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March 9, 2012

via hand delivery

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

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

Attn: CGB Room 3-B431

Re: **First Baptist Church of Montgomery Request for Exemption from the Commission's Closed Captioning Rules**
Case No. CGB-CC-0225
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 First Baptist Church ("FBC") to exempt its program *Crossroads* from the Commission's closed captioning rules, 47 C.F.R. § 79.1 (2010).[1] Consumer Groups oppose the petition because FBC does not include sufficient information to show the

[1] *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules, First Baptist Church*, Case No. CGB-CC-0225, CG Docket No. 06-181 (Feb. 8, 2012), http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-12-164A1.pdf; *Petition for Exemption from Closed Captioning Requirement for First Baptist Church*, Case No. CGB-CC-0225, CG Docket No. 06-181 (Jan. 18, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021755168, http://apps.fcc.gov/ecfs/document/view?id=7021755169 [hereinafter *FBC Petition*].

cost of captioning its programming. Moreover, the financial information provided by FBC demonstrates that may in fact be able to afford captioning.

Consumer Groups acknowledge FBC's efforts to "allow[] people to be a part of the church service even when they are not able to attend."[2] Nevertheless, the requested exemption would deny equal access to FBC's important programming for the members of FBC's community 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 offered by 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"),[3] 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

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[2] *FBC Petition, supra* note 1, at 1.

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

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).[4]

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.[5] 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.[6] 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.[7]

I. FBC's Ability to Afford Captioning

To sufficiently demonstrate that a petitioner cannot afford to caption its programming, a petition must provide both verification that the petitioner has diligently sought out and received accurate, reasonable information regarding the costs

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[4] *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, 14961-62, ¶¶ 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*].

[5] *See Anglers 2011, supra* note 4.

[6] *See id.*

[7] *See id.*

of captioning its programming, such as competitive rate quotes from established providers, and detailed information regarding the petitioner's financial status.[8] Both showings must demonstrate 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.

FBC has not demonstrated an inability to afford captioning. First, it has not provided clear information regarding the cost of captioning. Second, FBC's financial documents show ample assets that it could redistribute to fund captions.

A. The Costs of Captioning FBC's Programming

To successfully demonstrate that captioning would pose an undue burden in light of a petitioner's financial status, the petitioner must demonstrate a concerted effort to determine "the most reasonable price" for captioning its programming.[9] To allow the Commission and the public to evaluate whether a petitioner's cost estimates are reasonable, it is essential that a petitioner provide, at a bare minimum, detailed information about the basis and validity of cost estimates for captioning, such as competitive hourly rate quotes and associated correspondence from several established captioning providers.[10]

FBC's assessment of the cost of captioning its programming is inconsistent. For example, FBC asserts without corroborating documentation that two of the stations

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[8] *See id.*

[9] *See The Wild Outdoors*, 16 FCC Rcd. 13,611, 13,613 ¶ 7 (2001), *cited with approval in Anglers 2011, supra* note 4, 26 FCC Rcd. at 14,956, ¶ 28 n.101.

[10] *Compare, e.g., Outland Sports*, 16 FCC Rcd. at 13,607, ¶ 7 (2001) (approving of a petitioner's inclusion of rate quotes and associated correspondence from at least three captioning providers in its petition) *with Wild Outdoors I*, 16 FCC Rcd. at 13,613, ¶ 7 (disapproving of a petitioner's bald assertion of the cost to caption a program without supporting evidence). Consumer Groups agree with the Commission's suggestion in *Outland Sports* that a successful petitioner must include competitive rate quotes from at least three captioning providers.

which broadcast FBC's programming are not required to caption their programming, yet also asserts that each of those stations would require different versions of closed captioning, and that the third station on which FBC broadcasts would require yet another version of closed captions.[11] Without consistent information about the basis for these assertions, it is impossible to evaluate the cost of captioning for FBC's programming.

B. FBC's Financial Status

Even if FBC had provided verifiable information about the cost of captioning, FBC has not demonstrated that it has insufficient funds to pay for captioning. 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 burden on the petitioner's financial resources.[12] FBC has provided insufficient records from which to verify its available financial recourses.

More specifically FBC claims that its annual income was $385,000 short of its projected expenses for 2011.[13] This alleged shortfall, however, is misleadingly calculated by comparing projected expenses for the *entire year* of 2011 to revenue only from January through November of 2011, *excluding the month of December*. FBC's financial statement confirms that for the period of January through November of 2011, its income in fact exceeded its expenses by more than $125,000[14]—excess revenue that could more than cover the annual cost of captioning FBC's programming. And even if FBC experienced an unusually large loss in the month of December—a fact not substantiated

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[11] *FBC Petition, supra* note 1, at 2-3.
[12] *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 4, 26 FCC Rcd. at 14,956, ¶ 28 n.100.
[13] *FBC Petition, supra* note 1, at 3; Exhibit D.
[14] *See id.*

anywhere in the petition – FBC fails to provide information about available assets that could bear on FBC's ability to afford captioning.

Moreover, FBC's annual income through November 2011 was more than $5 million.[15] Using this figure, the costs of captioning would amount to a miniscule percentage of FBC's total income. 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 the resources available for a specific program."[16] Although FBC provides incomplete records and quotes for caption costs, the available information suggests that captioning would impose only minimal expense relative to FBC's overall budget.

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] A petitioner must provide documentation showing that it has sought assistance from other parties involved with the creation and distribution of its programming,[18] sought sponsorships or other sources of revenue to cover captions, and is unable to obtain alternative means of funding captions.[19] FBC asserts that it solicits donations at the end of the programming, the receipts of which are insufficient to cover the cost of

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[15] *Id.* at Exhibit D.

[16] *Anglers 2011, supra* note 4, 26 FCC Rcd. at 14,950, ¶ 17.

[17] *See id.* at 14,955-56, ¶ 28 (internal citations omitted).

[18] *See, e.g., Engel's Outdoor Experience*, Case No. CSR 5882, 19 FCC Rcd. 6867, 6868, ¶ 3 (MB 2004), *cited with approval in Anglers 2011, supra* note 4, 26 FCC Rcd. at 14,956, ¶ 28 n. 102.

[19] *See Outland Sports*, 16 FCC Rcd. at 13607-08, ¶ 7 (2001), *cited with approval in Anglers 2011, supra* note 4, 26 FCC Rcd. at 14,956, ¶ 28 n. 103.

captioning.[20] The petition contains no indication, however, that FBC has solicited sponsorships or other sources of revenue to cover the cost of captioning its program.

III. Conclusion

FBC's petition does not include sufficient information for the cost of captioning. Moreover, the financial information provided by FBC demonstrates that it likely has sufficient funds to be able to afford captioning. Consumer Groups therefore respectfully urge the Commission to dismiss the petition and require FBC to come into compliance with the closed captioning rules.

Respectfully submitted,

Blake E. Reid, Esq.†
March 9, 2012

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

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[20] *FBC Petition*, *supra* note 1, at 3.

† 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/_____

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National Association of the Deaf (NAD)

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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 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:

First Baptist Church
305 South Perry St.
Montgomery, AL 36104

Niko Perazich
March 9, 2012