

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

March 9, 2012

via hand delivery

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

FILED/ACCEPTED

MAR - 9 2012

Federal Communications Commission
Office of the Secretary

Attn: CGB Room 3-B431

**Re: Diocese of Gaylord, Michigan Request for Exemption from the
Commission's Closed Captioning Rules
Case No. CGB-CC-0270
CG Docket No. 06-181**

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 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 Diocese of Gaylord, Michigan ("Gaylord") to exempt its programming from the Commission's closed captioning rules, 47 C.F.R. § 79.1 (2010).¹ Consumer Groups oppose the petition because the information provided does not demonstrate that Gaylord cannot afford to caption its programming.

¹ *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules, Diocese of Gaylord, Case No. CGB-CC-0270, CG Docket No. 06-181 (Feb. 10, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0210/DA-12-181A1.pdf; Petition for Exemption from Closed Captioning Requirement for Diocese of Gaylord, Case No. CGB-CC-0270, CG Docket No. 06-181 (Jan. 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021755412> [hereinafter *Gaylord Petition*].*

Consumer Groups acknowledge the efforts of Gaylord's broadcast of its weekly Eucharistic Liturgy to provide viewers who are "ill, disabled, elderly, homebound or otherwise separated from the Church access to a timely local weekly liturgy."² The requested exemption, however, would deny equal access to Gaylord's programming to members of the community who are deaf or hard of hearing. In fact, Gaylord has identified the elderly and those otherwise unable to attend Church as a segment of its community that its programming is designed to benefit.³ This constituency is also one that may distinctly benefit from the inclusion of closed captions. Maximizing accessibility through the comprehensive use of closed captions is a critical step in ensuring that all members of the community 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.

Consumer Groups oppose the petition because Gaylord fails to present a compelling case that captioning its programming would impose an undue economic burden. The information supplied does not demonstrate that Gaylord cannot afford to caption its programming, or that it has investigated, much less exhausted, all available alternative options for providing captioning.

² *Gaylord Petition*, *supra* note 1, at 5.

³ *Id.* at 4.

Under section 713(d)(3) of the Communications Act of 1934 (“1934 Act”),⁴ as added by the 1996 Act and amended by section 202(c) of the CVAA, “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 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).⁵

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.⁶ If a petitioner sufficiently demonstrates such an inability, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning its

⁴ Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 27 U.S.C. 613(d)(3)).

⁵ *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. 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. 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*].

⁶ See *Anglers 2011*, *supra* note 5, 26 FCC Rcd. at 14,955-56, ¶ 28.

programming.⁷ 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.⁸

I. Gaylord'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.⁹ 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 possibility 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.¹⁰ While Gaylord provides a statement of its assets and liabilities for 2010 and 2011, it does not include any information about its revenues and expenses.¹¹ Accordingly, it is impossible to determine the impact of providing closed captioning on Gaylord's finances.

When evaluating the financial status of a petition, the Commission "take[s] into account the overall financial resources of the provider or program owner," not "only

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ 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 5, 26 FCC Rcd. at 14,956, ¶ 28 n.100.

¹¹ *Gaylord Petition*, *supra* note 1, at Exhibit 12.

the resources available for a specific program.”¹² Although Gaylord’s programming budget is only about \$50,000, Gaylord’s financial statements show that it has more than \$17 million in net assets.¹³ Gaylord could caption its programming, even at its estimated cost of \$25,000 (50% of the \$50,000 it budgets for its programming) by redirecting but a tiny fraction of its millions of dollars in assets.¹⁴

Gaylord’s nevertheless asserts that due to the “time, geographic region, broadcast area and liturgical guidelines involved, it is impossible . . . to include closed captioning in its weekly Mass with the timeframe and limited [resources in a rural area].”¹⁵ The petition, however, details several possibilities for on-site and live captioning that belie the reality that captioning would be possible if Gaylord chose to allocate its substantial assets to do so.¹⁶

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.¹⁷

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.¹⁸ The petition includes correspondence from Gaylord’s program distributor, WFQX-Fox 33, refusing captioning assistance,¹⁹

¹² *Anglers 2011*, *supra* note 5, 26 FCC Rcd. at 14,950, ¶ 17.

¹³ *Gaylord Petition*, *supra* note 1, at 5, Exhibit 12.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at Exhibit A.

¹⁷ *See Anglers 2011*, *supra* note 5, 26 FCC Rcd. at 14,955-56, ¶ 28 (internal citations omitted).

¹⁸ *See Outland Sports*, 16 FCC Rcd. at 13607-08, ¶ 7 (2001), *cited with approval in Anglers 2011*, *supra* note 5, 26 FCC Rcd. at 14,956, ¶ 28 n. 103

¹⁹ *Gaylord Petition*, *supra* note 1, at Exhibit 7.

but contains no indication that Gaylord has solicited sponsorships or other sources of revenue to cover the cost of captioning its program.

III. Gaylord Does Not Qualify for the Local Non-News Exemption

Gaylord argues that the Commission's local non-news exemption applies to its programming.²⁰ The Commission, however has made clear that 47 C.F.R. § 79.1(d)(8) specifically requires that "locally produced and distributed non-news programming be produced by the *video programming distributor, not programmers.*"²¹

The Commission defines video programming distributors as:

Any television broadcast station licensed by the Commission and any multichannel video programming distributor as designed in §76.1000(e) of this chapter, and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor *that is itself exempt from captioning that programming pursuant to paragraph (e)(9) of this section* shall itself be treated as a video programming distributor for the purposes of this section. To the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distribution shall be required to comply with the closed captioning requirements of this section.²²

Gaylord is not a television broadcast station and does not claim to be a multichannel video programming distributor or other distributor subject to the Commission's jurisdiction. Gaylord nevertheless appears to claim that it is a video programming distributor by virtue of the fact that it contracts for the distribution of its programming.²³

The definition of video programming distributor, however, only encompasses programmers where the actual distributor of the programming is exempt from captioning the programming under 47 C.F.R. § 79.1(e)(9). Gaylord does not assert or

²⁰ *Id.* at 6.

²¹ See *Anglers 2011*, *supra* note 5, 26 FCC Rcd. at 14,950, ¶ 17 n. 63 (emphasis added).

²² 47 C.F.R. § 79.1(a)(2) (emphasis added).

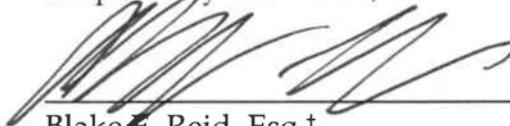
²³ *Gaylord Petition*, *supra* note 1, at 6.

explain why WFQX-Fox 33 is exempt from captioning Gaylord's programming under section 79.1(e)(9), nor do any of the exemptions in section 79.1(e)(9), such as for retransmitted broadcast signals and political advertisements, appear to apply to WFQX's broadcast of Gaylord's programming. Because Gaylord has not established that it is a video programming distributor, it cannot qualify for the local non-news exemption under section 79.1(d)(8).

IV. Conclusion

Gaylord'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 Gaylord 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.

Respectfully submitted,



Blake E. Reid, Esq.[†]

March 9, 2012

*Counsel for Telecommunications for the
Deaf and Hard of Hearing, Inc.*

Institute for Public Representation
Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9545
ber29@law.georgetown.edu

cc: Roger Holberg, Consumer &
Governmental Affairs Bureau
Traci Randolph, Consumer &
Governmental Affairs Bureau

[†] Counsel thanks Georgetown Law student clinicians Allyn Ginns and Cathie Tong for their assistance in preparing these comments.

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

_____/s/_____

Claude Stout, Executive Director • cstout@TDIforAccess.org

Contact: Jim House, CEPIN Outreach/Public Relations • jhouse@TDIforAccess.org

8630 Fenton Street, Suite 604, Silver Spring, MD 20910

301.589.3786

www.TDIforAccess.org

National Association of the Deaf (NAD)

_____/s/_____

Howard Rosenblum, Chief Executive Officer • howard.rosenblum@nad.org

Contact: Shane Feldman, Chief Operating Officer • shane.feldman@nad.org

8630 Fenton Street, Suite 820, Silver Spring, MD 20910

301.587.1788

www.nad.org

Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)

_____/s/_____

Cheryl Heppner, Vice Chair • CHEppner@nvrc.org

3951 Pender Drive, Suite 130, Fairfax, VA 22030

Association of Late-Deafened Adults (ALDA)

_____/s/_____

Contact: Brenda Estes, President • bestes@endependence.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 Stout
March 9, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on March 9, 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:

The Diocese of Gaylord
c/o Robert T. Westerman II, PLC
117 West First St.
Gaylord, MI 49735

A handwritten signature in black ink, appearing to read "Niko Perazich", is written over a horizontal line.

Niko Perazich
March 9, 2012