

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Petition for Closed Captioning Exemption et al.

) CGB-CC-0369

) CG Docket No. 06-181

Ministry of Communications of the
Archdiocese of Miami (FL)

)

)

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APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

The Ministry of Communications of the Archdiocese of Miami ("ADOM" or "Petitioner"), pursuant to 47 CFR §§ 1.115 and 1.4(b)(5), submits this Application for Review of the Letter, dated February 4, 2014 ("2014 Letter"), whereby the FCC's Consumer and Governmental Affairs Bureau ("Bureau") purported to dismiss, as "incomplete," the ADOM's January 18, 2012 Petition (hereinafter "Petition"), which broadly requests relief – on multiple bases – from the FCC's closed captioning rules and policies for the ADOM's liturgical, historic Sunday Mass telecast in Spanish on WLTV-TV ("Sunday Mass"). The Petition bases the ADOM's entitlement to administrative relief on both constitutional and also statutory/regulatory bases.

Background

On November 12, 2013, almost two years after the ADOM Petition was filed, the Bureau mailed a letter to ADOM ("2013 Letter"), stating that in order to determine whether the subject Sunday Mass "should be exempted" from FCC closed captioning rules and policies, ADOM should submit "additional information" to establish that such an FCC mandate would be "economically burdensome." Notably, however, the Bureau's 2013 Letter (i) failed even to acknowledge the Petition's argument that the Sunday Mass telecast qualifies under the FCC's rules for a "categorical [automatic] exemption" and also (ii) failed to meaningfully discuss the Petition's core constitutional argument: namely, that an FCC requirement that the ADOM alter the visual format of the historic Sunday Mass—by imposing closed captioning on the telecast—would unconstitutionally violate ADOM's First Amendment rights (as well as the free-exercise rights of more than one million Catholics in the Miami-Ft. Lauderdale television market) concerning this sacred religious observance, a format prescribed by the Catholic Church for more than two millennia.¹ *Id.* at 1.

In response to the Bureau's 2013 Letter, the ADOM timely filed a "Response and Supplement to Petition" ("Response") on December 12, 2013. Although the Response noted that "any proper legal

¹ See Petition, *supra*, at 9-10 and Appendix A.

analysis” of the Petition should never need to reach the subsidiary evidentiary issues regarding the ADOM’s entitlement to either an exemption or a waiver pursuant to the FCC’s rules, the Response nonetheless presented supplemental evidence on *both* the threshold constitutional issue and, *inter alia*, additional evidence to support ADOM’s alternate contentions that FCC-mandated closed captioning of the liturgical Sunday Mass telecast, *inter alia*, would unquestionably result in such an “undue burden” as to force the ADOM’s cancellation of the Sunday Mass telecast, the *only* Sunday Mass telecast (in Spanish) throughout South Florida to millions of Catholics. *Id.* at 2 and Appendix A.

On February 4, 2014, the Bureau mailed to ADOM’s counsel a cursory Letter Decision (“2014 Letter”), dismissing the Petition as allegedly “incomplete” regarding solely the Petition’s alternate evidentiary issue of ADOM’s entitlement to an exemption under the FCC’s “undue burden” rules.

Questions for Review

1. Whether the Bureau’s cursory dismissal of the Petition, on procedural grounds and as to only one issue raised by the Petition, provided a reasoned and legally sustainable basis under relevant statutory precedent, for effectively ignoring ADOM’s *threshold* constitutional argument.
2. Whether the FCC has the authority, under the First Amendment, to mandate closed-captioning of the Sunday Mass telecast, where the record establishes that such an intrusive federal mandate--regarding the visual format of the subject religious observance--would violate the ADOM’s religious rights regarding its discretion to make such internal judgments, based on liturgical practices of the Catholic Church and the specific 2011 dictates of the U.S. Catholic Conference of Bishops.
3. Whether the Bureau’s summary dismissal of the Petition without any discussion of the Petition’s leading evidentiary claim--that the Sunday Mass telecast, alternatively, is entitled under FCC rules to a “categorical [automatic] exemption”--is arbitrary, capricious or otherwise unlawful.
4. Whether the Bureau provided a reasoned basis, under the evidence and applicable legal precedents, for its summary conclusion that the ADOM is not entitled, alternatively, to an “undue

burden” exemption from FCC-mandated closed captioning, where the evidence establishes that a closed-captioning mandate for the Sunday Mass telecast would result not merely in an “undue [financial] hardship” but also because of the ADOM’s proven financial difficulties would result in the ADOM’s forced cancellation of its Sunday Mass telecast.

5. Whether the Bureau’s failure even to address, much less to decide, the Petition’s alternative request for a “waiver,” under the FCC’s broad “public interest” criteria, constitutes reversible error.

Factors Warranting Commission Review

Under Section 1.115 of the FCC’s rules, the following factors warrant the agency’s review of the cursory “dismissal” of the ADOM’s 2012 Petition:

1. The Bureau’s action taken pursuant to delegated authority is unconstitutional.
2. The Bureau’s action taken pursuant to delegated authority involves questions of law that have not been previously resolved by the Commission.
3. The Bureau’s action taken pursuant to delegated authority is inconsistent with both the FCC’s rules and legal precedent, whereby questions of fact and law are deemed to be legally decided by the FCC only where the agency has considered and reasonably addressed all relevant factors.

ARGUMENT

I. THE BUREAU ERRED IN SUMMARILY REJECTING PETITIONER’S CONSTITUTIONAL ARGUMENT WITHOUT ANY REASONED ANALYSIS OR SUSTAINABLE LEGAL BASIS.

While the ADOM’s 2012 Petition cited several independent bases for administrative relief from any FCC-mandated closed captioning of the Sunday Mass telecast, Petitioner’s principal argument consistently has been that any FCC mandate (on any posited basis) requiring the alteration of the visual format of the Sunday Mass telecast--such as imposing closed captioning--would violate ADOM’s First Amendment rights, as well as the free exercise rights of the more than one million Catholics in

the Miami-Ft. Lauderdale television market. See Petition at 1-2, 9-10, and Appendix A. In neither its 2014 Letter nor its 2013 Letter did the Bureau engage in any reasoned analysis of Petitioner's constitutional argument.

The 2014 Letter dismissed the Petition on procedural grounds and was erroneously mute as to the constitutional issue. The prior 2013 Letter lacked any reasoned analysis of the constitutional issue, stating that the Petitioner's reliance on the Supreme Court's decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012) is "not pertinent" as to whether an FCC closed-captioning mandate would violate Petitioner's religious rights. See 2013 Letter, at 1. The Bureau's specific, curious holding was simply that a closed-captioning mandate for the Sunday Mass "does not interfere with any religious organization's selection of ministers." *Id.*

The Bureau's cursory analysis of the Petition's constitutional issue is not legally sustainable. As the Chief Justice made clear, the legal principle undergirding the Court's recent decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, *supra*, is that federal rules may not constitutionally interfere with a religious organization's discretion to make sensitive internal judgments. *Id.* The Petition explained in detail how any FCC mandate requiring a major alteration in the visual format of the Sunday Mass telecast would ipso facto constitute an unlawful intrusion into the internal decision-making and longstanding religious directives and practices of the Catholic Church regarding the Sunday Mass, a liturgical religious observance that has evolved through more than two millennia.²

Indeed, the ADOM's adduced evidence on this threshold issue established that the Sunday Mass long has been subject to the "strict requirements of the Catholic Church's core liturgical guidelines." *Id.* at Appendix A. The evidence further established that "closed captioning (or even 'signing') presents a huge, threshold problem," because Catholic traditions require that "the visual presentation of the Sunday Mass cannot be altered or distorted." *Id.* ADOM's evidence further established that a

² *Id.* Indeed, the Sunday Mass is, generically, one of the most historically sacred religious observances of Catholic liturgy. *Id.* at Appendix A.

“distortion” such as closed captioning is “strictly prohibited” by the 2011 guidelines of the U.S. Catholic Conference of Bishops,” which are confidential but which the ADOM offered to make available to the FCC, upon any request therefor. *Id.* Thus, the Petition detailed to a precise degree how any such FCC mandated closed captioning of this particularly sacred, religious observance unlawfully would substitute a federal judgment for the sensitive, internal judgment of the Catholic Church.³

Petitioner expanded its discussion of the constitutional issue in its December 12, 2013 Response, *supra*. An ADOM official expressly advised the FCC that, because the Church’s “internal, good-faith judgment is that the visual format of the Sunday Mass on WLTV-TV cannot be altered and distorted by closed captioning,” any such FCC mandate would leave the ADOM with “no choice but to cancel the Sunday Mass.” *Id.* at Appendix A. Thus, notwithstanding *supplemental* evidence as to the dire consequences that such an intrusive federal rule would have if applied to the Sunday Mass telecast, the Bureau’s 2014 Letter chose to ignore Petitioner’s threshold issue.⁴ Indeed, the Bureau’s 2014 Letter also ignored Petitioner’s citation to other cases where the Supreme Court held that certain federal rules could not be imposed on religious organizations⁵ and also where the Court emphasized that the First Amendment shields religious groups against certain governmental regulations.⁶

In sum, both the Bureau’s 2013 Letter and its 2014 Letter unlawfully failed both to consider all of the relevant evidence or to articulate a reasoned basis for essentially ignoring Petitioner’s threshold constitutional objection to any FCC-mandated alteration to the visual format of the Sunday Mass telecast.⁷ The Bureau’s failure to provide a reasonable basis for the FCC to substitute its judgment for the sensitive internal judgment of the Church is reversible error. *Cf. Hosanna-Tabor Evangelical*

³ The Petition also noted that federal Courts repeatedly have held that the rights of religious groups extend to “religiously motivated conduct,” such as the Sunday Mass. *See* Response, *supra*, at note 7. *Accord The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1488-89.

⁴ The 2014 Letter also ignored the Petition’s citations to former FCC Commissioner Mc Dowell’s stated “concern” in 2012 that a closed-captioning mandate might in some cases be “harmful.” *See* Response, *supra*, at note 5.

⁵ *See* Response, *supra*, at 4 and note 6..

⁶ *Id.*

⁷ *See, e.g., Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978) (FCC must clearly and fully articulate its basis for any decision and engage in reasoned decision-making).

Lutheran Church and School v. EEOC, *supra* (federal rules may not constitutionally interfere with a religious organization's discretion to make sensitive internal judgments). The Bureau erred in failing to provide a reasoned explanation of why the Supreme Court's protection of a Church's religious right to determine its own internal *employment* policies would not logically be extended to a Church's right solely to make sensitive internal judgments concerning the visual format of a historic religious observance. *Id.* The Bureau unlawfully ignored the core issue of federal intrusion into the Church's right to make its own *internal determinations* as to the appropriate visual format of this historic religious observance, whose visual format has evolved over the span of more than two millennia.⁸ The Petition established that federally-mandated closed captioning for the Sunday Mass telecast not only would be so visually disruptive as to violate longstanding and fundamental Catholic orthodoxy, format and procedures but also would violate specific guidelines of the U.S. Catholic Conference of Bishops, which prohibit any denigration of the solemnity of the liturgical Sunday Mass.⁹ *Cf. Lutheran Church-Missouri-Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (Court holds certain aspects of the Commission's EEO rules to be unconstitutional).

II. THE BUREAU'S DISMISSAL OF THE PETITION ON EVIDENTIARY GROUNDS IS ARBITRARY, CAPRICIOUS AND UNLAWFUL

The Bureau's 2014 Letter unlawfully concluded that the Petition should be dismissed on the basis that, even as supplemented by ADOM's 2013 Response, its evidence was "incomplete." The Bureau's conclusion was both factually and legally erroneous.

1. **The Bureau's failure to even acknowledge or discuss the Petition's primary evidentiary contention constitutes reversible error.**

The 2014 Letter's "dismissal" of the Petition is based solely on the Bureau's contention that the evidentiary record established by Petitioner failed to include four (4) Bureau-denominated evidentiary

⁸ See Appendix A to the Petition.

⁹ *Id.*

items: (a) documentation of the ADOM's "financial status," (b) information as to the "costs" of its closed captioning, (c) "verification" that assistance was sought from the telecast's "distributor" (WLTV-TV) and (d) "verification" that the ADOM sought "other sources of revenue for captioning." *Id.* at 1. It is noteworthy that the Bureau's four "evidentiary items" are not the evidentiary factors stated in the FCC's rules as governing the resolution of petitions for exemptions. *See* 47 CFR § 79.1(d) and (f). It should be controlling here that the Petition met the evidentiary factors stated in the FCC's rules.¹⁰

The 2014 Letter fixated erroneously on only its four "evidentiary items," which addressed only ADOM's right, under FCC rules, to an exemption based on evidence of "undue [financial] burden."¹¹ Thus, the Bureau's sole legal basis for dismissing the Petition was its contention that the Petition's evidence on the "undue burden" issue was "incomplete." The Bureau failed *even to discuss*, much less reasonably to articulate in a reasoned decision, Petitioner's claim of its prima facie entitlement to a "categorical exemption" pursuant to 47 CFR 79.1(d)(8), for which no evidence as to the Bureau's four "evidentiary items" was required to be adduced by Petitioner.¹²

Petitioner supported its claim for a "categorical exemption" with irrefutable evidence that the Sunday Mass telecast is a "locally produced," "non-news program," of local religious and social interest, which has no "repeat value."¹³ Neither the Bureau's 2013 Letter, requesting additional evidentiary information, nor its 2014 Letter (dismissing the Petition) even acknowledged, much less discussed, this independent evidentiary basis for Petitioner's [automatic] entitlement to an exemption from the FCC's closed-captioning rules. Indeed, the Bureau's refusal even to acknowledge the Petition's unrefuted evidence, establishing that the Sunday Mass telecast is entitled under the FCC's rules to a

¹⁰ *See* Petition at 4-9 and Appendix A.

¹¹ *See* 47 CFR § 79.1(f)(1).

¹² *See* Petition at 2-3 and Appendix A.

¹³ *Id.*

“*categorical exemption*,” is a stunningly egregious legal error. See Public Media Center v. FCC, *supra*. Indeed, the Bureau’s repeated and arguably cavalier refusal even to address all of the Petition’s independent bases for relief from the closed-captioning rules is an affront to the documented intent of Congress and the FCC that the closed-captioning rules avoid “harm” to program producers.¹⁴

2. **The Bureau’s dismissal of the Petition, on grounds that ADOM’s evidence of “undue [financial] burden” was “incomplete,” was arbitrary, capricious and unlawful.**

The 2014 Letter’s conclusion that Petitioner’s evidence on the alternative “undue [financial] burden” issue was “incomplete” is *factually* erroneous. The 2014 Letter’s derivative conclusion to dismiss the Petition on such procedural grounds is arbitrary, capricious and otherwise unlawful.

First, the 2014 Letter failed to meet even minimal standards of reasoned agency decision-making.¹⁵ Even assuming *arguendo* that ADOM’s evidence failed to meet the Bureau’s four “evidentiary items,”¹⁶ the 2014 Letter failed to articulate any reasoned basis *why* the ADOM’s substantial evidence failed to meet the *statutory requirement* to establish that closed captioning would produce an “undue [financial] burden.” Because the Bureau failed to reasonably articulate *why* Petitioner’s allegedly “incomplete” record, based only on these four “evidentiary items,” was adequate grounds for the summary dismissal of the Petition, the Bureau’s action constitutes reversible error.¹⁷

Moreover, the 2014’s Letter’s contention that ADOM’s twice-adduced evidence was “incomplete” with respect to the Bureau’s four “evidentiary items” is *factually* erroneous. For example, as to the first of these four items, the record contains substantial evidence of the ADOM’s “financial

¹⁴ See, e.g., Closed Captioning Report and Order, 13 FCC Rcd 3272, 3364-5 and ¶ 202 (1997).

¹⁵ See Public Media Center v. FCC, 587 F.2d 1322, 1331 (D.C. Cir. 1978)(FCC must fully articulate its basis for any decision and engage in reasoned decision-making).

¹⁶ But see Discussion, *infra*, as to why even this generous “assumption” is not correct.

¹⁷ See Public Media Center v. FCC, *supra*.

status.”¹⁸ With respect to the second item, the record contains substantial evidence as to the “costs associated with captioning” of the Sunday Mass.¹⁹ Likewise, with respect to the third item, the record contains substantial evidence verifying that the ADOM’s telecaster (WLTU-TV) was unable to provide any assistance to the ADOM with regard to closed captioning of the Sunday Mass.²⁰ Finally, the record contains substantial evidence verifying that the ADOM had unsuccessfully sought “other sources of revenue for captioning.”²¹ Thus, the record as a whole reveals that the ADOM adduced substantial evidence that, *inter alia*, met the Bureau-denominated four “evidentiary items.”

Furthermore, Petitioner’s evidence unambiguously established that if the FCC were to mandate closed captioning of the Sunday Mass telecast, then the ADOM would have no choice but to terminate the weekly telecast of this historic, liturgical religious observance.²² As an ADOM official stated, “[t]here should be no doubt in the FCC’s mind—if closed captioning is mandated for the Sunday Mass, it will force the Ministry to cancel the Sunday Mass on WLTU-TV.”²³ In such circumstances, there can be no debate that any FCC-imposed closed-captioning “burden” that would result in the shutdown of the very telecast that is the subject of the petition for exemption, then that “burden” legally should be judged to be, *inter alia*, an “undue” burden.²⁴ In sum, the Bureau’s dismissal of the Petition, on grounds that ADOM’s evidence of “undue burden” was “incomplete,” constitutes reversible error. See Public Media Center v. FCC, supra.

¹⁸ See the 2012 Petition and Appendix; see also the 2013 Response and Appendix].

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See 2012 Petition, at 6-7 and Appendix A.

²³ *Id.* at Appendix A.

²⁴ See 2012 Petition at 4.

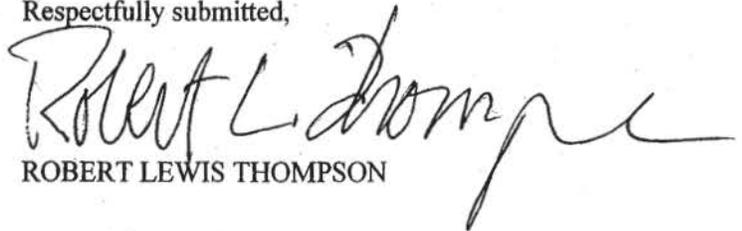
3. The Bureau failed to discuss Petitioner's alternative request for a Waiver

The 2014 Letter was also unlawfully mute regarding Petitioner's alternate evidentiary argument that, beyond the two regulatory "exemption" factors listed in Sections 79.1(d) (8) and (f) of the FCC rules, the ADOM is entitled to "waiver" of the closed captioning rules under the FCC's "good cause" standard²⁵ and also pursuant to 47 USC § 154(j), which requires the FCC to determine *in every proceeding* wherein the "public interest" lies. See Petition at 8-9. For example, the Petition noted that a forced shutdown of the Sunday Mass telecast, resulting from an FCC closed-captioning mandate, would violate other FCC rules and policies designed to promote 'locally produced programming.' *Id.* The Bureau's failure even to acknowledge and reasonably discuss this independent, alternative basis for relief is also reversible error. See Public Media Center v. FCC, *supra*.

CONCLUSION

In view of the foregoing, the Bureau's dismissal of the Petition should be reversed, set aside and the Commission promptly should grant appropriate administrative relief to Petitioner.

Respectfully submitted,



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²⁵ See generally WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir. 1969).