

*Before the*  
 FEDERAL COMMUNICATIONS COMMISSION  
 Washington, DC 20554

Accepted/Filed

MAR 26 2014

In the Matter of )  
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 Petition for Closed Captioning Exemption, et al. )  
 )  
 Ministry of Communications of the )  
 Archdiocese of Miami (FL) )

FCC Office of the Secretary

CGB-CC-0369  
 CG Docket No. 06-181

**OPPOSITION TO APPLICATION FOR REVIEW**

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), Cerebral Palsy and Deaf Organization (CPADO), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), National Association for the Deaf (NAD), Association of Late-Deafened Adults, Inc. (ALDA), and American Association of the Deaf-Blind (AADB), collectively, "Consumer Groups," pursuant to 47 C.F.R. §1.115, respectfully oppose the Application for Review filed by the Ministry of Communications of the Archdiocese of Miami ("ADM") of the Consumer and Government Affairs Bureau's ("CGB") dismissal of its petition for exemption from closed-captioning rules as incomplete.<sup>1</sup> The Commission should deny the application because the CGB acted reasonably in dismissing ADM's petition for incompleteness, thus rendering it unnecessary to reach ADM's meritless constitutional claims.

**Background**

ADM produces a weekly, thirty-minute, Spanish-language Sunday Mass program, aired on Univision's WLTV-TV in Miami.<sup>2</sup> The Church first filed a petition for

<sup>1</sup> Letter from Consumer and Governmental Affairs Bureau to Archdiocese of Miami, Case No. CGB-CC-0369, Dkt. 06-181 (Feb. 4, 2014) ("2014 Letter").

<sup>2</sup> Archdiocese of Miami's Renewed Petition to Request for Exemption from the FCC's Closed Captioning Rules, Case No. CGB-CC-0369, Dkt. 06-181, at 1, 5 (Jan. 18, 2012) ("2012 Petition").

exemption from the Commission's closed-captioning rules in 2005.<sup>3</sup> The CBG granted the petition under the 2006 *Anglers Order* and reversed it in 2011.<sup>4</sup> The CGB then notified ADM that if it still needed an exemption, it would need to refile its petition and include specific supporting documentation.<sup>5</sup>

ADM filed a revised petition in 2012.<sup>6</sup> This Petition sought confirmation that the program qualified for either a categorical exemption under 47 C.F.R. §79.1(d)(8) or an individual exemption under 47 C.F.R. §79.1(f)(1). ADM also argued that under *Hosanna-Tabor Evangelical Lutheran Church v. EEO*,<sup>7</sup> requiring the Mass to be closed-captioned would unconstitutionally restrict ADM's religious rights.

The CGB responded by letter in 2013, rejecting ADM's constitutional claim.<sup>8</sup> It stated that *Hosanna-Tabor* was not applicable because the Court held only that the "ministerial exception" allowed religious groups discretion to select ministers without government intervention, barring employment discrimination claims by former ministers. The CGB concluded that the exception was inapplicable, "because the captioning rules do not interfere with any religious organization's selection of ministers."<sup>9</sup>

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<sup>3</sup> See *Archdiocese of Miami's Request for Exemption from the FCC's Closed Captioning Rules*, Case No. CGB-CC-0369, Dkt. 06-181 (Dec. 29, 2005).

<sup>4</sup> *Anglers for Christ Ministries, Inc., New Beginnings Ministries, Video Programming Accessibility, Petitions for Exemption for Closed Captioning Requirements*, CBG-CC-0005 and CBG-CC-0007, Memorandum Opinion and Order, 21 FCC Rcd 10094 (Sept. 12, 2006); *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 Comm'n's Rules; Video Programming Accessibility*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, Dkt. Nos. 06-181 and 11-175, 26 FCC Rcd 14941, 14945 (Oct. 20, 2011).

<sup>5</sup> See *Letter from Consumer and Governmental Affairs Bureau to Archdiocese of Miami*, Case No. CGB-CC-0369, Dkt. 06-181 (Oct. 25, 2011) ("2011 Letter").

<sup>6</sup> See *2012 Petition*.

<sup>7</sup> 132 S.Ct. 694 (2012).

<sup>8</sup> *Letter from Consumer and Governmental Affairs Bureau to Archdiocese of Miami*, Case No. CGB-CC-0369, Dkt. 06-181 (Nov. 12, 2013) ("2013 Letter").

<sup>9</sup> *Id.* at 1.

The Letter then explained that the CGB could take no further action on the Petition because it lacked required information. It gave ADM 30 days to provide specific information about the nature and cost of closed captioning for the program and the financial resources of the organization and stated that if ADM failed to provide this information, the petition would be dismissed.<sup>10</sup>

ADM filed a response one month later, but provided no additional information about the cost of captioning or ADM's financial resources.<sup>11</sup> Instead, it argued that it was unnecessary to submit this information because the Commission should not reach that question "given the threshold constitutional issue here."<sup>12</sup> On February 4, 2014, the CGB dismissed ADM's petition as incomplete.<sup>13</sup> ADM filed its Application for Review on March 5, 2014.<sup>14</sup>

### Argument

The Commission should deny ADM's application for review. Had ADM provided the information CGB requested, it might have been able to show an undue economic burden.<sup>15</sup> Instead, it unreasonably insisted that its constitutional claims raised a "threshold" question. ADM's argument ignores the well-settled rule that administrative

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<sup>10</sup> *Id.* at 2-3, 5.

<sup>11</sup> *Archdiocese of Miami's Supplement to Request for Exemption from the FCC's Closed Captioning Rules*, Case No. CGB-CC-0369, Dkt. 06-181 (Dec. 12, 2013).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *See 2014 Letter.*

<sup>14</sup> *Application for Review by the Ministry of Commc'ns of the Archdiocese of Miami*, Case No. CGB-CC-0369, Dkt. 06-181, at 4 (Mar. 5, 2014) ("*Application for Review*").

Because, to our knowledge, ADM's petition was never put on public notice, Consumer Groups filed no opposition to the Petition. Consequently, even though ADM filed its application for review on March 5, 2014, Consumer Groups lacked knowledge of this fact until March 11, 2014, the date on which the document appeared in Docket 06-181 on the Commission's ECFS. Normally, oppositions are to be filed within 15 days after the application for review is filed. 47 C.F.R. §1.115(d). However, this timing assumes that application for review would have been served on the opposing parties. 47 C.F.R. §1.115(f). Since no service was required here, and Consumer Groups are filing within 15 days of the posting of the application for review, this Opposition should be deemed timely filed.

<sup>15</sup> 47 C.F.R. § 79.1(f).

agencies should refrain from deciding constitutional issues unnecessarily. Even if the Commission addresses ADM's constitutional claims, it should nonetheless reject them.

**A. The CGB properly dismissed ADM's petition after the Church failed to submit the necessary information as repeatedly requested by the Bureau.**

The CGB's dismissal of ADM's petition was appropriate because ADM repeatedly refused to supply the information the Bureau needed to make a reasoned exemption determination. The FCC held in the 2011 *Anglers Order* that to obtain a waiver under the "economically burdensome" standard, the petitioner must provide detailed documentation of its financial status, whether it has bargained for lower captioning costs, and proof that it explored alternative sources of funding.<sup>16</sup> The FCC also warned that failure to provide such evidence would result in dismissal.<sup>17</sup>

Here the CGB merely carried out the FCC's policy set forth in that Order. CGB's 2013 Letter provided a list of the documentation required to determine whether closed captioning would be economically burdensome, but ADM failed to provide that documentation. The CGB also put ADM on notice that such failure would result in dismissal. ADM's refusal made it impossible for the CGB to reach a decision. Thus, the CGB acted reasonably in dismissing ADM's petition as incomplete.

**B. The Bureau correctly rejected ADM's request for a categorical exemption.**

Contrary to ADM's claim that the CGB never acknowledged ADM's assertion that it qualified for a categorical exemption,<sup>18</sup> the Bureau specifically responded to this claim. In 2012, ADM sought confirmation that Sunday Mass qualified for a categorical

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<sup>16</sup> See *Anglers 2011*, 26 FCC Rcd at 14955-56; *Interpretation of Economically Burdensome Standard, Amendment of Section 79.1(f) of the Commission's Rules; Video Programming Accessibility*, CG Docket No. 11-175, 27 FCC Rcd 8831, 8834 (July 19, 2012).

<sup>17</sup> *Id.*

<sup>18</sup> *Application for Review* at 7 ("Neither the Bureau's 2013 Letter... nor its 2014 Letter even acknowledged, much less discussed, this independent evidentiary basis for the Petitioner's [automatic] entitlement to an exemption from the FCC's closed-captioning rules.").

exemption as a locally produced and distributed, non-news, non-repeating program.<sup>19</sup> The Bureau responded that the narrow exemption in Rule 79.1(d)(8) was only available for “[p]rogramming that is locally produced *by the video programming distributor*.”<sup>20</sup> FCC rules define a “video programming distributor” as any television station licensed by the FCC and any multi-channel video distributor.<sup>21</sup> CGB explained that because ADM produced a single program and did not operate a channel of programming, it did not fall within the definition of a video program distributor.<sup>22</sup> Thus, the Bureau reasonably rejected the claim that the Sunday Mass qualified for a categorical exemption.

**C. The CGB appropriately handled ADM’s constitutional claims.**

ADM contends that “its principle argument has been that any FCC mandate . . . requiring the alteration of the visual format of the Sunday Mass telecast—such as imposing closed captioning—would violate ADM’s First Amendment rights.”<sup>23</sup> It also asserts that “in neither its 2014 Letter nor its 2013 Letter did the Bureau engage in any reasoned analysis of Petitioner’s constitutional argument.”<sup>24</sup> In fact, the Bureau did not ignore those claims and its decision not to grant a waiver based on those claims was reasonable and consistent with FCC and court precedent.

**1. The CGB correctly declined to treat ADM’s constitutional claims as threshold questions.**

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<sup>19</sup> *2012 Petition* at 2-3.

<sup>20</sup> *2013 Letter* at 2 (emphasis added); *See also Letter from the Consumer and Governmental Affairs Bureau to Red Bradley*, CGB-CC-1239 at 1 (June 20, 2012) (discussing the Rule 79.1(d)(8) categorical exemption and confirming the definition of “video programming distributor”).

<sup>21</sup> *Id.* at 2, citing 47 C.F.R. §79.1 and 76.1000(e).

<sup>22</sup> CGB also noted that categorical exemptions are self-implementing. *2013 Letter* at 2; *See also Letter from the Consumer and Governmental Affairs Bureau to The Justice Foundation* CGB-CC-0572 at 1 (Sept. 26, 2012) (noting that a categorical exemption under Rule 79.1 is self-implementing).

<sup>23</sup> *Application for Review* at 3.

<sup>24</sup> *Id.* at 5.

While as discussed below, it is not true that the CGB ignored ADM's constitutional argument, the CGB appropriately declined to treat it as a threshold issue. It is well-settled that courts and administrative agencies alike refrain from deciding constitutional issues unnecessarily.<sup>25</sup> For example, in *Coalition for Preservation of Hispanic Broadcasting*, the D.C. Circuit declined to treat the constitutional question as a threshold issue, instead resolving the case on procedural grounds.<sup>26</sup> Moreover, whether an agency considers a constitutional issue is at the discretion of that agency,<sup>27</sup> and typically, the Commission has declined to exercise that discretion.<sup>28</sup> Here, the Bureau acted consistently with this precedent when it dismissed ADM's application as incomplete.

**2. Should the Commission address ADM's constitutional claim on the merits, they should be rejected.**

While there is no reason for the Commission to reach ADM's constitutional claims, if it chooses to address them, they can and should be rejected for several reasons.

**a. ADM's argument is premised on the factually incorrect assertion that closed captioning would visually alter the nature of the televised mass.**

ADM claims that "any FCC mandate . . . requiring the alteration of the visual format of the Sunday Mass telecast--such as imposing closed captioning--would violate [ADM]'s First Amendment right."<sup>29</sup> It further claims that "'closed captioning . . . presents a huge threshold problem,' because Catholic traditions require that the 'visual presentation of the Sunday Mass cannot be altered or distorted.'"<sup>30</sup>

<sup>25</sup> See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available."); *Coal. for Pres. of Hispanic Broad. v. FCC*, 931 F.2d 73, 76 (D.C. Cir. 1991); *Gutierrez v. INS*, 745 F.2d 548, 550 (9th Cir. 1984) ("This rule must bind not only the courts, but also the administrative agencies which they review. . .").

<sup>26</sup> 931 F.2d at 76 (finding that the petitioners had failed to exhaust administrative remedies).

<sup>27</sup> See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994).

<sup>28</sup> *Brunson Commc'ns, Inc. v. RCN Telecom Servs., Inc.*, 16 FCC Rcd 21499, 21507 (2001); *WXTC License P'ship, G.P.*, 15 FCC Rcd 3308, 3318-19 (2000).

<sup>29</sup> *Application for Review* at 3.

<sup>30</sup> *Id.* at 4.

Nothing in the FCC's captioning rules requires that the visual presentation of the Sunday Mass be altered. Rather, they merely require that the program have captions. Closed captions may be added live or in post-production. But in neither case do they require that the service be altered or distorted. Nor do they change the visual presentation of the Mass. In fact, the captions are only visible to a viewer who wants to see them.

Moreover, ADM's claim that Catholic doctrine prohibits closed captioning is at best overstated and unsupported. The U.S. Conference of Catholic Bishops does have guidelines for televising the liturgy. These guidelines suggest things like involving the bishop of the diocese in the broadcasts, broadcasting live if possible, and if pre-recorded, taping the service on a date as close as possible to the date of the broadcast. The guidelines do not say anything about closed captioning.<sup>31</sup>

In fact, U.S. Conference of Catholic Bishops' website provides advice about how to comply with the FCC's new rules for exemptions from closed-captioning rules.<sup>32</sup> This posting notes that there were 10 dioceses (including Miami) among the 303 entities that lost their exemptions, and describes what information a diocese should submit to the FCC if captioning would be economically burdensome. And even another diocese that sought an exemption supports the goal of captioning the mass.<sup>33</sup> Moreover, the Board of Directors of the National Catholic Office for Persons with Disabilities has formally

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<sup>31</sup> United States Conference of Catholic Bishops, Guidelines for Televising the Liturgy, <http://www.usccb.org/prayer-and-worship/liturgical-resources/media-and-the-mass/>. These guidelines recognize that televised Mass and other programs are useful in reaching individuals who are sick, homebound or otherwise unable to be a part of the Church community.

<sup>32</sup> United States Conference of Catholic Bishops, New Rules for Exemptions from Closed Captioning Rules, <http://www.usccb.org/about/communications/new-rules-for-exemptions-from-closed-captioning-rules.cfm>.

<sup>33</sup> See, e.g., *Letter from the Roman Catholic Diocese of Burlington to the Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-0038, Dkt. 06-181 (May 25, 2007) ("First of all, and once again, please let me make it painfully clear that we are not averse to captioning for the deaf for the TV Mass and other diocesan programs.").

endorsed “caption of films, videotapes and television programming.”<sup>34</sup> Thus, it appears that ADM’s petition incorrectly assumes that closed captioning requires alterations to the mass and/or that Catholic doctrine is opposed to closed captioning.

**b. The Bureau properly determined that requiring closed captioning does not interfere with the free exercise of religion.**

ADM’s reliance on *Hosanna-Tabor* is also misplaced.<sup>35</sup> It asserts that requiring closed captioning conflicts with its reading of *Hosanna-Tabor* that “federal rules may not constitutionally interfere with a religious organization’s discretion to make sensitive internal judgments.”<sup>36</sup>

The CGB correctly dismissed ADM’s constitutional claims.<sup>37</sup> In *Hosanna-Tabor*, the Equal Employment Opportunity Commission filed suit against the Hosanna-Tabor Church and School alleging that the Church had fired a teacher in retaliation for her threat to file a suit under the Americans with Disabilities Act.<sup>38</sup> The Court found that because the teacher was also a “minister,” this case fell within the longstanding “ministerial exception” to employment discrimination laws.<sup>39</sup> The Court emphasized that its holding was limited to the facts of this case, and “express[es] no view on whether the exception bars other types of suit.”<sup>40</sup>

The Court reaffirmed that the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the

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<sup>34</sup> National Catholic Partnership on Disability, NCPD Board: Statement on Captioning, <http://www.ncpd.org/views-news-policy/policy/church/ncpd/resolutions/captioning>. They note that “Captions can increase access to films and videotapes not only for deaf and hard of hearing individuals, but for those with language disabilities and for whom English is a second language.”

<sup>35</sup> *Application for Review* at 4.

<sup>36</sup> *Id.*

<sup>37</sup> *2013 Letter* at 1.

<sup>38</sup> *Hosanna-Tabor*, 132 S.Ct. at 699-701.

<sup>39</sup> *Id.* at 708. The Court explains that a church’s freedom to fire ministers as a narrow exception to this rule not merely because it concerns internal judgments, but because it affects “the faith and mission of the church itself.” *Id.* at 707.

<sup>40</sup> *Id.* at 710.

ground that the law [prescribes] conduct that his religion [proscribes].”<sup>41</sup> The FCC’s captioning rules are valid, neutral, and of general applicability. Thus, even if ADM believes that closed captioning is inconsistent with its religious doctrine, that does not relieve it of the obligation to comply with the FCC’s captioning rules.

**c. The Bureau correctly determined that ADM’s case presents no free speech issues.**

To the extent that ADM is arguing that requiring closed captions violates its First Amendment freedom of speech, the Bureau appropriately declined to revisit settled law. The November 2012 letter states that “the captioning requirement is consistent with the First Amendment because the rules are content-neutral and serve an important government interest without burdening substantially more speech than necessary.”<sup>42</sup>

The FCC and courts have consistently rejected claims that requiring captioning violates programmers’ First Amendment rights. For example, in *Gottfried*, the D.C. Circuit dismissed the broadcasters’ free speech argument as “without merit,” noting that “[a] captioning requirement would not significantly interfere with program content.”<sup>43</sup>

In *MPAA v. FCC*, the DC Circuit again considered whether requiring closed captions violated the First Amendment.<sup>44</sup> The court noted that closed captioning merely “displays the audio portion of television signals as words displayed on the screen and can be activated at a viewer’s discretion.” Because captions merely “present a verbatim

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<sup>41</sup> *Id.* at 706 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990)).

<sup>42</sup> November 2012 letter at 1 & n. 4, citing *Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15254-56 (2000).

<sup>43</sup> *Gottfried v. FCC*, 655 F.2d 297, 312, n.54 (D.C. Cir. 1981) This case involved a petition to deny the license renewals of television stations that had failed to caption their programming. See *License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles*, 69 FCC2d 451, 451-52 (1978), *reconsideration denied*, 72 F.C.C.2d 273 (1979), *aff’d in part and rev’d in part*, *Gottfried v. FCC*, 655 F.2d 297 (D.C. Cir. 1981), *reversed on other grounds*, *Cnty. Television v. Gottfried*, 459 U.S. 498 (1983). The court noted that the First Amendment might even “entitl[e] the hearing impaired to have access to some minimum of programming.” *Id.* (citations omitted).

<sup>44</sup> *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

translation of [a] program's spoken words" and video programmers need not "change program content" to provide captions, requiring closed captions raised no First Amendment concerns.<sup>45</sup>

Similarly, in its recent order implementing the Twenty-First Century Communications and Video Accessibility Act,<sup>46</sup> the FCC rejected arguments that closed captioning obligations on content owners would raise First Amendment concerns."<sup>47</sup> The FCC noted that "because closed captioning involves a 'precise repetition of the spoken words' communicated by the [video programmer], any First Amendment burden is only incidental."<sup>48</sup> Commissioner Clyburn added that the "true aim" of the FCC's rules was "equal access for all Americans to the video programming that forms the lifeblood of our civil discourse and the *marketplace of ideas embodied in the First Amendment*."<sup>49</sup>

Thus, the FCC has already found that its closed-captioning rules do not violate the First Amendment, and ADM provides no persuasive reasons for revisiting this question.

### **Conclusion**

Individuals who are deaf and hard of hearing in the Miami area should have the same ability to watch a Sunday Mass as anyone else. The FCC's rules properly provide an exemption to a program producer only where it can show that requiring captioning would be economically burdensome. ADM failed to make this showing, and the CGB properly dismissed ADM's petition as incomplete. Moreover, the CGB adequately addressed ADM's constitutional claims and argument regarding categorical exemptions. Thus, the Commission should deny the application for review.

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<sup>45</sup> *Id.* at 798, 805.

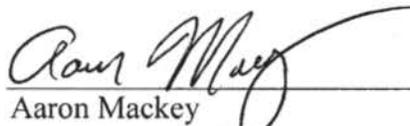
<sup>46</sup> Pub. L. No. 111-260, 124 Stat. 2751 § 202(b) (Oct. 8, 2010) (codified as amended at 47 U.S.C. 613(c) (2010)).

<sup>47</sup> *Closed Captioning of Internet Protocol-Delivered Video Programming*, Report and Order, 27 FCC Rcd 787, 803-04, ¶ 25 & n.117 (2012).

<sup>48</sup> *Id.* at 804, ¶ 25 & n.120 (quoting *MPAA*, 309 F.3d at 803; citing *Gottfried*, 655 F.2d at 311 & n.54).

<sup>49</sup> *Id.* at 897, Statement of Commissioner Mignon L. Clyburn.

Respectfully submitted



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## CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on March 26, 2014, pursuant to 47 C.F.R. §1.115(f), a copy of the forgoing Opposition to Application for Review of the Ministry of Communication of the Archdiocese of Miami (FL) was served by first class U.S. mail, postage prepaid, upon the petitioners at the address below.

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