

Institute for Public Representation  
600 New Jersey Ave. NW  
Washington, DC 20001  
(p): 202.662.9535  
(f): 202.662.9634

March 16, 2012

*via hand delivery*

Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, DC 20554

**Attn: CGB Room 3-B431**

**Re: Hillcrest Baptist Church of El Paso, TX Request for Exemption from the  
Commission's Closed Captioning Rules  
Case No. CGB-CC-0525  
CG Docket No. 06-181**

FILED/ACCEPTED

MAR 16 2012

Federal Communications Commission  
Office of the Secretary

Dear Ms. Dortch:

Pursuant to the Commission's Request for Comment, Telecommunications of 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 Hearing Loss Association of America (HLAA), the Association of Late-Deafened Adults (ALDA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this opposition to the petition of Hillcrest Baptist Church of El Paso, TX ("Hillcrest") to exempt its programming from the Commission's closed captioning rules, 47 C.F.R. § 79.1 (2010).<sup>1</sup> Consumer Groups

---

<sup>1</sup> *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules, Hillcrest Baptist Church of El Paso, TX, Case No. CGB-CC-0525, CG Docket No. 06-181 (Feb. 15, 2012),* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0215/DA-12-216A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/DA-12-216A1.pdf); *Petition for Exemption from Closed Captioning Requirement for Hillcrest Baptist Church of El Paso, TX, Case No. CGB-CC-0525, CG Docket No. 06-181 (Jan. 28, 2012),* <http://apps.fcc.gov/ecfs/document/view?id=7021755446> [hereinafter *Hillcrest Petition*].

No. of Copies rec'd 0+2  
List ABCDE

oppose the petition because it does not demonstrate that Hillcrest cannot afford to caption its programming.

Consumer Groups acknowledge the efforts of Hillcrest to “allow[] handicapped individuals, who might otherwise be unable to attend, to watch worship services from their home.”<sup>2</sup> This constituency, however, is one that may distinctly benefit from closed captions, and the requested exemption would deny equal access to Hillcrest’s programming to community members who are deaf or hard of hearing. Maximizing accessibility through the comprehensive use of closed captions is a critical step in ensuring that all viewers who are deaf or hard of hearing can experience the important benefits of video programming on equal terms with their hearing peers.

Because the stakes are so high for the millions of Americans who are deaf or hard of hearing, it is essential that the Commission grant petitions for exemptions from captioning rules only in the rare case that a petitioner conclusively demonstrates that captioning its programming would impose a truly untenable economic burden. To make such a demonstration, a petitioner must present detailed, verifiable, and specific evidence that it cannot afford to caption its programming, either with its own revenue or with alternative sources.

Under section 713(d)(3) of the Communications Act of 1934 (“1934 Act”),<sup>3</sup> as added by the Telecommunications Act of 1996 (“1996 Act”)<sup>4</sup> and amended by section 202(c) of the Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”),<sup>5</sup> “a provider of video programming or program owner may petition the Commission for an exemption from the [closed captioning] requirements of [the 1934 Act], and the Commission may grant such petition upon a showing that the

---

<sup>2</sup> *Hillcrest Petition*, *supra* note 1, at 2.

<sup>3</sup> Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 27 U.S.C. 613(d)(3)).

<sup>4</sup> Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

<sup>5</sup> Pub. L. 111-260, 124 Stat. 2751 (2010) (to be codified in scattered sections of 47 U.S.C.).

requirements . . . would be economically burdensome.” In its October 20, 2011 Interim Standard Order, the Commission directed the Consumer and Governmental Affairs Bureau to evaluate all exemption petitions filed subsequent to October 8, 2010 using the “undue burden” standard in section 713(e) of the 1934 Act, pursuant to the Commission’s existing rules in 47 C.F.R. § 79.1(f)(2)-(3).<sup>6</sup>

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.<sup>7</sup> If a petitioner sufficiently demonstrates such an inability, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning its programming.<sup>8</sup> Where a petition fails to make either of the foregoing showings, it fails to demonstrate that providing captions would pose an undue burden, and the Commission must dismiss the petition.<sup>9</sup>

---

<sup>6</sup> *Order, Interpretation of Economically Burdensome Standard*, CG Docket No. 06-181, 26 FCC Rcd. 14,941, 14,961, ¶ 37 (Oct. 20, 2011), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db1123/FCC-11-159A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1123/FCC-11-159A1.pdf). The Commission proposed to finalize this interim directive in a Notice of Proposed Rulemaking released with the 2011 ISO. *Interpretation of Economically Burdensome Standard*, CG Docket No. 11-175, 26 FCC Rcd. 14,941, 14,961-62, ¶¶ 38-39 (proposed Oct. 20, 2011), 76 Fed. Reg. 67,397 (Nov. 1, 2011), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/011/db1123/FCC-11159A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/011/db1123/FCC-11159A1.pdf). See also 2011 ISO at 14,960, ¶ 36. In some early adjudications, the Commission specifically analyzed exemption petitions under the four-factor rubric in section 713(e), analyzing whether each of the four factors weighed for or against granting a particular petition. E.g., *Home Shopping Club L.P.*, Case No. CSR 5459, 15 FCC Rcd. 10,790, 10,792-94 ¶¶ 6-9 (CSB 2000). Over the past decade, however, this factor-based analysis has evolved into several specific evidentiary requirements that must be satisfied to support a conclusion that a petitioner has demonstrated an undue economic burden sufficient to satisfy the requirements of section 713(e). See *Anglers for Christ Ministries*, Case Nos. CGB-CC-0005 and CGB-CC-0007, CG Docket No. 06-181, 26 FCC Rcd. 14,941, 14,955-56, ¶ 28 (Oct. 20, 2011) [hereinafter *Anglers 2011*].

<sup>7</sup> See *Anglers 2011*, *supra* note 6, 26 FCC Rcd. at 14,955-56, ¶ 28.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

## **I. Hillcrest's Ability to Afford Captioning**

To sufficiently demonstrate that a petitioner cannot afford to caption its programming, a petition must provide both detailed information regarding the petitioner's financial status and verification that the petitioner has diligently sought out and received accurate, reasonable information regarding the costs of captioning its programming, such as competitive rate quotes from established providers.<sup>10</sup> Both showings are essential to enable the Commission and the public to verify that the petitioner in fact cannot afford to caption its programming and eliminate the possibilities that captioning would be possible if the petitioner reallocated its resources or obtained more reasonable price quotes for captioning its programming.

A successful petition requires, at a bare minimum, detailed information regarding the petitioner's finances and assets, gross or net proceeds, and other documentation "from which its financial condition can be assessed" that demonstrates captioning would present an undue economic burden.<sup>11</sup> Hillcrest's supplied financial information for 2011, however, shows a \$61,691.30 surplus, enough to caption its programming at its quoted annual cost of \$6,500 for nearly the entirety of the next decade.<sup>12</sup>

## **II. Alternative Avenues for Captioning Assistance**

Even where a petition succeeds at demonstrating that a petitioner cannot afford to caption its programming, the petitioner must also demonstrate that it has exhausted all alternative avenues for attaining assistance with captioning its programming.<sup>13</sup> While Hillcrest claims that its video programming distributor refused assistance, there is no

---

<sup>10</sup> *See id.*

<sup>11</sup> *E.g., Survivors of Assault Recovery*, Case No. CSR 6358, 20 FCC Rcd. 10,031, 10,032, ¶ 3 (MB 2005), *cited with approval in Anglers 2011*, *supra* note 6, 26 FCC Rcd. at 14,956, ¶ 28 n.100.

<sup>12</sup> *Hillcrest Petition*, *supra* note 1, at Exhibit 1.

<sup>13</sup> *See Anglers 2011*, *supra* note 6, 26 FCC Rcd. at 14,955-56, ¶ 28 (internal citations omitted).

evidence that Hillcrest has fully investigated, much less exhausted, alternative avenues to fund captioning.<sup>14</sup>

To establish that providing captions would impose an undue economic burden, a petitioner must demonstrate that it has sought out sponsorships or other sources of revenue to cover the cost of captioning its program and is unable to obtain alternative means of funding captions for its programming.<sup>15</sup> The petition contains no indication that Hillcrest has solicited sponsorships or other sources of revenue to cover the cost of captioning its program.

### **III. The Captioning Rules Do Not Violate Hillcrest's First Amendment Rights**

Hillcrest states that its programming is “particularly beneficial to the handicapped [whose needs] would not be met if the programming had to be discontinued,” but it also claims that the church is dependent on donations of its members who “have the right to give to their church to provide for the religious needs of their community as they see fit.”<sup>16</sup> Hillcrest claims that its members’ “constitutional right of freedom of religion (First Amendment to the Constitution) should not be undermined by having the government impose its will on the church members as to how they should spend their money.”<sup>17</sup>

While the precise nature of Hillcrest’s conclusory argument is unclear, the First Amendment does not excuse Hillcrest from complying with the closed captioning rules. To the extent that Hillcrest argues that the captioning rules impermissibly burden its speech, the Commission affirms that captioning requirements do not violate the First Amendment because they involve only “a precise repetition of the spoken words” of

---

<sup>14</sup> *Hillcrest Petition*, *supra* note 1, at 3.

<sup>15</sup> See *Outland Sports*, 16 FCC Rcd. at 13607-08, ¶ 7 (2001), *cited with approval in Anglers 2011*, *supra* note 6, 26 FCC Rcd. at 14,956, ¶ 28 n. 103.

<sup>16</sup> *Hillcrest Petition*, *supra* note 1, at 3.

<sup>17</sup> *Id.*

the captioned programming and do “not significantly interfere with program content.”<sup>18</sup>

To the extent that Hillcrest instead argues that the captioning rules impermissibly burden the free exercise of religion, it implies that providing closed captioning to serve viewers of Hillcrest’s community of broadcast who are deaf or hard of hearing somehow runs counter to the religious beliefs of Hillcrest or its members. We presume that this is not the case. But even if so, the Supreme Court has held that “if prohibiting the exercise of religion . . . is not the object of [a law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>19</sup> The Commission’s captioning rules are generally applicable to television video programming, and there is no evidence that the Commission has intentionally applied the rules to burden the free exercise of religion in Hillcrest’s case or in any other, or that the rules have ever had such an effect. To the contrary, the plain and obvious goal and frequently realized effect of the Commission’s rules is to make video programming accessible to viewers who are deaf or hard of hearing, and no more.

#### **IV. Conclusion**

Hillcrest’s petition fails to conclusively demonstrate that it cannot afford to caption its programming or that it has exhausted all available alternatives for providing captions. Because the petition fails to establish that it would be unduly burdensome for Hillcrest to caption its programming under the high standard demanded under the 1996 Act and the CVAA, we respectfully urge the Commission to dismiss the petition.

---

<sup>18</sup> *Report and Order, Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket 11-154, ¶ 25 (Jan. 13, 2012), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0130/FCC-12-9A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0130/FCC-12-9A1.pdf) (quoting *MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002)).

<sup>19</sup> See *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 878 (1990).



**Hearing Loss Association of America (HLAA)**

\_\_\_\_\_  
/s/

Brenda Battat, Executive Director • Battat@Hearingloss.org

Contact: Lise Hamlin, Director of Public Policy, LHamlin@Hearingloss.org

7910 Woodmont Avenue, Suite 1200, Bethesda, MD 20814

301.657.2248

www.hearingloss.org

**Association of Late-Deafened Adults (ALDA)**

\_\_\_\_\_  
/s/

Contact: Brenda Estes, President • bestes@independence.org

8038 Macintosh Lane, Rockford, IL 61107

**Cerebral Palsy and Deaf Organization (CPADO)**

\_\_\_\_\_  
/s/

Contact: Mark Hill, President • deafhill@gmail.com

1219 NE 6th Street #219, Gresham, OR 97030

503.468.1219

## CERTIFICATION

Pursuant to 47 C.F.R. § 1.16 and 79.1(f)(9), I, Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), hereby certify under penalty of perjury that to the extent there are any facts or considerations not already in the public domain which have been relied in the foregoing Opposition, these facts and considerations are true and correct to the best of my knowledge.

*Claude L. Stout*

---

Claude Stout  
March 16, 2012

## CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on March 16, 2012, pursuant to the Commission's aforementioned Public Request for Comment, a copy of the foregoing Opposition was served by first class U.S. mail, postage prepaid, upon the petitioner:

Hillcrest Baptist Church of El Paso  
James L. Oyster, Counsel  
108 Oyster Lane  
Castleton, VA 22716-9720



Niko Perazich  
March 16, 2012