

Institute for Public Representation
Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9535 (phone)
202.662.9634 (fax)



September 10, 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

SEP 10 2012

Federal Communications Commission
Office of the Secretary

Attn: CGB Room 3-B431

**Re: Pan American Broadcasting Petition for Exemption from the
Commission's Closed Captioning Rules
Case No. CGB-CC-1027
CG Docket No. 06-181**

Dear Ms. Dortch:

Pursuant to the Commission's Request for Comment, 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 opposition to the petition of Pan American Broadcasting ("PAB") to exempt *The Jimmy Surgener Program* from the Commission's closed captioning rules, 47 C.F.R. § 79.1.¹ Consumer Groups

¹ *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181 (August 9, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0809/DA-12-1309A1.pdf; *PAB Petition for Exemption*, Case No. CGB-CC-1027, CG Docket No. 06-181 (January 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021857153> ("*PAB Petition*"). The Consumer and Governmental Affairs Bureau initially determined that the *PAB Petition* was deficient because it lacked sufficient documentation of PAB's financial status. *Letter from the Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-1027, CG Docket No. 06-181 (April 4, 2012) ("*CGB Letter*") (on file with counsel). PAB then filed a

oppose the petition because it impermissibly attempts to seek an exemption for PAB's programming based on Mr. Surgener's financial information, even though PAB appears to be the entity financially responsible for producing the programming.

Consumer Groups acknowledge Mr. Surgener's efforts to "share his ministry teaching on the Christian television."² PAB's requested exemption, however, would deny equal access to the program to community members who are deaf or hard of hearing. Maximizing accessibility through the comprehensive use of closed captions is critical to ensuring that all viewers can experience the important benefits of video programming on equal terms.

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 documentation 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"), as added by the Telecommunications Act of 1996 Act ("1996 Act")³ and amended by section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 ("CVAA"),⁴ "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 July 20, 2012 Report and

supplement. *PAB Supplement*, Case No. CGB-CC-1027 (April 26, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021919337>.

² *PAB Supplement* at 1

³ Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 613(d)(3)).

⁴ Pub. L. 111-260, 124 Stat. 2751 (codified at 47 U.S.C. § 613(d)(3)).

Order, the Commission formally adopted the analysis set forth in its October 20, 2011 Interim Standard Order and Notice of Proposed Rulemaking.⁵ In doing so, the Commission interpreted the term “economically burdensome” as being synonymous with the term “undue burden” as defined in section 713(e) of the 1934 Act and ordered the Consumer and Governmental Affairs Bureau to continue to evaluate all exemption petitions using the “undue burden” standard pursuant to the Commission’s amended rules in 47 C.F.R. § 79.1(f)(2)-(3).⁶

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.⁷ If a petitioner sufficiently demonstrates an inability to afford captioning, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning.⁸ Where a petition fails to make either of those showings, it fails to demonstrate that providing

⁵ The *Interim Standard Order* and the *NPRM* were part of a multi-part Commission decision. See *Anglers for Christ Ministries, Inc., New Beginning Ministries, Petitioners Identified in Appendix A, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, CG Docket Nos. 06-181 and 11-175, 26 FCC. Rcd. 14941 (Oct. 20, 2011) (“*Anglers 2011*”).

⁶ *Report and Order, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, CG Docket No. 11-175, ¶ 8 (July 20, 2012) (“*Economically Burdensome Standard Order*”). 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 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

⁷ See *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

⁸ See *id.*

captions would be economically burdensome, and the Commission must dismiss the petition.⁹

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 of captioning its programming, such as competitive rate quotes from established providers, and detailed information regarding the petitioner's financial status.¹⁰ Both showings must demonstrate 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.

In particular, 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.¹¹ Although PAB provides no detailed information regarding Mr. Surgener's finances, PAB's filings indicate that Mr. Surgener is on Social Security and has a set limited income below the level required to file a tax return.¹²

It appears, however, that PAB itself, rather than Mr. Surgener, is the entity financially responsible for the production of the program. As PAB's petition notes, PAB "pays LeSEA Broadcasting [presumably, the distributor of the program] \$595 per program to air the show."¹³ PAB's filings, submitted with signatures from PAB

⁹ See *id.*

¹⁰ See *id.*

¹¹ *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*, 26 FCC Rcd. at 14,956, ¶ 28 n.100.

¹² PAB Petition at 1; PAB Supplement at 2, 3.

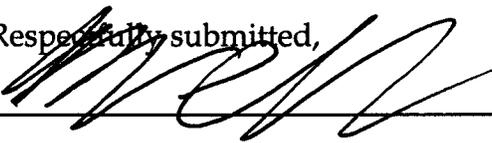
¹³ PAB Petition at 1.

representatives and on PAB letterhead, indicate that PAB is the owner of the program. The relevant question, then is not whether captioning would impose an undue burden on Mr. Surgener, but rather on PAB.

PAB provides no information suggesting that captioning its programming would impose an undue burden; in fact, PAB provides no information of any kind about its financial status or operations. It appears that PAB is seeking an undue burden exemption for itself by presenting Mr. Surgener's financial information. But Mr. Surgener's financial information is irrelevant to whether PAB can afford to provide captioning for its programming.

Because PAB's petition fails to provide any information suggesting that captioning its programming would impose an undue burden on PAB or that PAB has made any efforts caption its programming, and impermissibly attempts to substitute Mr. Surgener's financial information for PAB's own information, we respectfully urge the Commission to dismiss the petition with leave for PAB to file a new petition containing relevant information about its own finances and efforts to provide captioning for its programming.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. Reid', is written over a horizontal line.

Blake E. Reid
September 10, 2012

Counsel to TDI

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

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

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

 /s/

Claude Stout, Executive Director • cstout@TDIforAccess.org

Contact: Jim House, Director of Public Relations • jhouse@TDIforAccess.org

8630 Fenton Street, Suite 121, Silver Spring, MD 20910

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

Claude L. Stout

Claude Stout
September 10, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on September 10, 2012, pursuant to the Commission's aforementioned Request for Comment, a copy of the foregoing document was served by first class U.S. mail, postage prepaid, upon the petitioner:

Pan American Broadcasting
7011 Koll Center Parkway, Suite 250
Pleasanton, CA 94566-3253



Niko Perazich
September 10, 2012