

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:)
)
Interpretation of Economically) CG Docket No. 11-175
Burdensome Standard)
)

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), the Hearing Loss Association of America (HLAA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, “Consumer Groups,” submit these comments in response to the Federal Communication Commission’s Notice of Proposed Rulemaking (“NPRM”)¹ in above-referenced proceeding. Consumer Groups strongly support the Commission’s tentative construction of the term “economically burdensome” and its proposed amendment of section 79.1(f) of its rules.² We agree that the Commission’s interpretation of this term is consistent with Congress’s unambiguously expressed intent. Even assuming for the sake of argument that Congress’s intent is ambiguous, the Commission’s interpretation is reasonable and furthers the purposes of both the Telecommunications Act of 1996 (“1996 Act”)³ and the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”).⁴

¹ Notice of Proposed Rulemaking, Interpretation of Economically Burdensome Standard, 76 Fed. Reg. 67,397 (Nov. 1, 2011) (to be codified at 47 C.F.R. pt. 79.1) [hereinafter *NPRM*].

² *NPRM*, *supra* note 1, at ¶¶ 38-39.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) [hereinafter *1996 Act*].

⁴ Twenty-First Century Communications and Video Accessibility Act of 2010,

I. Background

The 1996 Act amended the Communications Act of 1934 (“1934 Act”)⁵ by adding a new section 713 regarding “Video Programming Accessibility.”⁶ Section 713(b) required the Commission to prescribe regulations requiring “video programming . . . to be fully accessible through the provision of closed captions,” except where the programming is exempted under section 713(d). In relevant part, section 713(d) permits the Commission to issue two types of exemptions from its captioning rules: categorical exemptions by rulemaking for “programs, classes of programs, or services” under section 713(d)(1), and individual exemptions by petition for video programming providers or owners under section 713(d)(3).

The 1996 Act set forth separate standards for evaluating categorical and individual exemptions. Categorical exemptions are available under section 713(d)(1) only after Commission determines by rulemaking that the provision of closed captions for the category of programming at issue would be “economically burdensome” to the programming’s provider or owner. Although the 1996 Act did not specifically define the term “economically burdensome,” the conference report directed the Commission to consider seven factors in determining whether captioning was economically burdensome:

- (1) the nature and cost of providing closed captions;
- (2) the impact on the operations of the program provider, distributor, or owner;
- (3) the financial resources of the program provider, distributor, or owner and the financial impact on the program;
- (4) the cost of the captioning, considering the relative size of the market served or the

Pub. L. No. 111-260, 124 Stat. 2751 (2010) [hereinafter CVAA].

⁵ Communications Act of 1934, Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) [hereinafter *1934 Act*].

⁶ *1996 Act*, *supra* note 3, at § 305.

audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; and (7) the existence of alternative means of providing access to the hearing disabled, such as signing.⁷

The Commission promptly initiated a rulemaking proceeding and adopted several categorical exemptions.⁸

Individual exemptions are available on a case-by-case basis under section 713(d)(3) to program providers, producers, or owners that do not fall within a categorical exemption. Prior to the enactment of the CVAA, section 713(d)(3) stated that a program provider or owner could petition the Commission for an exemption from the captioning rules and that the "Commission [could] grant such petition upon a showing that the requirements contained in this section would result in an *undue burden*" (emphasis added). The following section, 713(e), entitled "Undue burden," defined the term, stating in full:

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.

⁷ H.R. REP. NO. 104-458, at 183 (1996) (Conf. Rep.).

⁸ Report and Order, Closed Captioning and Video Description of Video Programming, 13 FCC Rcd. 3272, 3342-3351, ¶¶ 143-168 (released Aug. 22, 1997) (codified at 47 C.F.R. pt. 79.1(d)), *reconsideration granted in part*, 13 FCC Rcd. 19,973 (released Oct. 2, 1998).

In promulgating rules implementing section 713(e), the Commission adopted the statutory language verbatim.⁹

Section 202(b) of the CVAA amended section 713 of the 1934 Act to expand closed captioning to certain video programming delivered using Internet protocol. CVVA section 202(c), entitled “Conforming Amendment,” replaced the existing section 713(d)(3) with new language. While both the pre- and post-CVAA versions of section 713(d)(3) provide for the Commission’s evaluation of individual exemption petitions, the section’s new language under the CVAA uses the term “economically burdensome” instead of the term “undue burden” from the 1996 Act. The CVAA did not make any changes to section 713(e), which sets out the four factors the Commission should consider to determine whether requiring captioning would impose an “undue economic burden.”

On October 20, 2011, the Commission reversed the 298 individual exemptions granted by the Media Bureau in 2006 based on the Bureau’s misapplication of section 713(d)(3) in its decision granting exemption requests by Anglers for Christ Ministries, Inc. and New Beginning Ministries (“Anglers Order”).¹⁰ The Commission afforded the petitioners whose exemptions were reversed 90 days to file new exemption petitions.¹¹

Between the time that the Bureau initially granted the 298 exemptions and the Commission’s reversal of the exemptions, the CVAA modified the language of section 713(d)(3). Thus, the Commission appended this NPRM to its order

⁹ *Id.* at 3357-367, 3412, ¶¶ 182-205, App’x B (codified at 47 C.F.R. pt. 79.1(f)(2)).

¹⁰ Anglers for Christ Ministries, Inc. and New Beginning Ministries, Mem. Opinion and Order, 76 Fed. Reg. 67,377, at ¶ 16 (Nov. 1, 2011) (reversing Anglers for Christ Ministries, Inc., New Beginning Ministries, Video Programming Accessibility, Petitions for Exemption from Closed Captioning Requirements, Mem. Opinion and Order, 21 FCC Rcd. 10094 (2006)).

¹¹ *Id.* at ¶ 28.

overturning the Anglers Order-based exemptions.¹² In this NPRM, the Commission proposes to amend section 79.1(f) of its rules to replace the term “undue burden” with “economically burdensome” to reflect the CVAA’s updated language.¹³ To assist entities in filing new exemption petitions, the Commission also adopted an Interim Standard Order (“ISO”) to provide “guidance on how the Commission will construe, on an interim basis, the term ‘economically burdensome’ for purposes of evaluating requests for individual exemptions.”¹⁴

In the ISO, the Commission concluded that in changing the “nomenclature” of section 713(d)(3) when it enacted the CVAA, Congress “intended for the Commission to continue using the undue burden factors contained in 713(e), as interpreted by the Commission and reflected in Commission rules and precedent, for individual exemption petitions, rather than to make a substantive change to this standard.”¹⁵ The NPRM incorporates the ISO by reference and seeks comment on its tentative conclusion.¹⁶

II. The Commission's interpretation correctly interprets congressional intent.

Consumer Groups agree with the Commission’s conclusion that Congress did not intend for the Commission to substantively change the standard under which it evaluates individual exemption petitions.¹⁷ This conclusion is explicitly and unambiguously supported by the CVAA’s legislative history and is

¹² NPRM, *supra* note 1, at ¶ 38.

¹³ *Id.* at ¶ 39.

¹⁴ Interim Standard Order, Interpretation of Economically Burdensome Standard, 76 Fed. Reg. 67,376, at ¶ 30, 32-33 (Nov. 1, 2011) [hereinafter *ISO*].

¹⁵ *Id.* at ¶ 30.

¹⁶ NPRM, *supra* note 1, at ¶ 38.

¹⁷ *See id.*

consistent with the overall goal of the 1996 Act and the CVAA to maximize the availability of closed captioned programming while allowing for individual exemptions where providing captions would impose a truly untenable burden.

As described in detail in the ISO, the Commission has always applied different standards for individual and categorical exemptions.¹⁸ For categorical exemptions, the Commission has used the seven-factor standard from the legislative history of the 1996 Act.¹⁹ While some of those seven factors overlap with the four "undue burden" factors, additional factors such as the relative size of markets served by programming, the non-profit status of programming providers, and the existence of captioning alternatives, may only be considered in evaluating categorical exemptions. By enacting the four-factor "undue burden" standard in section 713(e), Congress plainly indicated that the additional considerations in the seven-factor standard were inappropriate for the Commission to consider when evaluating individual exemption petitions under section 713(d)(3).²⁰

Neither the text nor the legislative history of the CCVA explain why Congress amended section 713(d)(3) to replace the term "undue burden" with the term "economically burdensome." Nor does the CVAA or its legislative history define the term "economically burdensome." The legislative history, however, makes clear that Congress intended the Commission to continue evaluating individual exemption petitions under the "undue burden" factors articulated in section 713(e).

¹⁸ ISO, *supra* note 14, at ¶ 35 (internal citations omitted).

¹⁹ E.g., Notice of Proposed Rulemaking, Closed Captioning and Video Description of Video Programming, 12 FCC Rcd. 1044, 1083, ¶ 92 & n. 172 (released Jan. 17, 1997).

²⁰ See also ISO, *supra* note 14, at 36 n.122.

More specifically, the report of the Senate Committee on Commerce, Science and Transportation “encourages the Commission, in its determination of ‘economically burdensome’ to use the factors listed in section 713(e).”²¹ This unequivocal and explicit guidance is further supported by Congress’s decision to leave section 713(e)’s definition of the term “undue burden” intact, despite the reality that section 713, as amended by the CVAA, includes no other references to the term “undue burden.” Taken together, these actions demonstrate that Congress did not intend section 202(c) of the CVAA to alter the Commission’s process for evaluating individual exemption petitions under section 713(d)(3). Rather, the text and legislative history of section 202(c) indicate unambiguous Congressional intent for the Commission to continue evaluating such petitions under the four-factor “undue burden” standard in section 713(e).²²

III. The Commission's interpretation is reasonable and consistent with the overall purpose of the 1996 Act and the CVAA.

Even assuming for the sake of the argument that Congress’s intent in enacting section 202(c) is ambiguous, the Commission’s tentative conclusion is

²¹ S. REP. 111-386, at 14 (2010) (emphasis added).

²² The NPRM does not seek comment on the separate question of whether it should apply the seven-factor or the four-factor standard in determining whether to add, modify, or remove categorical exemptions. That issue is not before the Commission in this proceeding, but should be addressed when the Commission acts on the January 27, 2011 petition for rulemaking filed by TDI and other groups asking for review of categorical exemptions in light of changed market and technological circumstances. Congress’s amendment to conform the language in subsections 713(d)(1) and (d)(3) could be read to indicate that Congress intended that the Commission to apply section 713(e)’s four-factor “undue burden” standard when evaluating categorical exemptions instead of seven-factor “economically burdensome” test set forth in the 1996 conference report. The resolution of this question, however, does not bear on the appropriate standard for evaluating individual exemption petitions.

reasonable and furthers the overall purposes of the 1996 Act. Section 713 was designed "to ensure that video services were accessible to hearing impaired . . . individuals." The individual exemptions available under section 713(d)(3) were intended simply to provide flexibility to the Commission to ensure that the provision of captions did not "hinder[] the production or distribution of programming" where "providing closed captions would constitute an undue burden."²³

The Commission's conclusion also furthers the purpose of the CVAA, which Congress designed to *expand* the scope of the 1996 Act's captioning requirements to video published or exhibited on television and delivered via Internet protocol.²⁴ CVAA sponsor Congressman Markey noted on the floor of the House of Representatives that the CVAA was designed to, among other things, "*significantly increase accessibility for Americans with disabilities . . . by providing Americans who are deaf the ability to watch new TV programs online with the captions included.*"²⁵ Interpreting section 202(c) of the CVAA to require a change in the application of section 713(e)'s four-factor "undue burden" standard to individual exemption petitions would risk restricting the scope of programming accessible to consumers who are deaf or hard of hearing in direct contravention of the overall purpose of the 1996 Act and the CVAA.

Finally, the Commission's suggestion that section 202(c) of the CVAA was intended to change the "nomenclature" and not the substantive application of section 713(d)(3) is reasonable.²⁶ Congress labeled section 202(c) a "Conforming Amendment." Section 202(c)'s function appears to be to "conform," or

²³ H.R. REP. NO. 104-458, at 183.

²⁴ See generally CVAA, *supra* note 4, at § 202(b).

²⁵ 156 CONG. REC. H6004 (2010) (statement of Rep. Markey) (emphasis added)

²⁶ See ISO, *supra* note 14, at 32.

harmonize, the language of section 713(d)(1), which refers to “economically burdensome,” section 713(d)(3), which refers to “undue burden,” and section 713(e), which interchangeably refers to “undue burden” and “undue economic burden.” Thus, it is reasonable to interpret section 202(c) as clarifying that the term “economically burdensome” has the same meaning and uses the same four-factor standard as “undue burden” and “undue economic burden.”

Accordingly, Consumer Groups support the Commission’s proposal to change the language of its rules to reflect the CVAA’s “economically burdensome” language while continuing to apply section 713(e)’s four-factor standard to petitions for individual waivers.

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Respectfully submitted,

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