribution chain. Petitions must include information that demonstrates how the programming for which the exemption is sought meets one or more of the statutory criteria for undue burden exemptions. Petitioners may also submit any other information they deem appropriate for our evaluation of their situations. Depending on the individual circumstances, we may grant partial exemptions and may consider proposals that programming be made accessible through alternative means (e.g., additional text or graphics).

In the Matter of Closed Captioning and Video Description of Video Programming

Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming

Accessibility, 13 FCC Rcd 3272, 3281 (FCC 1997). The revenue threshold exemption, which limits the impact of mandated closed captioning on licensees with revenues of less than Three Million Dollars requires the careful attention of both the claiming exemption applicant and the Commission:

Calculating whether the \$3 million gross revenues threshold in section 79.1(d)(12) has been met requires a review of advertising revenues from station-controlled inventory, including network compensation and barter transactions. *See Closed Captioning Report and Order*, 13 FCC Rcd at 3350, para. 165; *see also Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20002, paras. 66-67. The \$3 million revenue exemption was “intended to address the problems of small providers that are not in a position to devote significant resources towards captioning (*i.e.*, those who would find it economically burdensome).” *Closed Captioning Report and Order*, 13 FCC Rcd at 3350, para. 164.

Closed Captioning Further Notice of Proposed Rule-Making, 23 FCC Rcd 16674, 16688 n.96 (FCC 2008).

As a consequence of the Telecommunications Act, the regulations enacted thereunder by the Commission, and the good will and efforts of the broadcast community, the proportion of broadcast materials accessible to the deaf and the hearing impaired has grown exponentially in recent years. This is an era when analog broadcasters are making the transition to digital broadcast signals, and when licensees are compelled by the Commission’s rules to increase the portions of total programming made accessible through closed captioning. Now, new questions arise regarding the interest in how to serve the public interest in making broadcast television accessible for the deaf and hearing impair, while, at the same time, continuing to pursue other important interests. Among the important interests that may be at odds with the Commission’s contemplated changes in rules regarding mandatory closed captioning are insuring the religious liberties of religious broadcasters, and insuring that the Commission-identified interest in broadcast localism continue to be served.

In its *Closed Captioning Further Notice of Proposed Rule-Making*, 23 FCC Rcd 16674 (FCC 2008) (herein “Further Notice of Proposed Rule-making”) the Commission solicited comments on whether the transition to digital broadcasting should affect the Three Million

Dollar annual revenues threshold, which serves as a trigger for closed captioning obligations of broadcast licensees. The Commission's NPRM states:

35. As the nation transitions from analog to digital broadcasting, the video programming and broadcasting landscape will change substantially. Digital broadcasting not only affords consumers the potential for better picture and sound quality, it also allows for the more efficient use of spectrum. With analog broadcasting, broadcasters use their spectrum allocation to provide programming on a single channel. With digital broadcasting, broadcasters may use their digital allotment to multicast several streams of programming, known as "multicasting." Because section 79.1(d)(12) of our rules exempts from the closed captioning requirements certain programming "channels," in this Notice of Proposed Rulemaking we seek comment on the application of that exemption to digital broadcasting.

23 FCC Rcd at 16687 (footnote omitted).

In light of the developments noted by the Commission, the Further Notice of Proposed Rule-making raises a series of questions related to the revenue-based exemption, the digital broadcasting of multiple streams of programming, and whether to reduce the threshold for obligatory closed captioning or to aggregate the revenues produced from all multicast programming streams of a licensee for purposes of imposing obligatory closed captioning requirements:

35. As the nation transitions from analog to digital broadcasting, the video programming and broadcasting landscape will change substantially. Digital broadcasting not only affords consumers the potential for better picture and sound quality, it also allows for the more efficient use of spectrum. With analog broadcasting, broadcasters use their spectrum allocation to provide programming on a single channel. With digital broadcasting, broadcasters may use their digital allotment to multicast several streams of programming, known as "multicasting." Because section 79.1(d)(12) of our rules exempts from the closed captioning requirements certain programming "channels," in this *Notice of Proposed Rulemaking* we seek comment on the application of that exemption to digital broadcasting.

36. Section 79.1(d)(12) exempts video programming channels that

produced annual gross revenues of less than \$3 million during the previous calendar year from the Commission's closed captioning obligations. In 1997, when the Commission adopted the exemption for channels producing less than \$3 million in revenues, it specified that "[a]nnual gross revenues shall be calculated for *each channel* individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel." The Commission did not determine, however, what constitutes a "channel" for purposes of satisfying this self-implementing exemption. As noted above, at that time broadcasters used their spectrum allocation to provide analog programming on a single channel; with digital broadcasting, broadcasters can multicast several streams of programming. *We therefore seek comment on whether, for purposes of section 79.1(d)(12), each programming stream on a multicast signal constitutes a separate channel, or whether the broadcaster's entire operations attributable to its digital allotment should be considered one channel.*

37. The determination of whether multicast channels constitute separate channels for purposes of the exemption in section 79.1(d)(12) has important consequences. If each multicast stream is a separate channel, under the current rule such a channel would be exempt from the closed captioning rules until its revenues reach the \$3 million mark. As a result, if we were to determine that each multicast stream is a separate channel, it is likely that there will be less captioned programming available. We seek comment on this assumption. At the same time, however, if the majority of programming aired on secondary multicast streams is already captioned, it is possible that the percentage of available captioning will not be greatly affected, given that programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact. We note that, under our rules, programming that is already captioned and delivered to a broadcaster for airing must be aired with the captions intact, regardless of the multicast stream on which the programming airs, pursuant to the pass through rule. Further, as noted in the *Declaratory Ruling*, the pass through rule applies regardless of whether a distributor is exempt from the captioning rules. Therefore, given the pass through rule, it is likely that much of the programming delivered to broadcasters for airing on multicast streams will already be captioned, especially if it is programming provided by a network programmer, even if section 79.1(d)(12) applies to each multicast channel. We seek comment on what percentage of programming that airs on multicast streams, other than the main stream, is network programming, and how much of that programming is already captioned.

38. *We also seek comment on whether we should conclude that individual programming streams are not separate channels for purposes of calculating revenues for purposes of section 79.1(d)(12).*

In such circumstances, digital broadcasters would be exempt from the Commission's captioning requirements under section 79.1(d)(12) only if their overall operations, taking into account all activities on all "streams," received less than \$3 million in revenues. *We seek comment on the relative merits of this approach and its practical effects, including how this determination might affect program diversity, the airing of locally-originated programming, or the airing of other kinds of programming that may afford little or no economic return. We also seek comment on whether this approach may result in an increase in the number of petitions for exemption from the closed captioning requirements under the "undue burden" standard set forth in section 79.1(f).*

39. Finally, *we seek comment on whether we should revise the exemption as it applies to multicast streams to, for example, change the \$3 million threshold for the multicast programming streams other than the "main" stream or adopt a new non-revenue approach. Specifically, we seek comment on whether the \$3 million revenue amount is a reasonable threshold for determining if secondary multicast streams should be exempt from the closed captioning requirements, or whether, given the general nature of the programming on such channels, a smaller figure is appropriate and, if so, what that amount should be.*

40. *We also seek comment on whether it is appropriate to adopt something other than a fixed revenue threshold for determining whether secondary multicast streams must be captioned.* For example, we seek comment on whether captioning requirements should be tied to a formula that considers the number of programming streams being offered (or some other variable). Such an approach might be similar to that used for determining a broadcaster's children's television programming requirements. In the context of children's television programming, the Commission sought comment on the continued application of our children's television requirements in light of the transition to digital television and the increased programming opportunities that are now available to broadcasters. The Commission ultimately adopted rules requiring that a multicast broadcaster's core programming obligation increases in proportion to the amount of free programming being offered. *We seek comment on similar alternatives for applying captioning requirements to multicast program streams.*

23 FCC Rcd at 16687 (footnotes omitted) (emphasis added).

Trinity, as explained within, conducts multicasting of free-to-the-home video programming streams on its licensed stations. For this reason, and because of the unique considerations arising in application of closed captioning obligations (or, indeed, any statutory or

regulatory duty) on a religious person or organization, Trinity believes its comments require the Commission's particular attention.

B. Trinity Is a Multicast Broadcaster as Contemplated by the Notice of Proposed Rulemaking

Trinity pursues a two-fold mission through its broadcasting activities. Trinity seeks to evangelize those who have not heard the Gospel of Jesus. For those who have heard and believed the Gospel, Trinity seeks to provide training:

The mission of the Church is worldwide evangelization on the one hand, and the nurture and discipline of Christians on the other.²

These have been the constant goals and purposes of Trinity. The pursuit of licenses, the operation of licensed broadcast facilities, the generation of programming, all these activities have been undertaken – with attendant troubles and expenses – in order to evangelize and train.

As for other broadcasters, so too for Trinity, the advent of digital broadcasting presented new programming opportunities. Key among such opportunities is the capacity of a licensee undertaking a digital broadcast service to use the additional capacity of digital transmission to multicast within its licensed portion of the spectrum. While Trinity does not disapprove the actions of multicasting licensees who seek to maximize revenues through multicasting, there are other values that drive Trinity than revenue generation or profit.

In pursuit of its religious mission and goals, Trinity has rolled out several additional streams of video programming. Those multicast streams include “The Trinity Broadcasting Network,” “The Smile of A Child TV,” “The Church Channel,” “Enlace USA,” and “JCTV.” In addition to its flagship service, “The Trinity Broadcasting Network,” Trinity developed these

2. <http://www.tbn.org/index.php/3/3.html> (last visited on February 11, 2009).

additional multicast video programming streams for the religious purpose of evangelization and training. Happily, head-on pursuit of its religious mission has allowed Trinity to extensively serve the public interest by developing these particular, additional programming streams.³

“Enlace USA,” for example, serves the religious programming needs and interests of Spanish-speaking viewers. “The Smile of A Child TV,” a 24 hour digital multicast service, provides significant educational programming service from a distinctly Christian perspective for children. “The Church Channel,” crossing denominational lines across America, provides access to the church services of the best of them. Finally, “JCTV” is a Christian programming network that is designed with the 13-29 year old age group in mind, combining music video programming, sketch and stand up comedy, talk shows, action sports programming, and other subject matter of interest to teens and young adults. Each of these multicast programming streams is available on over the air digital broadcasting receivers free for any viewer in a community of license for Trinity, and also is available through many cable service and direct satellite broadcasting services that carry Trinity’s flagship network.

Trinity’s experience with the development of additional video programming streams and with the operation of multicast digital programming streams ideally situates it to comment on questions raised in the Further Notice of Proposed Rule-making.

3. Of course, the Commission must recognize and give appropriate space for the constitutional dimensions of broadcast licensees’ discretion in the selection of broadcast programming. *See In the Matter of Children’s Television Programming and Advertising Practices*, 96 F.C.C.2d 634, ¶¶ 39-43 (FCC 1984) (discussing cases and decisions); *id.*, ¶ 43 (“[w]e thus find ourselves precisely caught between the apparent possibility of accomplishing an extremely important and socially desirable objective and the legislative and Constitutional mandate and the values on which they are based which forbid our direct involvement in program censorship and which require that broadcast station licensees retain broad discretion in the programming they broadcast”). In the case of Trinity, the pursuit of mission and the goal of enlarging the circle of those who not only have access to its programming services, but are actually served by them, has driven its development of the varied lines of multicast video programming discussed herein.

II. CHANNEL BY CHANNEL EVALUATION HAS PROVED A WORKABLE BASIS FOR DETERMINING THE BALANCE BETWEEN ECONOMIC BURDENS ON LICENSEES IN PROVIDING CLOSED CAPTIONING AND ASSURING ENTRY LEVEL ACCESSIBILITY FOR NEW AND DIVERSE VOICES IN THE BROADCASTING MARKETPLACE

In the Further Notice of Proposed Rule-making, the Commission invited comments on the approach it should take to its treatment of the separate programming streams multicasted by its licensees. Until the Commission holds otherwise, multicast licensees such as Trinity have treated each separate multicast stream as a separate channel. Indeed, as the Commission noted in the Further Notice of Proposed Rule-making, the Commission treats each separate video programming stream as a separate channel:

We note that when the closed captioning rules were adopted, the Commission determined that compliance with the requirements would be measured on a channel-by-channel basis, and rejected the suggestion of those commenters who advocated a system-wide approach, stating that such an approach would prove administratively burdensome for video programming distributors. *Id.* at 3309, para. 79. The Commission also determined that each channel of a multiplexed signal will be obligated to meet the minimum requirements of the rules. *Id.* at 3309, para. 80.

23 FCC Rcd at 16688 n.95.

As explained previously, Trinity has developed, in addition to its flagship Trinity Broadcasting Network, four different channels of video programming: Enlace USA, Smile of a Child TV, The Church Channel and JCTV. For purposes of organization, each of these channels is treated as a separate channel and is programmed in that fashion.

The Commission has stated the relevant issue thus:

36. Section 79.1(d)(12) exempts video programming channels that produced annual gross revenues of less than \$3 million during the previous calendar year from the Commission's closed captioning obligations. In 1997, when the Commission adopted the exemption for channels producing less than \$3

million in revenues, it specified that “[a]nnual gross revenues shall be calculated for *each channel* individually based on revenues received in the preceding calendar year from all sources related to the programming on that channel.” The Commission did not determine, however, what constitutes a “channel” for purposes of satisfying this self-implementing exemption. As noted above, at that time broadcasters used their spectrum allocation to provide analog programming on a single channel; with digital broadcasting, broadcasters can multicast several streams of programming. We therefore seek comment on whether, for purposes of section 79.1(d)(12), each programming stream on a multicast signal constitutes a separate channel, or whether the broadcaster’s entire operations attributable to its digital allotment should be considered one channel.

23 FCC Rcd at 16687 (footnotes omitted).

Trinity objects to the proposal to treat as a single channel its multicast operation of five distinct and different video programming streams and enterprises. Initially, the actuality should not be ignored. In the case of multicast video programming, the consumer undoubtedly treats each of Trinity’s separate multicast video streams as a distinct channel. Trinity fairly confidently concludes that the audience base for Enlace USA, a Spanish language channel, is distinct from that of The Church Channel. Similarly, Trinity confidently concludes that the audience base for Smile of a Child TV, which is made of elementary school aged, or younger children, is quite a different demographic group than the audience base for its JCTV programming stream, which targets teens and twenty-somethings. What audiences know is not beyond the ken of the Commission. Audiences know that, at least for this multicaster, its video programming streams are quite diverse and their appeal to varying audiences is quite apparent.

The public’s understanding that each of these video programming streams is a separate channel is not the only factor to be considered. As the Further Notice of Proposed Rulemaking noted, the Commission had already concluded that it should treat channels separately for the purpose of evaluating revenue based exemptions from closed captioning requirements.

Years after multicasters like Trinity have committed substantial resources to develop programming streams that uniquely serve the public interest in distinct ways and with lesser expectations of financial return, the Commission's proposal to transmogrify the distinctive program offering lines, audience bases, and programming development plans of Trinity's distinct channel offerings makes no regulatory sense. Cold calculation seems evident in the proposal. Can further closed captioning be squeezed out of these licensees? Can such additional captioning be squeezed out even where the aggregated channels include one or more that, while capable of surviving, do not thrive so well that they threaten to break through the revenue threshold without such gerrymandering?

The Commission's proposal demonstrates that it is now operating in the margins. Substantial efforts over a decade, congressional direction, and regulatory action have made closed captioning widely available. The proposal the Commission has floated shows that it is now in what the military would call a mop up operation. The risks of such an approach should not be discounted. There are other underserved groups than the deaf and the hearing impaired.⁴ Such aggregation puts in play a clear conflict of interests of these real, distinct underserved groups. Rather than limit or undermine the unique offerings that have arisen *because of the multicast feature of digital broadcasting* and the service to other underserved groups, the Commission should either withdraw the Further Notice with respect to this proposal, or it should adopt an express definition of channel that treats each separate video stream as a distinct channel.

4. Long before there were any captioning requirements, Trinity pioneered in the area of serving the deaf and hearing impaired community with unique and accessible programming, such as "DeafWorld" which provided sign language translation. Such service has been provided throughout the last 30 years. Trinity understands and has a long record of serving and appreciating the needs of the deaf and heavily impaired community.

III. PROGRAMMING INNOVATION RESULTING FROM LOCAL ORIGATION AND FROM PROVIDING TARGETED STREAMS OF PROGRAM OF LOCAL INTEREST AND UTILITY WILL BE IMPACTED NEGATIVELY BY AGGREGATION OF THE SEPARATE REVENUE STREAMS OF LICENSEES' MULTICAST CHANNELS

There is only one likely outcome from the adverse treatment of multicast video programming streams contemplated by the Commission's Further Notice of Proposed Rule-making. That will be the diminution in the quantity of voices and programming streams from which broadcast television audiences will be able to choose. Licensees will be driven by the Commission to either pursue revenue positive selections, without regard to whether the choices that result serve the public interest, or abandon a wider diversity in multicast programming presented. The fact is that aggregation of separately programmed video streams as single channels, along with reducing the revenue threshold for closed captioning obligations, virtually guarantees that licensees will be put to precisely those hard choices.

That outcome is not only unfortunate. It is inconsistent with constitutional values and important communications policies of the United States. More than sixty years ago, the Supreme Court noted that the First Amendment's "assumption that the widest possible dissemination of information from diverse and antagonistic sources" promotes a free society. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). More recently, the Supreme Court held, in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997), that "promoting the widespread dissemination of information from a multiplicity of sources" is an important government interest, and a core First Amendment value. As Justice Kennedy's opinion for the Court explained:

We have noted that it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. [I]ncreasing the

number of outlets for community self-expression represents a long established regulatory goal^[1] in the field of television broadcasting.

520 U.S. at 192-93 (citations and internal quotation marks omitted).

Trinity's experience in multicasting *may evidence* that Trinity has taken a more studied and distinctly public service oriented approach than other licensees. Whether that is the case or not, there is no doubt that because of the unique nature of the opportunity presented by the capacity to multicast multiple video programming streams with digital broadcasting, Trinity has used the increased capacity to serve the public interest in providing a diversity of programming options, to the end that a broader scope of audience demographics find their particular broadcasting interests and needs answered by one or another of Trinity's offerings. In doing so, Trinity has advanced the interest in diversifying the voices carried by its video programming services, and properly advanced the interests of the First Amendment and the public. Making the changes suggested in The Further Notice of Proposed Rule-making will limit these advancements in public service, and should be avoided.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT COMPELS THE COMMISSION MUST EVALUATE THE IMPACT OF LOWERED REVENUE THRESHOLDS AND/OR AGGREGATION OF REVENUES FROM MULTICAST VIDEO PROGRAMMING CHANNELS OF RELIGIOUS BROADCASTERS

Federal law – specifically the Religious Freedom Restoration Act of 2003 (hereinafter “RFRA”), Title 42 U.S.C. § 2000bb *et seq.* – compels the Commission to evaluate whether changes to the exemptions from closed captioning, *see* 47 CFR § 79.1(d), will impose statutorily prohibited burdens on religious broadcasters. The duty to make such an evaluation *before* adopting any rule change arises under RFRA. RFRA operates to compel the Commission advance consideration in any rule-making whether its regulatory adjustment of exemptions

substantially burdens a religious practice, and if it does, whether the burden serves a compelling government interest by the least restrictive means available. *Id.*

In Trinity's view, eliminating or reducing the Three Million Dollar revenue threshold, or changing the method by which it is calculated (from a channel by channel calculation under analog broadcasting to an aggregation of revenues from all digital multicast streams), would fail scrutiny under RFRA. Those contemplated changes substantially burden religious practice. In Trinity's case, the expenses associated with compliance with closed captioning obligations on its innovative multicast video streams could well pressure it to re-evaluate the effort to increase and expand the breadth of its program services and viewer options. Such an outcome is particularly troubling because it is self-evident that less restrictive means exist. The Commission's experience shows that the maintenance of the Three Million Dollar revenue threshold has not hampered in any substantial way the expansion of closed captioning services across the nation.

A. RFRA Commands the Commission to Evaluate Planned Regulatory Actions to Insure that Religious Exercises Are Not Substantially Burdened Except When in Service of a Compelling Interest and When Served by the Least Restrictive Means Available.

In 1993, Congress enacted and President Clinton signed into law the Religious Freedom Restoration Act of 1993 (hereinafter "RFRA"). Pub. L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489. Congress enacted RFRA in response to the decision of the Supreme Court in *Employment Div. v. Smith*, 494 U.S. 872 (1990). *Smith* rejected unemployment compensation claims arising as a result of terminated employees' sacramental use of peyote, a controlled substance. Justice Scalia's majority opinion was broadly viewed to have radically altered the law governing the

right to the free exercise of religion under the First Amendment.⁵ Whether *Employment Div.* actually radically altered the legal landscape is beyond the scope of these comments. What can be said about the decision is this much: after *Employment Div.*, claimed violations of the right to free exercise of religion would fail when the violation arose in the circumstances of law enforcement of truly neutral laws of general applicability.

Congress crafted RFRA to govern religious freedom disputes at both the federal level and within the States. Invoking Section Five of the Fourteenth Amendment, Congress imposed the obligations of RFRA on the States. See Senate Report 103-111, 103rd Cong., 1st Sess. at 13; H. Rep. R. 103-88, 103rd Cong., 1st Sess., at 9.

RFRA was not limited, however, to the States. Congress quite deliberately and broadly crafted a sweeping amendment of all federal law via RFRA. See Title 42 U.S.C. § 2000-bb(2)(a) & (b). In describing those governed by RFRA, Congress expressly included federal agencies within the scope of the Act. See Title 42 U.S.C. § 2000bb-2(a) (defining “government” as used in RFRA as including “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity”). Without question, RFRA governs the duties and responsibilities of the Commission.

5. See Michael Hirsley, Churches Battle for Return to Past, CHI. TRIB., Aug. 9, 1991, § 2, at 9 (“There is ready consensus among religious groups that the Smith decision is devastating to religious freedom.”); Ruth Marcus, Reins on Religious Freedom? Broad Coalition Protests Impact of High Court Ruling, WASH. POST, Mar. 9, 1991, at A1 (“The problem with the decision is that the United States Supreme Court has gutted the Free Exercise clause of the First Amendment.”) (quoting statement of Forest Montgomery, counsel for the National Association of Evangelicals); W. John Moore, Religious Rights in the Balance, NAT’L J., Aug. 11, 1990, at 1981 (Smith decision was “nothing less than a judicial earthquake,” raising “the specter of state laws that would effectively ban certain religious practices”); Stephen J. Solarz, The Court’s Erosion of Religious Freedom, NEWSDAY, Aug. 23, 1990, at 71 (“The implications of this ruling are staggering and extend far beyond the concerns of Native American religions.”); see also John Delaney, Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of *Oregon v. Smith*, 25 IND. L. REV. 71 (1991); James D. Gordon III, Free Exercise on the Mountaintop, 79 CAL. L. REV. 91 (1991); Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109 (1990).

B. RFRA and The Commission

The Commission has some experience litigating claimed violations of RFRA.

Mixed results have met assertions of RFRA in cases involving the Commission. In *La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313 (6th Cir. 2000), a microbroadcaster had sued the Commission in the District Court, rather than seeking review of the agency's administrative actions on appeal. In its suit, La Voz Radio laid a claim under RFRA, and argued that, while typically review of the Commission's took parties to the D.C. Circuit, the RFRA claim entitled the District Court to determine their case. The Sixth Circuit dismissed the action. *Id.* at 319-320.⁶

Subsequently, that same Sixth Circuit *allowed* a microbroadcaster to assert RFRA as a defense to an *in rem* forfeiture action in the District Court. See *United States v. Any and All Radio Station Transmission Equip. (Strawcutter)*, 204 F.3d 658 (6th Cir. 2000).⁷ Distinguishing *Strawcutter* from *La Voz Radio*, the court said,

In *Strawcutter*, this court held that when the FCC does not proceed administratively against an unlicensed microbroadcaster, but instead initiates an *in rem* action in the district court seeking the forfeiture of offending broadcasting equipment, the microbroadcaster is not precluded from challenging the legal basis of the government's forfeiture case in the district court.

6. Similarly, in *Radio Luz v. FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), the District Court for the Eastern District of Pennsylvania rejected a claimant's attempted circumvention of review of the Commission's administrative action in the D.C. Circuit via the assertion of a claim for relief under RFRA. 88 F. Supp. 2d at 373, 375-76. See also *United States v. Any & All Radio Station Equip. (2151 Jerome Avenue, 2nd Floor Bronx, New York 10453)*, 93 F. Supp. 2d 414 (D.N.Y. 2000) (rejecting RFRA defense to *in rem* forfeiture); *United States v. Any and All Radio Station Transmission Equipment (200 Griggs St. SW, Grand Rapids, MI)*, 1999 U.S. Dist. LEXIS 18846, at *13-18 (W.D. Mi. 1999) (same).

7. In like vein, *United States v. Any and All Radio Station Transmission Equipment (103 Locust Street, Lancaster, Pennsylvania)*, 1999 U.S. Dist. LEXIS 13967 (E.D. Pa. 1999), the District Court for the Eastern District of Pennsylvania concluded that, in an *in rem* action against a microbroadcasting church, forfeiture was not the least restrictive means to accomplishing its statutorily authorized purposes. 1999 U.S. Dist. LEXIS 13967 *10-14.

223 F.3d at 319.

The Commission's prior litigation experience with RFRA notwithstanding, Trinity urges the Commission to comply with RFRA. Here, the duty imposed on the Commission under RFRA would be to evaluate any contemplated change to the scheme of exemptions from mandatory closed captioning requirements under the rubric imposed by RFRA.⁸ In Trinity's view, a rule change that eliminates the revenue based exemption, or that aggregates revenues across all of a licensee's multicast digital programming streams, will impose substantial burdens on those licensees, like itself, that are both *religious* broadcasters and broadcasters of *religious* programming. Given the regime of exemptions in place, and the history of the revenue based exemption, there is no likelihood that such changes in the rules could pass review.

C. Changes That Reduce the Revenue Threshold, Either Directly or By Mandating Aggregation of Revenues from All Multicast Video Streams Will Impose Substantial Burdens on the Exercise of Religion By Trinity and Other Religious Broadcasters.

1. Trinity's Purpose and Mission as a Broadcaster Is to Further Their Religious Beliefs Regarding the Duty to Proclaim the Gospel and to Disciple the Nation.

Trinity is a church organization. It offers a broadcast service of religious programming. Trinity offers its programming to further its religious duties, in particular of propagating the Gospel of Jesus Christ. Trinity plainly falls within the category of "religious broadcasters" as

8. See *In the Matter of Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808 (FCC 1999). In *Jones Cable TV Fund 12-A*, the Commission sadly conflated the free speech consideration of content-neutrality with the mandatory duty under RFRA to determine whether or not its actions substantially burdened religious practices, and if so, whether such burden served a compelling government interest by the least restrictive means available. That mistaken conflation of issues allowed the important statutory issues to escape the Commission's consideration and determination. The Commission should proceed advisedly, with the understanding – made patent in the cases cited above – that its failure to satisfy the RFRA standards in its consideration of the proposed rules is subject to review before the D.C. Circuit.

contemplated by the Commission: those licensees that are themselves a church, synagogue or religious entity, or that have a close affiliation with a church, synagogue, or such other religious entity.⁹ Apart from these regulatory considerations, the fact is that Trinity was formed and organized to spread the Gospel of Jesus Christ, and to facilitate the discipleship of all believers.

Trinity carries out its work and ministry of broadcast programming with the aid of spiritual disciplines. Those disciplines include prayer and scripture study. These spiritual disciplines mark the regular life of the stations it operates. That Trinity's is a religious broadcast service is also evident from its program content, both on its flagship, Trinity Broadcasting Network, and on all of the multicast digital video programming streams that it has developed -- "Enlace USA," "Smile of a Child TV," "The Church Channel," and "JCTV." Trinity's programming consists entirely of religious, non-entertainment, informational, public affairs, children's and family oriented programs. Individually and taken together, the programming it offers is purposefully crafted by Trinity to advance Christian values, a Christian world-view, and Christian family values. Trinity is supported by contributions from fellow Christians and viewers, along with sharing of air-time costs with other religious ministries and churches providing programming.

9. See *Second Report and Order in MM Docket No. 98-204, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, FCC 02-203, 17 FCC Rcd 24018, ¶50 (FCC 2002) ("*Second Report and Order*") (quoting *Report and Order, Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329, 2392-93 ¶¶157-161 (2000)).

2. Eliminating or Reducing the Revenue Threshold, Either Directly, or By Aggregation, With the Result that Its Multicast Video Programming Streams Would Lose their Exemptions from Closed Captioning Mandates, Would Substantially Burden the Religious Work and Ministry of Trinity.

As noted above, one possible outcome of the Notice of Proposed Rule-making would be a rule change effectively reducing the revenue threshold for the imposition of mandatory closed captioning requirements. That outcome could take the form of a rule reducing the current Three Million Dollar threshold to some lesser dollar amount. That outcome could as easily take the form of a decision of the Commission to determine the question of duty to close caption and the Three Million Dollar revenue exemption by aggregating all revenues from each of a licensee's multicast video programming streams.

In Trinity's case, for example, such aggregation would lump the revenue streams of Smile of a Child TV, JCTV, and Enlace USA – video programming streams that do not cross the Three Million Dollar threshold – with the flagship stream, Trinity Broadcasting Network, and with The Church Channel. As a consequence, either of a lowered revenue cap or an aggregation approach, Trinity could well be required to comply with closed captioning mandates on its multicast video programming streams that, taken individually, would not be required to do so. The outcome thus would punish Trinity's past decisions to expand the scope and reach of its programming to reach and serve underserved community groups and demographics. Trinity does not doubt that other licensees with underperforming, but otherwise important, multicast video programming streams would be put to the same difficult choice between serving the public interest by multicasting programming of service to underserved groups and demographics, or adopting programming alternatives based solely on revenue positive results or discontinuing the service altogether.

Real risks inhere in either of the proposed regulatory approaches. Trinity and similar licensees that multicast video programming are very likely to be coerced by the economic pressures related to the costs of providing closed captioning to reconsider decisions that led to the creation of specialty, niche video programming streams. Often for religious broadcasters, as is the case with Trinity, non-monetary considerations lead decision-making. In Trinity's case, the creation of specialty streams, including one to serve the Spanish speaking community, one to provide abundant quantities of high quality, educational programming for children, and one to serve the interests of teens and twenty-somethings, were not primarily economic calculations. Instead, Trinity made those decisions in pursuit of its twin missions of evangelism and training. But, such decisions, because they are not driven first by economic considerations, may result in jeopardy to socially valuable programming streams *if the duty to provide closed captioning on them is imposed because another video programming stream from the licensee is of sufficient interest or economic viability that it garners sufficient revenues.*

There is, of course, a separate constitutional difficulty with the external pressure that limiting or eliminating the revenue based exemption inflicts, in that, to the extent that such pressures limit programming discretion they are, at a minimum inconsistent with First Amendment values.¹⁰

Title 47 CFR § 79.1(d) provides several categories of exemptions to mandatory closed captioning. The Commission would evidence consistency with RFRA's requirements by

10. The Supreme Court has taken note of this separate duty of broadcasters: “[p]ublic and private *broadcasters* alike *are* not only permitted, but *indeed required*, to *exercise substantial editorial discretion* in the selection and presentation of their programming.” *Forbes v. Ark. Educ. Television Comm’n.*, 523 U.S. 666, 673 (1997) (emphases added).

contemplating expressly the identity and nature of religious broadcasters, and by accounting for the deleterious impact of being compelled because of proposed rule changes to change its multicast programming choices. Yet, in order to cover the often considerable costs of closed captioning, Trinity and other religious broadcasters could be put in just such a dilemma. The result: religious broadcasters being compelled to focus on revenue generation rather than service of the public interest with programming options targeted at underserved communities and demographics.

Any failure on the part of the Commission to make the particularized inquiry commanded by RFRA, substituting instead a “one size fits all” approach to the balance between increasing accessibility and driving programming choices by economic pressures, is persuasive evidence that the Commission laid excessively burdensome duties on Trinity and other religious broadcasters. Such would be a substantial burden because it directly affects and burdens the mission-oriented, broadcaster-determined selection of programming for service of the public interest.

3. While Important, Accessibility of Video Programming to the Deaf and Hearing Impaired Has Not Been Treated by the Commission or the Congress as So Compelling as to Overwhelm All Other Interests.

Congress mandated evaluation of the extent to which closed captioning was available when it enacted the Telecommunications Act of 1996. Congress also directed the Commission to undertake a program of regulation to expand the availability of closed captioning on licensed stations. *See* 47 U.S.C. § 613. The Commission, in turn, enacted the relevant regulatory framework. *See* 47 C.F.R. § 79.1. Congress specifically directed that the Commission develop exemptions from mandatory closed captioning obligations. The Commission, in turn, did

precisely that.

Both the statutory authorization and mandate, 47 U.S.C. § 613, and the regulatory framework resulting therefrom, 47 C.F.R. § 79.1, expressly provided for exemptions from closed captioning requirements. The exemptions adopted by the Commission include a broad scope of programmers and programming elements. *See* 47 C.F.R. § 79.1(d)(1)-(13). Such a broadly drawn scheme of exemptions from a generalized rule indicates that, while the interests underlying the rule may be considerable, they are not predominant. Consequently, both Congress and the Commission have powerfully rebutted any assertion that the interest in accessibility is so compelling as to overwhelm all other interests.

4. Reductions in the Revenue Threshold, Whether Directly or By Aggregation of Revenues of All Multicast Video Programming Streams, is Not the Least Restrictive Means of Serving the Interest in Enhanced Accessibility.

As an initial matter, imposed as a blanket rule without consideration for the religious identity of its religious broadcast licensees, any such amendment or alteration of the revenue threshold exemption would fail to account for the special contours that religious identity requires that the Commission draw for Trinity and similar licensees. In fact, that Congress mandates a revenue related exemption, and that the Commission has afforded such an exemption for a decade, indicates that the Commission and the Congress considered such an exemption as a more carefully tailored, closely drawn approach to the balancing the interests of enhancing accessibility for the deaf and the hearing impaired, on one hand, and the interest allowing the continued operation of broadcast services where limited revenue streams could not bear the impact of the costs of closed captioning.

Consequently, in the first instance, the Commission could draw more narrowly simply by maintaining the current revenue threshold. In the alternative, the Commission could extend the current revenue threshold to a qualified category of licensees, religious broadcasters, nonprofit licensees, etc. These approaches both more narrowly draw the amending regulation to respect the religious exercise put at risk by imposition of increased costs. Such approaches would also undermine the development and availability of free-to-the-home programming intended to serve underserved communities and demographics.

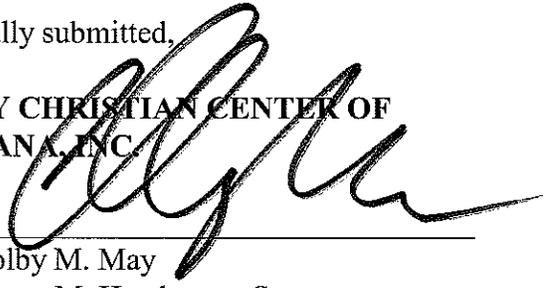
CONCLUSION

For the foregoing reasons, the Commission should refrain from lowering the revenue threshold for closed captioning obligations contemplated by the Closed Captioning Further Notice of Proposed Rule-making, and should maintain the channel-by-channel method for determining annual revenues, rather than aggregating the revenues of each of a licensee's multicast digital programming streams.

Respectfully submitted,

**TRINITY CHRISTIAN CENTER OF
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