

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
Kellogg Street Productions) CGB-CC-0413
Petition for Exemption from the) CG Docket No. 06-181
Closed Captioning Requirements)

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 2015

Released: November 17, 2015

By the Deputy Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we address a petition filed by Kellogg Street Productions (Kellogg) for a temporary exemption from the Federal Communications Commission's (FCC's or Commission's) closed captioning requirements for its program, Mohawk Valley Living. Because we conclude that Kellogg has demonstrated that its compliance with the Commission's closed captioning requirements would be economically burdensome to it at this time, we grant a temporary exemption to this petitioner until December 31, 2015. Kellogg reports that it will either cease production of Mohawk Valley Living by the end of the year 2015 or will provide closed captions after that time; accordingly, we do not address the merits of continuing the exemption beyond that time.

II. BACKGROUND

2. In 1996, Congress added section 713 to the Communications Act of 1934, as amended (Communications Act), establishing requirements for closed captioning of video programming to ensure access to such programming by people who are deaf or hard of hearing and directing the Commission to prescribe rules to carry out this mandate. In 1997, the Commission adopted rules and implementation schedules for closed captioning, which became effective on January 1, 1998. The Commission's closed

1 Telecommunications Act of 1996, Pub. L. No. 104-104, § 305, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. § 613). As recognized by Congress, the goal in captioning video programming is "to ensure that all Americans ultimately have access to video services and programs, particularly as video programming becomes an increasingly important part of the home, school and workplace." H.R. Rep. 104-458 (Conf. Rep.) at 183-184, 104th Cong., 2d Sess. (1996). "Video programming" means "programming by, or generally considered comparable to programming provided by a television broadcast station." 47 U.S.C. § 613(h)(2).

2 47 U.S.C. §§ 613(b)-(c).

3 See 47 C.F.R. § 79.1; Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, Report and Order, 13 FCC Rcd 3272 (1997) (Closed Captioning Report and Order); Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, MM Docket No. 95-176, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (Closed Captioning Reconsideration Order).

captioning rules currently require video programming distributors, absent an exemption, to caption 100 percent of all new English and Spanish language programming.⁴

3. Section 713(d)(3) of the Communications Act authorizes the Commission to grant individual exemptions from the television closed captioning requirements upon a showing that the requirements would be economically burdensome, defined as imposing on the petitioner a “significant difficulty or expense.”⁵ Any entity in the programming distribution chain, including the owner, provider, or distributor of the programming, may petition the Commission for such an exemption under section 79.1(f) of the Commission’s rules.⁶ When making its determination as to whether a petitioner has made the required showing, the Commission, in accordance with section 713(e) of the Communications Act and section 79.1(f)(2) of the Commission’s rules, considers the following factors on a case-by-case basis: (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.⁷

4. The Commission has also determined that the following information and documentation must be submitted with closed captioning exemption petitions to enable its consideration of the above factors:

⁴ 47 C.F.R. §§ 79.1(b)(1)(iv), (b)(3)(iv). A “video programming distributor” is defined as (1) any television broadcast station licensed by the Commission; (2) any multichannel video programming distributor (MVPD) as defined in section 76.1000(e); and (3) any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. 47 C.F.R. § 79.1(a)(11). The Commission’s rules also require closed captioning of 75% of a programming distributor’s pre-rule, nonexempt English and Spanish language programming that is distributed and exhibited on each channel during each calendar quarter. 47 C.F.R. §§ 79.1(b)(2)(ii), (b)(4)(ii). “Pre-rule” programming refers to analog video programming first published or exhibited before January 1, 1998, or digital video programming first published or exhibited before July 1, 2002. 47 C.F.R. § 79.1(a)(6). Bilingual English-Spanish language programming is subject to the same closed captioning requirements for new and pre-rule programming. *See Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing, Inc., Petition for Rulemaking*, CG Docket No. 05-231, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 29 FCC Rcd 2221, 2288-89, ¶ 115 (2014).

⁵ *See* 47 U.S.C. §§ 613(d)(3),(e). *See also* 47 C.F.R. § 79.1(f)(2). As originally enacted in 1996, section 713 of the Communications Act authorized the Commission to grant individual closed captioning exemptions upon a showing that providing closed captioning would “result in an undue burden.” 1996 Act, § 305. Section 202(c) of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA) replaced the term “undue burden” with the term “economically burdensome.” Pub. L. No. 111-260, § 202(c), 124 Stat. 2771, amending 47 U.S.C. § 613(d)(3). For purposes of evaluating individual exemptions, the Commission has determined that Congress intended the term “economically burdensome” to be synonymous with the term “undue burden” as defined by section 713(e) of the Communications Act and section 79.1(f)(2) of the Commission’s rules. *See Interpretation of Economically Burdensome Standard, Amendment of Section 79.1(f) of the Commission’s Rules, Video Programming Accessibility*, CG Docket No. 11-175, Report and Order, 27 FCC Rcd 8831, 8834, ¶ 7 (2012) (*Economically Burdensome Standard Order*).

⁶ 47 C.F.R. § 79.1(f)(1). A “video programming provider” is defined as “[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming.” 47 C.F.R. § 79.1(a)(3). *See also* n.4, *supra* (for definition of “video programming distributor”). A petitioner may seek an exemption for “a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider.” 47 C.F.R. § 79.1(f)(1).

⁷ 47 U.S.C. § 613(e); 47 C.F.R. § 79.1(f)(2). A petitioner may also present for the Commission’s consideration “any other factors the petitioner deems relevant to the Commission’s final determination,” including alternatives that might constitute a reasonable substitute for closed captioning. 47 C.F.R. § 79.1(f)(3). The Commission has delegated the responsibility for evaluating and ruling on these petitions to the Consumer and Governmental Affairs Bureau. *Economically Burdensome Standard Order*, 27 FCC Rcd at 8834-35, ¶ 8.

- documentation of the petitioner's financial status, including detailed information regarding finances and assets;
- verification that the petitioner has obtained information about the costs it would incur to provide closed captioning of the programming;
- verification that the petitioner has sought closed captioning assistance from its video programming distributor(s), noting the extent to which such assistance has been provided or rejected;
- verification as to whether the petitioner has sought additional sponsorships (other than from its video programming distributor(s)) or other sources of revenue for captioning; and
- a showing that the petitioner does not have the means to provide captioning for the programming.⁸

5. Each petition must contain a detailed, full showing of any facts or considerations relied upon, supported by affidavit.⁹ Failure to support an exemption request with adequate explanation and evidence may result in the dismissal of the request.¹⁰ While a petition is pending, the programming subject to the request for exemption is considered exempt from the closed captioning requirements.¹¹

6. Kellogg initially submitted a petition for exemption on February 6, 2006.¹² In a Public Notice released on November 7, 2006, the Consumer and Governmental Bureau (Bureau) invited comment on the Petition.¹³ Certain consumer organizations jointly filed an opposition to the Petition.¹⁴ In 2012, the Bureau notified Kellogg of the need to file updated information with respect to its pending

⁸ *Anglers for Christ Ministries, Inc., et al.; Amendment of Section 79.1(f) of the Commission's Rules; Video Programming Accessibility*, CG Docket Nos. 06-181 and 11-175, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, 26 FCC Rcd 14941, 14955-56, ¶ 28 & nn. 100-04 (2011) (*Anglers Reversal MO&O*). The Bureau has provided additional guidance for petitioners regarding these requirements in the document "Required Information to Provide in Filing a New Petition to be Exempt from the Closed Captioning Requirements," which is provided by the staff to captioning exemption petitioners and is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-323421A1.pdf (*Bureau Information Guidance*).

⁹ 47 C.F.R. § 79.1(f)(9). A petition for exemption may also be supported by an unsworn written statement signed by a declarant under penalty of perjury. 47 C.F.R. § 1.16.

¹⁰ *Anglers Reversal MO&O*, 26 FCC Rcd at 14955-56, ¶ 28 (citing *The Wild Outdoors, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, CSR Docket No. 5444, Memorandum Opinion and Order, 16 FCC Rcd 13611, 13614, ¶ 12 (Cable Services Bureau, 2001) (*Wild Outdoors 2001*)).

¹¹ 47 U.S.C. § 613(d)(3); 47 C.F.R. § 79.1(f)(11).

¹² See Letter from Sharry Whitney, Kellogg Street Productions, to FCC (filed Feb. 6, 2006) (Petition).

¹³ *Consumer and Governmental Affairs Bureau Action; Request for Exemption from Commission's Closed Captioning Rules*, CG Docket 06-181, Public Notice, 21 FCC Rcd 13142 (CGB 2006). The comment period established by this Public Notice was extended by 120 days, to March 27, 2007, through a subsequent Public Notice. *Consumer and Governmental Affairs Bureau Action; Extension of Comment Period on Petitions for Exemption from Commission's Closed Captioning Rules*, CG Docket 06-181, Public Notice, 21 FCC Rcd 13487 (CGB 2006).

¹⁴ See RE: CGB-CC-0413 - Opposition to Petition for Exemption from Closed Captioning Requirements Filed by Kellogg Street Productions, filed by Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults (ALDA), American Association of People with Disabilities (AAPD) and California Association of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) (Mar. 2, 2007).

Petition.¹⁵ In response, Kellogg supplemented its Petition.¹⁶ On February 28, 2013, the Bureau invited comment on the Petition.¹⁷ Again, several consumer groups jointly opposed the Petition.¹⁸ By letter dated April 19, 2013, Kellogg responded to this opposition with supplemental information.¹⁹ Subsequently, the Bureau determined that it required additional and updated information to enable it to determine whether the programming that was the subject of the Petition should be exempt from the Commission's closed captioning obligations.²⁰ In response to Bureau letters dated September 27, 2013 and May 30, 2014, Kellogg supplemented its Petition.²¹ The Bureau again placed the Petition on Public Notice for comment on January 14, 2015.²² Several consumer groups jointly supported the Petition.²³

III. DISCUSSION

7. Kellogg produces *Mohawk Valley Living*, a one half-hour program that is broadcast weekly on Station WFXV-TV in Utica, New York (WFXV-TV).²⁴ Kellogg states that its program “explores the many small communities in the Utica area” with interviews with historians, business owners, artists, farms, and churches.²⁵ Kellogg contends that it is operated solely by Lance and Sharry Whitney, who have no employees and no other source of income than that which is produced by the

¹⁵ *Notice of Need to File Updated Information with Respect to Pending Petitions for Exemption from Commission's Closed Captioning Rules Which Were Filed Prior to October 2010*, CG 06-181, Public Notice, 27 FCC Rcd 3106 (CGB 2012). See also Letter from Kris Monteith, Acting Chief, CGB, to Kellogg Street Productions (Apr. 5, 2012).

¹⁶ See CGB-CC-0413 Supplement to Update Our Current Pending Application seeking a Waiver for Exemption from Closed Captioning Rules (filed July 2, 2012) (2012 Supplement).

¹⁷ *Request for Comment, Request for Exemption from Commission's Closed Captioning Rules*, CG Docket 06-181, Public Notice, 28 FCC Rcd 1962 (CGB 2013). A previous Public Notice listing this petition number was subsequently deleted through an erratum. See *Request for Comment, Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 27 FCC Rcd 13403 (CGB 2012); *Erratum, Request for Comment, Request for Exemption from the Commission's Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 27 FCC Rcd 14807 (CGB 2012).

¹⁸ See RE: Opposition to Petitions for Exemption from the Commission's Closed Captioning Rules, CG Docket No. 06-181, filed by TDI, NAD, DHHCAN, ALDA and Cerebral Palsy and Deaf Organization (CPADO) (Apr. 1, 2013).

¹⁹ Supplement II to Update Our Current Pending Application Seeking a Waiver for Exemption from Closed Captioning Rules (Apr. 19, 2013) (filed Apr. 23, 2013) (April 2013 Supplement).

²⁰ See Letter from Cheryl J. King, Attorney, Disability Rights Office (DRO), to Kellogg Street Productions (Sept. 27, 2013); Letter from E. Elaine Gardner, Attorney, DRO, to Kellogg Street Productions (May 30, 2014).

²¹ See CGB-CC-0413, Updated Application Seeking a Waiver for Exemption from Closed Captioning Rules (Oct. 24, 2013) (filed Oct. 28, 2013) (October 2013 Supplement); CGB-CC-0413, Supplement to Our Request for a Temporary Waiver for Closed Captioning Exemption (June 29, 2013) (filed June 30, 2014) (June 2014 Supplement); Quote from VITAC via Email 4/22/2013 (Sept. 18, 2014) (filed Sept. 22, 2014) (September 2014 Supplement); *Supplement to Our Request for a Temporary Waiver for Closed Captioning Exemption* (Oct. 15, 2014) (October 2014 Supplement); Supplement to Our Request for a Temporary Waiver for Closed Captioning Exemption (Nov. 24, 2014) (November 2014 Supplement).

²² *Request for Comment on Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 30 FCC Rcd 176 (CGB 2015).

²³ See Re: Comment on Petition for Exemption from the Commission's Closed Captioning Rules, CG Docket No. 06-181, Kellogg Street Productions, CGB-CC-0413, filed by TDI, NAD, CPADO, and Deaf Seniors of America (DSA) (collectively, Consumer Groups) (Feb. 13, 2015) (Consumer Groups Comments).

²⁴ Petition at 1, June 2014 Supplement at 2-3. Kellogg originally broadcast a half-hour program on WKTV, but rate increases forced it to move its program to a smaller station, WFXV-TV, where it broadcasts a half-hour of new programming and an “Encore” half-hour presentation of the previous week's show. October 2013 Supplement at 1.

²⁵ July 2012 Supplement at 1.

program.²⁶ It states that it is unable to afford the cost of closed captioning for the program.²⁷ Kellogg asks for a temporary exemption to the end of the year 2015, and that it intends to cease production of *Mohawk Valley Living* at the end of the year 2015, and in the case production continues, captioning will be ensured for all future programming starting in the year 2016.²⁸

8. Kellogg obtained two quotes to caption its program, one for \$150.00 per half-hour program from Caption Advantage and another for \$150.00 per half-hour program from VITAC.²⁹ Based on these quotes, Kellogg states that cost of captioning services for a full year of *Mohawk Valley Living* (65 programs) would be \$9,750.00 annually.³⁰

9. Kellogg submitted financial statements in the form of personal tax returns from 2012 and 2011 for Lance and Sharry L. Whitney, as Kellogg's sole proprietors.³¹ For 2012, Kellogg reports total income from Kellogg Street Productions of \$51,206.00, expenses of \$24,111.00, and a net profit of \$27,095.00.³² For 2011, Kellogg reports total income from Kellogg Street Productions of \$17,114.00, total expenses of \$16,529, and a net profit of \$585.00.³³

10. Kellogg also submitted balance sheets for 2012 and 2011. Kellogg reports current assets as of December 31, 2012 of \$1,549.66, and no current liabilities, resulting in net current assets of \$1,549.66.³⁴ Kellogg also reports current assets as of December 31, 2011 of \$263.87, and no current liabilities, resulting in net current assets of \$263.87.³⁵

11. Kellogg reports that it requested captioning assistance from both its former and its current video programming distributors, WKTV and WFXV, respectively; however, neither was able to offer captioning assistance.³⁶ Kellogg further indicates that it was unsuccessful in its efforts to secure captioning assistance from its sponsors.³⁷ Kellogg asserts that, absent an exemption from the captioning requirements, it "would be forced to stop the show immediately."³⁸ It states, moreover, that it intends to

²⁶ April 2013 Supplement at 1.

²⁷ *Id.*

²⁸ *Id.* and June 2014 Supplement at 1. Kellogg stated that after the 500th episode, it would sell the program, retire the program, or move the program to the Albany market. April 2013 Supplement at 1. However, Kellogg subsequently stated in a supplement that the program would end on episode 500. June 2014 Supplement at 1. In its most recent supplement, Kellogg states that it will either end the show at the end of 2015 or, if it continues the show, the programming will be closed captioned. November 2014 Supplement at 1.

²⁹ See June 2014 Supplement, at 2-3.

³⁰ *Id.*

³¹ See October 2013 Supplement at 1; 15-140.

³² *Id.* at 17. Kellogg's expenses are calculated by combining the total expenses (\$21,321.00) and expenses for business use of home (\$2,790.00). *Id.*

³³ *Id.* at 78. Kellogg's expenses are calculated by combining the total expenses (\$13,704.00) and expenses for business use of home (\$2,825.00). *Id.*

³⁴ November 2014 Supplement at 1. These current assets are calculated by adding the funds at end of year 2012 in Kellogg's business checking account (\$1,304.07) and personal checking account (\$245.59). *Id.*

³⁵ *Id.* These current assets are calculated by adding the funds at end of year 2011 in Kellogg's business checking account (\$247.32) and personal checking account (\$16.55). *Id.*

³⁶ July 2012 Supplement at 2 (WKTV) and October 2013 Supplement at 1 (WFXV-TV).

³⁷ October 2013 Supplement at 2; April 2013 Supplement at 2; July 2012 Supplement at 3.

³⁸ October 2013 Supplement at 3.

end the program at the end of 2015.³⁹ It therefore requests a temporary exemption until the program ceases operation.⁴⁰

12. Consumer Groups, which were the only parties to comment on the Petition in response to the *2015 Public Notice*, do not oppose Kellogg's request for a temporary waiver through the end of 2015.⁴¹ They conclude that Kellogg has demonstrated that captioning would be economically burdensome, due to the impact that the captioning cost of \$9,750.00 would have on Kellogg's 2012 profit of \$27,095.⁴² For this reason, and because Kellogg has stated that it plans to cease production in 2015, Consumer Groups do not oppose a temporary waiver through the end of 2015.⁴³ Consumer Groups note, however, that if Kellogg resumes production after 2015, it should budget captioning as a production cost, and comply with the Commission's captioning requirements.⁴⁴

13. *Determination.* After a careful review of the record, the Bureau finds that Kellogg has demonstrated that the provision of closed captioning for its program would be economically burdensome. According to the information and documentation it has provided, Kellogg operated with an excess of revenue over expenses (net profit) of \$27,095.00 for 2012 and \$585.00 for 2011.⁴⁵ When we compare the annual closed captioning estimate submitted by Kellogg of \$9,750.00⁴⁶ to Kellogg's net profits in 2011, the cost of captioning would have caused Kellogg to suffer a loss of \$9,165.00 in that year. While Kellogg showed a net profit of \$27,095.00 in 2012, the cost of captioning in that year would have been nearly 36% of Kellogg's revenue, a significant amount given that the profits from Kellogg Street Productions constitute the sole source of income for Kellogg.⁴⁷ In addition, Kellogg's sole proprietors show minimal net current assets of only \$1,549.66 in 2012 and of \$263.87 in 2011,⁴⁸ which provide further evidence that the provision of closed captioning would be economically burdensome.

14. Kellogg has indicated its commitment to caption should it continue productions beyond December 31, 2015, which further persuades us to support this grant of its request for a temporary exemption.⁴⁹ In light of Kellogg's reassurances, in the event that Kellogg continues to produce and air *Mohawk Valley Living* after December 31, 2015, we expect that it will contain closed captions.⁵⁰ In the event that Kellogg does continue to need an exemption after that date, it may submit a new petition with supporting documentation, on which we will conduct a new review to determine whether a determination of economic burden continues to be justified.⁵¹

IV. ORDERING CLAUSES

³⁹ See n. 28, *supra*. In its most recent supplement, Kellogg states that it will either end the show at the end of 2015 or, if it continues the show, it will begin close captioning. November 2014 Supplement at 1.

⁴⁰ November 2014 Supplement at 1. See also June 2014 Supplement at 1; October 2014 Supplement at 1.

⁴¹ Consumer Groups Comments at 1, 3.

⁴² *Id.* at 1-2.

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 3.

⁴⁵ See ¶ 9, *supra*.

⁴⁶ See ¶ 8, *supra*.

⁴⁷ July 2012 Supplement at 1; October 2013 Supplement at 1.

⁴⁸ See ¶ 10, *supra*.

⁴⁹ See n. 28 *supra*; November 2014 Supplement at 1.

⁵⁰ Consumer Groups Comments at 3.

⁵¹ In fact, Kellogg has indicated an intention to provide captioning should it decide to continue production after the year 2015. See n. 30, *supra*; November 2014 Supplement at 1.

15. Accordingly, pursuant to section 713 of the Communications Act of 1934, as amended, and sections 0.141(f) and 79.1(f) of the Commission's rules,⁵² IT IS ORDERED that the Petition filed by Kellogg Street Productions, requesting an exemption from the Commission's closed captioning rules, IS GRANTED through December 31, 2015.

16. IT IS FURTHER ORDERED that the programming that is the subject of its Petition must be captioned no later than January 1, 2016, if the programming continues to be aired subsequent to that date.

17. IT IS FURTHER ORDERED that, in the case that the programming is not discontinued after January 1, 2016, Kellogg must inform the Commission of the date on which the programming is closed captioned in accordance with this Order and the Commission's rules by e-mail to captioningexemption@fcc.gov.⁵³ The e-mail attachment must reference Case Identifier CGB-CC-0413 and will be posted on the docket to be publicly available.

FEDERAL COMMUNICATIONS COMMISSION

Karen Peltz Strauss
Deputy Chief
Consumer and Governmental Affairs Bureau

⁵² 47 U.S.C. § 613, 47 C.F.R. §§ 0.141(f), 79.1(f).

⁵³ See *Notice of New Electronic Filing Procedures for Television Closed Captioning Exemption Requests*, Public Notice, 29 FCC Rcd 3960 (CGB 2014).