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November 26, 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

Attn: CGB Room 3-B431

**Re: The Kiya Amajioyi Company Petition for Exemption from the
Commission's Closed Captioning Rules
Case No. CGB-CC-1235
CG Docket No. 06-181**

FILED/ACCEPTED

NOV 26 2012

Federal Communications Commission
Office of the Secretary

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), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this opposition to the petition of The Kiya Amajioyi Company ("KAC") to exempt its program *The Kiya Amajioyi Show* from the Commission's closed captioning rules, 47 C.F.R. § 79.1.¹

¹ *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181 (October 26, 2012), http://hraunfoss.fcc.gov/cs_public/attachmatch/DA-12-1729A1.pdf; *KAC Petition for Exemption*, Case No. CGB-CC-1235, CG Docket No. 06-181 (April 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021918755> ("*KAC Petition*"). The Consumer and Governmental Affairs Bureau initially determined that the *KAC Petition* was deficient. *Letter from the Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-1235, CG Docket No. 06-181 (June 20,

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Consumer Groups oppose the petition because it does not sufficiently demonstrate that KAC has diligently sought out the most reasonable price for captioning services or that it cannot afford to caption its programming.

Consumer Groups acknowledge KAC's efforts to broadcast its programming. KAC's requested exemption, however, would deny equal access to its programming 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")² and amended by section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 ("CVAA"),³ "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 Order, the Commission formally adopted the analysis set forth in its October 20, 2011

2012), <http://apps.fcc.gov/ecfs/document/view?id=7021977572> ("CGB Letter"). KAC then filed a supplement. *KAC Supplement*, Case No. CGB-CC-1235 (July 6, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022004047>.

² Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 613(d)(3)).

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

Interim Standard Order and Notice of Proposed Rulemaking.⁴ 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).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 an inability to afford captioning, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning.⁷ Where a petition fails to make either of those showings, it fails to demonstrate that providing captions would be economically burdensome, and the Commission must dismiss the petition.⁸

⁴ 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*”).

⁵ *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.

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

⁷ See *id.*

⁸ See *id.*

I. KAC'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 of captioning its programming, such as competitive rate quotes from established providers, and detailed information regarding the petitioner's financial status.⁹ 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.

A. The Cost of Captioning KAC's Programming

To successfully demonstrate that captioning would be economically burdensome, a petitioner must demonstrate a concerted effort to determine "the most reasonable price" for captioning its programming.¹⁰ To allow the Commission and the public to evaluate whether a petitioner's cost estimates are reasonable, it is essential that a petition 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.¹¹

KAC asserts that, "[b]ased on [its] highest and lowest estimates," captioning its programming "would cost some where between \$210.00 and \$420.00 per program."¹²

⁹ *See id.*

¹⁰ *See The Wild Outdoors*, Case No. CSR 5444, 16 FCC Rcd. 13,611, 13,613-14 ¶ 7 (CSB 2001), cited with approval in *Anglers 2011*, 26 FCC Rcd. at 14,956, ¶ 28 n.101.

¹¹ Compare, e.g., *Outland Sports, Inc.*, Case No. CSR 5443, 16 FCC Rcd. 13,605, 13,607, ¶ 7 (CSB 2001) (approving of a petitioner's inclusion of rate quotes and associated correspondence from at least three captioning providers in its petition) with *The Wild Outdoors*, 16 FCC Rcd. at 13,613-14, ¶ 7 (disapproving of a petitioner's bald assertion of the cost to caption a program without supporting evidence).

¹² *KAC Petition* at 4.

KAC provides no explanation for the basis of these estimates, nor does it provide any evidence that it reached out to multiple captioning companies and attempted to negotiate a more affordable rate. Without more information, it is impossible for the Commission or the public to conclude that KAC has undertaken the necessary effort to determine the most reasonable price for captioning its programming, or what that price might be.

B. KAC's Financial Status

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.¹³

KAC claims that closed captioning would nearly double the cost to air its programming and that it "has already stretched" resources for its television programming budget.¹⁴ The specific budget for KAC's programming, however, is irrelevant to the Commission's determination. 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."¹⁵

KAC submits only a redacted financial statement that apparently projects a net loss of \$16,670 for the period between May 2012 and May 2013.¹⁶ The chart, however, lists only \$3,670 in expenses and shows no income. We presume that the \$13,000 not accounted for in the chart is the cost allocated to pay WMDT to broadcast KAC's programming.¹⁷ The financial statement suggests, then, that KAC plans to generate no

¹³ *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.

¹⁴ *KAC Petition* at 2.

¹⁵ *Anglers 2011*, 26 FCC Rcd. at 14,950, ¶ 17.

¹⁶ *KAC Supplement* at 2.

¹⁷ See *KAC Petition* at 4.

income at all for more than a year. But this suggestion is contradicted by KAC's references to the "resources" and "monies" used to produce the programming.¹⁸

It is unclear whether KAC itself generates no income, or whether the company generates other income but generates no income through its programming. If KAC generates other income, specific information about that income must be made available to permit the public to evaluate whether KAC can afford to caption its programming. If KAC generates no income, then it must offer a plausible explanation for why it has been able to create and broadcast its programming at a significant loss since at least 2008 but cannot incur the modest additional cost of captioning. If its programming is supported by unreported assets, then those assets must be disclosed to permit the public to evaluate whether they could be leveraged to support captioning as well as the creation and broadcast of programming.

II. The Locally Produced and Distributed Non-News, Non-Repeating Exemption for Video Programming Distributors

Finally, KAC apparently believes that the local, non-news exemption to the closed captioning rules applies to its programming.¹⁹ But the narrow exemption in Section 79.1(d)(8) of the Commission's rules applies only to "[p]rogramming that is locally produced by [a] video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the 'electronic news room' technique of captioning is unavailable."²⁰ As CGB has repeatedly determined, entities like KAC are plainly not video programming distributors under the meaning of the Commission's rules and cannot qualify for this exemption.²¹

¹⁸ *KAC Petition* at 2.

¹⁹ *Id.* at 1.

²⁰ *See CGB Letter* at 1.

²¹ *See* 47 C.F.R. § 79.1(a)(2) (defining "video programming distributor").

III. Other Factors

KAC offers four different “alternatives” to captioning its programming, including the use of “Karaoke”-style text typed at the bottom of the screen, “using the lower-thirds by delineating the message that is conveyed through an episode,” including sign-language translation, or “us[ing] titles to display words and definitions of words that are used for the theme of some episodes.”²² While Consumer Groups acknowledge KAC’s efforts to investigate alternative solutions, none of them offer a reasonable substitute for closed captions – with the possible exception of text typed at the bottom of the screen. We are unclear, however, on how precisely KAC intends to “type the words for what is being said at the bottom of the screen” without effectively creating captions – which KAC alleges it cannot afford.²³ Without further explanation, the Commission cannot accept this practice as a tenable substitute for captioning.

IV. Conclusion

KAC has not sufficiently demonstrated that it diligently sought out the most reasonable price for captioning services or that it cannot afford to caption its programming. Accordingly, we respectfully urge the Commission to dismiss the petition and require KAC to bring *The Kiya Amajioyi Show* into compliance with the closed captioning rules. If the Commission nonetheless determines that KAC should be granted an exemption, Consumer Groups respectfully request that the exemption be limited to no more than one year and that KAC be required to include a comprehensive substitute for captioning during the period of the exemption.

²² KAC Supplement at 1.

²³ *Id.*

Respectfully submitted,



Blake E. Reid†

November 26, 2012

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† Counsel thanks Georgetown Law student Jessica Lee for her assistance in preparing these comments.

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

Claude L. Stout

Claude Stout
November 26, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on November 26, 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:

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Niko Perazich
November 26, 2012