

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

April 5, 2012

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via hand delivery

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

Federal Communications Commission
Office of the Secretary

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**

Dear Ms. Dortch:

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), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this Supplemental Response to the Reply of Hillcrest Baptist Church of El Paso, TX¹ to the Consumer Groups' Opposition² to Hillcrest's original Petition for Exemption.³

¹ *Reply of Hillcrest Baptist Church of El Paso, TX to Opposition to Petition for Exemption, Case No. CGB-CC-0525, CG Docket No. 06-181 (received April 2, 2012) [hereinafter Hillcrest Reply].*

² *Opposition to Hillcrest Baptist Church of El Paso, TX Request for Exemption, Case No. CGB-CC-0525, CG Docket No. 06-181 (March 16, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021902070> [hereinafter Consumer Groups Opposition].*

³ *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),*

Hillcrest's reply addresses matters not raised in Consumer Groups' opposition and advances novel legal and factual arguments absent from Hillcrest's original petition. As the Commission recently noted, "the process for determining closed captioning exemptions on the basis of purported undue burden requires notice to the public in order to afford the public an opportunity to comment on whether grant of these petitions was in the public interest."⁴ Because Hillcrest's reply advances new bases upon which Hillcrest argues it should be exempt from the Commission's closed captioning rules, the public must be afforded the opportunity to comment. In the interest of due process, fairness, and expediency, we request that the Commission accept the following responses to the new matters raised in Hillcrest's reply.

I. Hillcrest does not qualify for categorical exemptions from the Commission's closed captioning rules.

In its reply, Hillcrest suggests for the first time that it may be eligible for an exemption from the Commission's closed captioning rules under 47 C.F.R. §§ 79.1(d)(8), 79.1(d)(11), and 79.1(d)(12).⁵ The Commission has made clear, however, that the categorical exemption under section 79.1(d)(8) specifically requires that "'locally produced and distributed non-news programming' be produced *by the video programming distributor*, not programmers."⁶ Hillcrest's programming cannot be exempt under section 79.1(d)(8) because Hillcrest is not a video programming distributor. And sections 79.1(d)(11) and 79.1(d)(12) by their terms are only applicable to *channels of*

<http://apps.fcc.gov/ecfs/document/view?id=7021755446> [hereinafter *Hillcrest Petition*].

⁴ *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, ¶ 27 & n.94 (Oct. 20, 2011) (citing 47 C.F.R. § 79.1(f)(5)) [hereinafter *Anglers Reversal Order*].

⁵ *Hillcrest Reply*, *supra* note 1, at 5-6, ¶ 11.

⁶ See *Anglers Reversal Order*, *supra* note 4, 26 FCC Rcd. at 14,950, ¶ 17 n.63 (emphasis original).

video programming. Hillcrest is not seeking an exemption for a channel and its programming therefore cannot be exempt under sections 79.1(d)(11) or 79.1(d)(12).

II. The Commission must consider Hillcrest's entire budget, not just its "broadcast budget."

Hillcrest argues for the first time in its reply that it cannot afford to caption its programming because the cost of captioning would exceed its specific "broadcast budget."⁷ This argument stands in contrast to its original, more general claim that providing captioning "would create a serious hardship on [its] *working budget*,"⁸ which, as our opposition noted, shows a surplus large enough to caption Hillcrest's programming for nearly a decade.⁹ Nevertheless, when evaluating the financial status of a petitioner, 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."¹⁰ If the Commission were to consider only the resources available for a specific program, petitioners could avoid having to comply with the captioning rules simply by refusing to allocate available funds toward captioning their programming. Accordingly, Hillcrest's specific broadcast budget is not relevant to the Commission's consideration of Hillcrest's petition, and Hillcrest's refusal to allocate available funds to its broadcast budget for the purpose of closed captioning does not excuse it from compliance with the rules.

III. The closed captioning requirements do not violate Hillcrest's free speech rights under the First Amendment.

Finally, Hillcrest argues for the first time in its reply that requiring it to caption its programming would cause a "'chilling effect' on free speech" in violation of the First

⁷ *Hillcrest Reply*, *supra* note 1, at 1-2, ¶¶ 2-3.

⁸ *Hillcrest Petition*, *supra* note 3, at Exhibit 1.

⁹ *Consumer Groups Opposition*, *supra* note 2, at 4.

¹⁰ *Anglers Reversal Order*, *supra* note 4, 26 FCC Rcd. at 14,950, ¶ 17.

Amendment “because of the distinct possibility that [Hillcrest] will be unable to continue to broadcast its services on television” if required to provide captioning.¹¹ This specific argument was not present in Hillcrest’s vague allusion to the First Amendment in its original petition.¹²

Regardless, Hillcrest’s economic ability to broadcast its programming on television with captions is precisely the subject of the Commission’s inquiry in considering Hillcrest’s petition. A denial of Hillcrest’s petition would not represent any unwarranted incursion on Hillcrest’s free speech rights, but merely a recognition of Hillcrest’s inability to demonstrate that it cannot afford to caption its programming.

Consumer Groups express no desire for Hillcrest to cease broadcasting its programming, and we encourage Hillcrest to simply allocate the small fraction of its demonstrably available funds that would be required to provide captioning. Should Hillcrest choose to discontinue its programming altogether instead of making the modest expenditure required to make its programming accessible to members of its community who are deaf or hard of hearing, that decision, however unfortunate, is Hillcrest’s alone and does not implicate the First Amendment.

IV. Conclusion

Hillcrest’s newly raised arguments provide no legitimate basis for the Commission to exempt Hillcrest’s programming from the closed captioning rules. Accordingly, we respectfully reiterate our request that the Commission dismiss Hillcrest’s petition and require Hillcrest to come into compliance with the rules.

¹¹ *Hillcrest Reply*, *supra* note 1, at 4-5, ¶ 8.

¹² *Hillcrest Petition*, *supra* note 3, at 3 (“[Church members’] constitutional right of freedom of religion (*First Amendment to the U.S. Constitution*) should not be undermined by having the government impose its will on the church members as to how they should spend their money.”) (emphasis added).

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 document, these facts and considerations are true and correct to the best of my knowledge.

Claude L. Stout

Claude Stout
April 5, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on April 5, 2012, pursuant to the Commission's aforementioned Public Request for Comment, a copy of the foregoing document 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
April 5, 2012