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June 9, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554
Attn: CGB Room 3-B431

Re: Requests of United Communications Corporation for Exemption from New Captioning Requirements and/or Request for Waiver of Deadline for Television Stations WWNY-TV, Carthage, New York (Facility ID# 68851) and KEYC-TV, Mankato, Minnesota (Facility ID# 68853), CG Docket No. 05-231

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), by its counsel, Institute for Public Representation, along with National Association for the Deaf (NAD), American Association of the Deaf-Blind (AADB), Cerebral Palsy and Deaf Organization (CPADO), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Association of Late-Deafened Adults, Inc. (ALDA), Hearing Loss Association of America (HLAA), and Deaf Community Services of San Diego (DCSofSD), collectively "Consumer Groups," respectfully oppose the petitions filed by United Communications Corporation (UCC) to exempt, waive or extend the effective date for the Commission's recently revised closed captioning rules for Station WWNY-TV Carthage, New York (Facility ID# 68851) and Station KEYC-TV, Mankato, Minnesota (Facility ID# 68853).

UCC has failed to make any showing that could support an exemption, waiver or delay. Moreover, granting UCC's requests would deny deaf and hard-of-hearing residents served by those stations access to critical sources of local news, weather, and emergency information. Finally, if the Commission were to grant UCC's request, it could create loophole in closed captioning requirements that could undermine Congress' and the Commission's long-standing goal that all American have access to video services and programs.

I. Background

A. Captioning Requirements

Section 713 of the 1996 Telecommunications Act requires closed captioning of video programming to ensure access for persons with disabilities.¹ In 1997, the Commission adopted rules implementing Section 713, which took effect in 1998.² Under these rules, the Commission required all non-exempt, new English language programming to have closed captioning starting in 2006.

The rules set forth twelve categories of exemptions where the Commission found that compliance with mandatory captioning would be economically burdensome.³ In particular, the rules exempt small, cash-strapped broadcasters if captioning expenses exceed 2% of gross revenues or if the channel has gross revenues of less than \$3 million during the previous calendar year. Even if a television station does not fall within one of the categorical exceptions, it may petition the FCC for a waiver on the basis that the captioning obligations would be economically burdensome.⁴

The 1997 rules as adopted allowed television stations to use a form of closed captioning, known as Electronic Newsroom methodology (ENR), also known as Electronic Newsroom

¹ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

² *1997 Closed Captioning Report and Order*, 13 FCC Rcd 3272, 3311-12, ¶ 84 (Aug. 22, 1997) ("*1997 Captioning Order*").

³ 47 C.F.R. §79.1(d)(3)-(13).

⁴ 47 C.F.R. §79.1(d)(2).

Technique (ENT), for newscasts and other live programming. The Commission explained that “ENR is commonly used for live programming, especially newscasts, and creates captions from a news script computer or teleprompter. Only material that is scripted can be captioned using this technique and, thus, within a program live field reports, breaking news, sports and weather may remain uncaptioned.”⁵

NAD/CAN sought reconsideration of the 1997 decision. Recognizing the limitations of ENR, the Commission decided to limit the use of ENR to stations that were less able to afford real captioning, *i.e.*, stations not affiliated with the top four networks and/or stations in markets below the top 25.⁶ But at the same time, the Commission urged providers to use real-time captioning even when it was not required. It expected that “providers will voluntarily use real-time captioning and thus, a large proportion of the population should have complete captioning for news programming” by the end of the transition period, that is, 2006.⁷ In addition, the Commission put stations on notice that it would “continue to review the rules and expand the class of providers that cannot count ENR for compliance with the rules. We expect that the ability to use ENR will by far be the exception rather than the general rule, and that only those entities that are so small or who present unusual circumstances will be permitted to continue to use ENR because live closed captioning would be an economic burden.”⁸

In 2004, Consumer Groups filed a petition for rulemaking asking FCC to establish captioning quality standards and enforcement mechanisms.⁹ Among other things, the petition asked the Commission to extend the prohibition on counting ENT towards meeting compliance standards for stations below the top 25 markets because of the poor quality of ENT captioning

⁵ See *1997 Captioning Order*, 13 FCC Rcd at 3311-12, ¶ 84; see also 47 C.F.R. § 79.1(e)(3).

⁶ *Closed Captioning Reconsideration Order*, 13 FCC Rcd 19973, 19991, ¶¶ 35-36 (Sept. 17, 1998)

⁷ *Id.* at ¶ 40.

⁸ *Id.*

⁹ *TDI Petition for Rulemaking*, RM 11065 (filed July 23, 2004) (“TDI Petition”).

and the reduced costs of live captioning. In response, the FCC issued a NPRM in Docket 05-231, asking whether “captioning costs decreased such that little hardship would result if the Commission were to further limit the circumstances under which captions created using electronic newsroom technique would be allowed to count as captioned programming?”¹⁰

In 2010, the Commission asked commenters to refresh the record in Docket 05-231, and again specifically asked for comment on whether to revise the rule to disallow the use of ENT.¹¹ Consumer groups urged the Commission to phase “ENT out of all markets, especially and particularly for local news programming.”¹² Consumer Groups explained that a “critical deficiency in ENT captioning is that only material that is scripted ends up being captioned, resulting in no captioning of substantial portions of live programming. Spontaneous commentary, live field reports, breaking news and weather updates—including warnings involving flash flooding, tornadoes and other critical information—will ordinarily not be captioned when the ENT technique is used.”¹³ Consumer Groups also pointed out that the

Commission’s acceptance of ENT was based entirely on concerns over the cost of real-time captioning to VPDs, and the “top 25 markets” exception was a compromise. These costs concerns are outdated and no longer justify the use of ENT, if they ever did, as captioning costs have fallen dramatically since these rules were adopted. In fact, real-time captioning rates, adjusted for inflation, have declined between 70-85% over the 14 years since this rule was established.¹⁴

In February 2014, the Commission issued the *Captioning Quality Order* in Docket 05-231 amending the rules regarding the use of ENT.¹⁵ The Commission found that many stations in

¹⁰ 2005 NPRM, 20 FCC Rcd 13211, 13215-17, ¶¶ 8-12, 13219 ¶¶ 21-24, 13327, ¶¶ 49-51, Dkt. 05-231 (July 14, 2005).

¹¹ *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules*, Public Notice, Dkt. No. 05-231 (Oct. 25, 2010) (“2010 Public Notice”).

¹² Consumer Groups Comments in Response to Bureau Request to Refresh the Record at 8, Dkt. No. 05-231 (filed Nov. 24, 2010).

¹³ *Id.* at 8-9 (footnotes omitted).

¹⁴ *Id.* at 11 (footnotes omitted).

¹⁵ *Closed Captioning of Video Programming*, Report & Order, 29 FCC Rcd 2221, Dkt. 05-231 (Feb. 24, 2014) (“*Captioning Quality Order*”).

mid-size to smaller markets had failed to phase out ENT as expected, and as a result, a large number of Americans were denied full and equal access to news programming.¹⁶ While finding that the cost of real-time captioning had declined, the Commission acknowledged NAB's contention that some stations had "concerns about their ability to provide local news if they are denied the opportunity to provide captions through ENT."¹⁷ As a result, the Commission adopted a new compromise that allows stations to comply with the captioning requirements for local news by using real-time captioning **or** ENT that meets the NAB's ENT Best Practices ("enhanced ENT").

Relying on NAB's comments that improvements in ENT technology allowed "the majority of a local newscast's content to be captioned without significant additional cost, or ramp up time," the Commission made this section of the amended rule effective 90 days after the Order's publication in the Federal Register, which is June 30, 2014.¹⁸ The Commission stated that "[t]o the extent it is not technically feasible for a particular station to comply with our new requirements by this time, the station may request additional time by seeking a limited waiver of the effective date, supported by an appropriate good cause showing."¹⁹

B. UCC's Requests

On May 21, UCC asked the Commission to grant WWNY-TV a one-year waiver of the June 30, 2014 deadline for compliance with the new ENT rules.²⁰ UCC explains that WWNY-TV serves about 94,330 households in Watertown-Carthage, New York, which is currently ranked 176 out of 210 television markets.²¹ The station airs CBS network programming on its main

¹⁶ *Captioning Quality Order* at ¶ 75.

¹⁷ *Id.* at ¶ 77.

¹⁸ NAB Jan. 17, 2014 *Ex Parte* at 2, Dkt. 05-231; *Captioning Quality Order* at ¶ 80. The Order was published in the Federal Register on March 31, 2014, 79 Fed. Reg. 17911 (March 31, 2014), making the deadline for complying with the new ENT rules June 30, 2014.

¹⁹ *Captioning Quality Order* at ¶ 80 (emphasis added).

²⁰ *Request for Waiver of Deadline United Communications Corporation Television Station WWNY-TV Carthage, New York (Facility ID# 68851)*, CG Dkt. No. 05-231 (May 21, 2014) ("First WWNY-TV Request").

²¹ First WWNY-TV Request at 1.

digital stream and Fox programming on a secondary digital stream, as well as on a nearby Class A station.²² WWNY-TV is the only full power commercial television station in the region that regularly produces a local newscast; it produces more than 25 hours of local news programming per week.²³

UCC contends that the adding the cost of the upgrading its ENT captioning “in a short period of time to the costs already associated with this ambitious level of local production would impose a hardship on the station.”²⁴ It adds that the *Captioning Quality Order* was released after it completed its budgeting process for 2014, and thus, it has “no additional funds in the budget for enhanced closed captioning.”²⁵ The petition concludes that granting the request would serve the public interest by “preserving the current level of local programming in the Watertown DMA, while allowing a reasonable time for marshalling the resources needed to implement the enhanced ENT requirements.”²⁶

Nine days later, without any explanation, WWNY-TV submitted a second request to Commission.²⁷ This time, UCC asked for an exemption to the rules or, in the alternative, a *two-year* waiver of the enhanced ENT deadline. Apart from claiming that the “new requirements impose an undue burden on a very small market station like WWNY-TV,”²⁸ the arguments are essentially the same as in the first waiver request. UCC nowhere explains why nine days earlier it told the Commission that a one-year waiver would give the station sufficient time to comply with the rules, but now it needs twice that amount.

²² *Id.*

²³ *Id.* at 2, 3.

²⁴ *Id.*

²⁵ *Id.* at 3-4.

²⁶ *Id.* at 4.

²⁷ *Request for Exemption of New Captioning Requirements United Communications Corporation Television Station WWNY-TV Carthage, New York (Facility ID# 68851)*, CG Dkt. No. 05-231 (May 30, 2014) (“Second WWNY-TV Request”).

²⁸ Second WWNY-TV Request at 1.

The next day, May 31, 2014, UCC filed a similar exemption/waiver request for its television station KEYC-TV. According to UCC, KEYC-TV is the only full power station, and “the sole sources of local television news” in the Mankato, Minnesota, DMA.²⁹ Like WWNY-TV, KEYC-TV broadcasts CBS programming on its primary stream and Fox programming on a secondary digital stream.³⁰ UCC made essentially the same arguments that it did in the Second WWNY-TV Waiver Request, and sought the same relief.

II. The Commission should deny the exemption/waiver requests

At the outset, Consumer Groups note that it is unclear whether UCC is seeking exemptions/waivers under the economically burdensome standard set forth in 47 C.F.R. § 79.1(f) or the “good cause” waiver standard of 47 C.F.R. § 1.3, or both. But ultimately it does not matter because UCC has failed to meet either standard.

A. UCC has not provided the information necessary to make a determination of undue burden under Section 79.1

The Commission’s requirements for seeking an individual exemption of the closed captioning rules are clearly set forth in 47 C.F.R. § 79.1(f). A petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would be economically burdensome. In making this determination, the Commission considers four factors:³¹

1. the nature and cost of the closed captions for the programming;
2. the impact on the operation of the provider or program owner;
3. the financial resources of the provider or program owner; and
4. the type of operations of the provider or program owner.

²⁹ That DMA is ranked 199, and includes 58,320 households. *Request for Exemption of New Captioning Requirements United Communications Corporation Television Station KEYC-TV Mankato, Minnesota (Facility ID# 68853)*, CG Dkt. No. 05-231, at 3 (May 31, 2014) (“KEYC-TV Request”).

³⁰ *Id.*

³¹ 47 C.F.R. § 79.1(f).

UCC submitted none of the information required by the Commission.

First, instead of providing detailed information about the nature and cost of closed captioning, UCC provides only ballpark estimates. It claims that it would cost WWNY-TV about "\$150,000 per year for the personnel cost, plus \$20,000 annually to lease the needed equipment."³² For KEYC-TV, it estimates that it would cost \$150,000 to "implement the new rules."³³ However, UCC does not explain how it arrived at these figures or provide any support for them. Moreover, it makes no effort to compare the costs of providing real-time captioning versus enhanced ENT.

Not only are UCC's estimated costs unsupported, they are much higher than other estimates for providing enhanced ENT. According to NAB, the most commonly used ENT system costs between "\$1,200 and \$2,500 per month."³⁴ Using these figures, the annual cost would be between \$14,400 and \$30,000, far less than the totals cited by UCC. NAB notes that because stations already pay to use ENT, "improved captioning ability does not appear to come at additional cost."³⁵

Second, with regard to the impact on the operation of the provider — UCC baldly asserts it would have to cut back on local programming to comply with the *Caption Quality Order*.³⁶ However, again it fails to provide any evidence that would support this claim.

Third, contrary to the Commission's requirement that a party requesting a waiver disclose its financial resources, UCC provides no supporting materials to demonstrate that it cannot afford to provide real time captioning or enhanced ENT. WWNY-TV and KEYC-TV are the only full-power television stations in their respective markets, both have affiliations with two major networks, and both are the sole providers of local news and other local programming. UCC also

³² Second WWNY-TV Request at 5.

³³ See Second WWNY-TV Request at 5; KEYC-TV Request at 7.

³⁴ NAB January 17, 2014 *Ex Parte* at 2, Dkt. 05-231.

³⁵ *Id.*

³⁶ First WWNY-TV Request at 3-4; Second WWNY-TV Request at 6; KEYC-TV Request at 5-9.

owns a class A television station in Massachusetts and three translator television stations in St. James, Minnesota, which extends the reach of its programming. Given their dominant status in their communities, these stations could be very profitable despite their location in small markets.

Not only did UCC fail to disclose any information about its financial resources, little public information is available because UCC is a family-owned, privately-held corporation. Clearly, UCC's captioning expenses would not exceed 2% of gross revenues, nor did the stations have gross revenues of less than \$3 million during the previous calendar year, because in that case, they would qualify for one of the categorical exemptions. Moreover, UCC also owns newspapers in Kenosha, Wisconsin, Attleboro, Massachusetts, and Watertown, South Dakota.³⁷ Although UCC implies that its small local newspapers are not profitable by referring generally to the financial stresses on the newspaper business,³⁸ it provides no data to support its claim.

Further, UCC's own statements call into question its claims that it cannot afford captioning because of budget concerns. For example, UCC describes how it plans to launch a new morning newscast on KEYC-TV. It also states that it is upgrading both stations for high definition programming.³⁹ Because taking on these additional expenses is not mandated, it suggests that UCC, despite its unsupported assertions, has sufficient funds to comply with captioning requirements, or at least the flexibility to upgrade closed captioning to meet the rules before adding new programs or services. UCC has been on notice since the 2005 Notice of Proposed Rulemaking that the Commission was intending to phase out the use of ENT, and it should have budgeted accordingly.

Finally, the type of operations that UCC provides cuts against the grant of a waiver. The programming for which UCC seeks waivers is largely local news, local weather, and local sports. For example, it touts how local viewers relied on KEYC-TV for critical information with regard

³⁷ See First WWNY-TV Request at 4; Ownership Biennial Report (Form 323) of Tuchler Family Dynasty Trust (Dec. 20, 2013) Station Profile of WWNY-TV, *available at* <http://data.fcc.gov/mediabureau/v01/tv/application/1613728.html>.

³⁸ Second WWNY-TV Request at 6.

³⁹ KEYC-TV Request at 7; Second WWNY-TV Request at 5.

to tornados and severe thunderstorms on May 8, 2014.⁴⁰ UCC also describes how it plans to tape a debate on June 12, 2014 among candidates for 21st Congressional District of New York for broadcast later that day.⁴¹ These are the very types of programs that all Americans need to access to exercise their rights as citizens, to stay safe, and to be active participants in their communities.⁴² Thus, it is particularly important that deaf and hard of hearing persons are not excluded by granting UCC a waiver of the captioning rules.

In sum, the Commission should dismiss UCC's petitions because it failed to provide the information needed to make a determination. Indeed, the Commission recently dismissed dozens of other exemption petitions for failing to provide adequate support for their requests, many of which provided more information in their initial petitions than that provided by WWNY-TV.⁴³

B. UCC has failed to demonstrate “good cause” for a waiver

In the *Captioning Quality Order*, the Commission provided that “[t]o the extent it is not *technically feasible* for a particular station to comply with our new requirements by this time, the station may request additional time by seeking a limited waiver of the effective date, supported by an appropriate good cause showing.”⁴⁴ The Commission's waiver authority thus is limited to

⁴⁰ KEYC-TV Request at 3.

⁴¹ Second WWNY-TV Request at 3.

⁴² See *Captioning Quality Order* at ¶ 16, n. 47 (noting that erroneous or missing captions can endanger viewers when the topic concerns “weather disasters and safety threats”); see also *Closed Captioning and Video Description of Video Programming; Accessibility of Emergency Programming*, Second Report and Order, 15 FCC Rcd 6615, 6619, ¶ 9, Dkt. 95-176 (April 14, 2000) (“providing all viewers with accurate information regarding emergencies is of great importance”).

⁴³ See *Notice of Dismissals of Closed Captioning Exemption Petitions and Obligation to Begin Providing Closed Captioning*, Public Notice, Dkt. 06-181, DA 14-762 (June 2, 2014) available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0602/DA-14-762A1.pdf. For example, the Consumer and Governmental Affairs Bureau (CGB) dismissed Message for Today's exemption petition because, although the petitioner provided information on the nature of its programming and its captioning costs, it failed to detail its financial resources or whether it sought additional sponsorships. See Letter from CGB to Message for Today, Case No. CGB-CC-1176, Dkt. 06-181 (June 2, 2014) available at <http://apps.fcc.gov/ecfs/comment/view?id=6017695651>.

⁴⁴ *Captioning Quality Order* at ¶ 80 (emphasis added).

situations in which broadcasters lack the technical ability to meet the deadline for ENT best practices. On its face, UCC has failed to show that compliance is not technically feasible. All of its arguments concern economic feasibility, which is not relevant for purposes of this waiver.⁴⁵

Because the Commission rules and orders clearly spell out the criteria for waivers of the closed captioning rules, arguably, they provide the exclusive means by which the Commission may waive captioning requirements. But even if the Commission retains general authority to grant a “good cause” waiver, UCC has failed to show good cause.

In *WAIT Radio v. F.C.C.*, the court explained that

A general rule implies that a commission need not re-study the entire problem de novo and reconsider policy every time it receives an application for waiver of the rule. On the other hand, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the ‘public interest’ if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.⁴⁶

The court added that the waiver applicant “faces a high hurdle even at the starting gate. ‘When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action.’”⁴⁷ Moreover, the reasons for granting a waiver must be “stated with clarity and accompanied by supporting data.”⁴⁸

UCC fails to surmount this high threshold showing. As shown above, UCC failed to include any particular facts that would support a waiver or any supporting data.

In addition, UCC fails to show that waiving the revised closed caption rule would not undermine the purpose of that rule, which has been to serve the public interest, as required in

⁴⁵ This narrow nature of the waiver makes sense because the National Association of Broadcasters, which represents large-, mid-, and small-market broadcasters, explained how enhanced ENT could be implemented quickly “using existing ENT equipment without significant cost, or ramp-up time.” NAB January 17, 2014 *Ex Parte* at 2, Dkt. 05-231.

⁴⁶ *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (citation omitted).

⁴⁷ *Id.* at 1157 (citation omitted).

⁴⁸ *Id.* See also *Petition of Northern Telephone & Data Corp. For Waiver of Section 61.26(B)(1) of the Commission's Rules*, 25 FCC Rcd 274, 276 (WCB, 2010) (Waiver requests lacking “supporting documentation” fail to justify diversion from the Commission's rules and must be dismissed).

WAIT. In revising the closed captioning rules, the Commission sought to provide millions of individuals with access to news programming by requiring stations in mid- and small-markets using ENT to either provide full captioning or improve ENT captioning by scripting all in-studio programming and following other best practices.⁴⁹ Allowing these stations to air local news with incomplete and substandard ENT captions, which have been found inadequate, would not serve the purpose of the captioning rule.⁵⁰

To the extent that UCC is arguing that it deserves a waiver because the public interest overall is better served by allowing it to air local programming without captioning,⁵¹ it misunderstands the purpose of waivers. While airing political debates, as well as other local news, weather, and religious programming is part of a station's overall public interest obligation to serve its community of license under Section 309 of the Communications Act, providing programs without captioning clearly undermines the purpose of the *closed captioning rules*. Were the Commission to adopt the reading suggested by UCC, it would essentially open the flood gates for stations in all but the largest markets to seek similar waivers, and thus completely undermine access for the large number of Americans who are deaf or hard of hearing.

⁴⁹ *Closed Captioning Quality Order* at ¶ 81.

⁵⁰ To be sure, UCC alleges that "it would confer no benefit upon the hearing-impaired residents of the Station's service area if the costs associated with the requirement for use of enhanced ENT forced the Station to curtail valuable free local programming service that the Station has traditionally provided." Second WWNY-TV Request at 2. But this argument fails because UCC has provided no evidence to support the assertion that the cost of enhanced ENT would force it to curtail its other programming.

⁵¹ For example, in discussing its plan to air a candidate debate on WWNY-TV, UCC asserts that the "Commission should recognize that the production and broadcast of the debate already represents a financial sacrifice for the Station – which it is willing to shoulder the exercise of its public interest duties. That sacrifice should . . . not [be] burdened with full caption responsibilities." Second WWNY-TV Request at 3. Moreover, in suggesting that the captioning rule would require it to script the candidate debate because it is "news" and it will be taped in a studio, *id.*, indicates that UCC does not understand how the captioning rules work. The Commission should clarify that in such cases, the rules require either live captioning, or the insertion of captioning before airing.

Opposition to WWNY-TV and KEYC-TV's Exemption/Waiver Requests

June 9, 2014

Page 14 of 15

cc (via email):

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Susie Rose Singleton, Consumer and Governmental Affairs Bureau

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CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on June 9, 2014, pursuant to 47 C.F.R. §1.47(f), a copy of the forgoing Opposition to Requests for Exemption from New Captioning Requirements/Waiver of Enhanced ENT Deadline by United Communications Corporation Television Station WWNY-TV, Carthage, New York (Facility ID# 68851) and Television Station KEYC-TV, Mankato, Minnesota (Facility ID# 68853) was served by first class U.S. mail, postage prepaid, upon the party at the address below.

Barry D. Wood
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Counsel for United Communications Corporation

Niko Perazich
June 9, 2014