

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

In the Matter of)	
)	
Roman Catholic Diocese of Gaylord)	CGB-CC-0270
)	
Petition for Exemption from the)	CG Docket No. 06-181
Closed Captioning Requirements)	

MEMORANDUM OPINION AND ORDER

Adopted: July 21, 2015

Released: July 21, 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 Petitioner Roman Catholic Diocese of Gaylord (Gaylord) for an exemption from the Federal Communications Commission's (FCC's or Commission's) closed captioning requirements for its program, *Sunday Mass*. Because we conclude that Gaylord has not demonstrated that its compliance with the Commission's closed captioning requirements would be economically burdensome to it, we deny the Petition. In light of our action, *Sunday Mass* must be captioned no later than October 19, 2015, which is 90 days from the date of the release of this Order.

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 hearing¹ and directing the Commission to prescribe rules to carry out this mandate.² In 1997, the Commission adopted rules and implementation schedules for closed captioning, which became effective on January 1, 1998.³ 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 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.

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:

- 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. Gaylord initially filed a petition for exemption on December 26, 2005.¹² The Consumer and Governmental Affairs Bureau (CGB or Bureau) granted the petition and issued an exemption to Gaylord by letter order dated September 11, 2006.¹³ On November 7, 2006, the Bureau issued a Public Notice holding in abeyance various letter orders granting exemptions, including Gaylord's, and invited public comment on certain exemption petitions, including Gaylord's.¹⁴ In 2011, the Commission reversed

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 Candace Neff, Director of Communications, Diocese of Gaylord, to Office of the Secretary, FCC (Dec. 26, 2005) (filed Jan. 3, 2006).

¹³ See Letter from Thomas E. Chandler, Disability Rights Office, CGB, to Diocese of Gaylord (Sept. 11, 2006).

¹⁴ *Consumer and Governmental Affairs Bureau Action Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 21 FCC Rcd 13142 (CGB 2006). Consumer Groups opposed the petition by letter dated March 2, 2007. See In Re: *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility* CGB-CC-0270 – Opposition to the Petition for Exemption from Closed Captioning Requirements Filed

certain grants of exemption, including the exemption granted to Gaylord.¹⁵ By letter dated October 25, 2011, the Bureau notified Gaylord of this reversal and explained that Gaylord would need to file a new exemption petition and supplement the record with up-to-date information, supported by affidavit, about its inability to provide closed captioning if it wished to receive a closed captioning exemption.¹⁶ Gaylord submitted a new petition on January 17, 2012 (hereinafter Petition).¹⁷ On February 10, 2012, the Bureau invited comment on the Petition.¹⁸ In response, various consumer organizations jointly filed an opposition to the Petition.¹⁹ On two subsequent occasions, in letters to Gaylord, the Bureau requested 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 these Bureau letters, dated September 27, 2013, and May 30, 2014, Gaylord further supplemented its Petition.²¹ The Bureau again placed the Petition on Public Notice for comment on November 19, 2014.²² Again, several consumer groups jointly opposed the Petition.²³

III. DISCUSSION

by Diocese of Gaylord, filed by Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association for the Deaf (NAD), Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), Hearing Loss Association of America (HLAA), Association of Late-Deafened Adults, Inc. (ALDA), American Association of People with Disabilities (AAPD), and California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) (Mar. 2, 2007). The petitioner filed a reply. *See* Response to Opposition to Petition for Exemption from Closed Captioning Requirements Filed By Diocese of Gaylord, CGB-CC-0270, CG Docket No. 06-181, filed by Robert T. Westerman II, PLC (May 7, 2007).

¹⁵ *Anglers Reversal MO&O*, 26 FCC Rcd at 14949, ¶ 25. The Commission reversed this and other Bureau letter orders because they had failed to analyze the individual circumstances of the petitioners under the “undue burden” criteria, as required under the Communications Act and the Commission’s rules. *Id.*, 26 FCC Rcd at 14949, ¶ 26. As explained earlier, the economically burdensome criteria now used by the Commission to evaluate closed captioning exemption requests are identical to the undue burden criteria. *See* n.5, *supra*.

¹⁶ *See* Letter from Joel Gurin, CGB, to Diocese of Gaylord (Oct. 25, 2011). *See also* 47 C.F.R. § 79.1(f)(11); *Anglers Reversal MO&O*, 26 FCC Rcd at 14949, ¶ 16, n.60.

¹⁷ *See Petition Requesting Exemption from Closed Captioning Requirements Filed by Diocese of Gaylord* and Letter from Robert T. Westerman II, PLC, to Office of the Secretary, FCC (Jan. 17, 2012) (filed Jan. 18, 2012) (Petition).

¹⁸ *Request for Comment, Request for Exemption from Commission’s Closed Captioning Rules*, CGB-CC-0270, CG Docket No. 06-181, Public Notice, 27 FCC Rcd 1457 (CGB 2012).

¹⁹ *See Re: Diocese of Gaylord, Michigan Request for Exemption from the Commission’s Closed Captioning Rules*, Case NO. CGB-CC-0270, CG Docket No. 06-181, filed by TDI, NAD, DHHCAN, ALDA, and Cerebral Palsy and Deaf Organization (CPADO) (Mar. 9, 2012).

²⁰ *See* Letter from Cheryl King, Disability Rights Office, CGB, to Diocese of Gaylord (Sept. 27, 2013); Letter from E. Elaine Gardner, Disability Rights Office, CGB, to Diocese of Gaylord (May 30, 2014).

²¹ *See Response to Federal Communications Commission Request for Supplemental Information Dated September 27, 2013* (Nov. 8, 2013) (filed Nov. 12, 2013) (November 2013 Petition Supplement) (Gaylord had requested, and was granted, a 90 day extension of time for filing its supplement. *Request for Extension of Time for Supplemental Information* (Oct. 24, 2013) (filed Oct. 29, 2013)); *Diocese of Gaylord Response to May 30, 2014 Supplemental Information Request from FCC* (Jun. 27, 2014) (filed Jul. 3, 2014) (June 2014 Petition Supplement).

²² *Request for Comment, Request for Exemption from Commission’s Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 29 FCC Rcd 13907 (2014).

²³ *See Re: Opposition to Petition for Exemption from the Commission’s Closed Captioning Rules*, CGB Dkt. No. 06-181, Diocese of Gaylord, CGB-CC-0270, filed by TDI, NAD, CCASDHH, CPADO, ALDA, and Deaf Seniors of America (collectively, Consumer Groups) (Dec. 19, 2014) (Consumer Groups Opposition).

7. Gaylord produces *Sunday Mass*, a one-hour “Eucharistic Liturgy (Mass)” that is broadcast weekly on Station WFQX-TV, Cadillac, MI (WFQX) on Sunday mornings.²⁴ Gaylord records its Saturday evening liturgy at 5:00 p.m., and then minimally edits this to turn it into a television program that it is one hour long.²⁵ It then sends the edited program to WFQX-TV by courier on Saturday evening to air on Sunday morning.²⁶ Gaylord indicates that its program is aimed at church members and others who are ill, homebound, hospitalized, imprisoned or who are otherwise separated from the church, including those who cannot get to church in the winter months, during which travel can be extremely hazardous.²⁷ Gaylord further contends that it is unable to budget the large expenditure required for live captioning, especially as it was without a Bishop for a period of time during the pendency of its Petition.²⁸

8. Gaylord obtained two quotes to caption its program using real-time captioning services.²⁹ One quote, dated October 21, 2013, states that caption costs would be \$125.00 per week (\$6,500.00 per year), plus a monthly encoder rental fee of \$400.00 per month (\$4,800.00 per year), for a total of \$11,300.00 per year.³⁰ The second quote, dated October 22, 2013, states that captioning costs would be \$500.00 per week (\$26,000.00 per year).³¹ Gaylord reports that the latter quote, however, would require Internet service at the Cathedral, which would cost an additional \$13,900.00, making the total cost for the second quote \$39,900.00 per year.³² Accordingly, based on the information provided by Gaylord, the total cost of captioning services for a full year of *Sunday Mass* would be either \$11,300.00 or \$39,900.00.

²⁴ Petition at 3; November 2013 Petition Supplement, Exhibit 1 at 2.

²⁵ Petition at 3.

²⁶ *Id.* at 3-4. Gaylord reports that the National Conference of Catholic Bishops’ Guidelines for Televising the Liturgy requires that, whenever possible, the liturgy should be telecast live, or taped on a date as close as possible to the dates of the actual telecast. November 2013 Petition Supplement I, Exhibit 1 at 2, and Exhibit 4.

²⁷ November 2013 Petition Supplement, Exhibit 1 at 1, 4.

²⁸ *Id.* at 3, 5-8. At the time that it filed its petition, Gaylord reported that it was without a Bishop, that additional new expenses such as captioning require a Bishop’s approval, and that it “likely will be several months” until a new Bishop would be appointed. *Id.* at 3. Since that submission, a new Bishop has been selected and ordained, on August 28, 2014. See <http://www.dioceseofgaylord.org/news/101/2057/> (last visited Mar. 23, 2015).

²⁹ Gaylord explains that the use of real-time captioning services is necessary because it needs to deliver its program to the station within hours of taping for broadcasting that conforms with the National Conference of Catholic Bishops’ Guidelines for Televising the Liturgy. See *id.* at 5. See also *id.* at Exhibit 4.

³⁰ November 2013 Petition Supplement, Exhibit 8 at 7. This quote requires that the station have caption encoder equipment, *id.*, which WFQX does not appear to have. *Id.* at 4, 7. The quote further notes that if the station does not have such equipment, Gaylord has the option to either rent or purchase encoder equipment. *Id.* at 7. The quote estimates that Gaylord can rent the equipment for approximately \$400.00 per month, \$4,800.00 annually. *Id.* The quote further estimates that the cost to purchase an encoder would be “\$3,000 for an SD encoder, more for HD.” *Id.* Gaylord provides no cost documentation for SD encoders, but provides the following cost documentation for two HD caption encoders: \$7,792.05 and \$7,029.95. *Id.* at 8-9. For purposes of this Order, we use the annualized cost to rent equipment, which is the option Gaylord appears to choose in its submissions. *Id.* at 7. Although Gaylord notes that other costs may be incurred for “phone service, personnel, etc.,” *id.* at 7, because details on these costs are not provided, we will not consider them in evaluating whether providing closed captioning would be economically burdensome for Gaylord.

³¹ *Id.* at 5-6. The second quote also included an estimate of \$750 per week, which would require a different turnaround time. *Id.* For purposes of our exemption determination, we have used the lower of this captioning service’s estimates.

³² Petition, Exhibit A at 5; *id.* at Exhibit 10. According to Gaylord, both of the options proposed by captioning services are “virtually impossible,” because, among other things, they would require Internet access at the Cathedral, which it does not have. *Id.* at 5.

9. Gaylord submitted financial statements for fiscal years ending June 30, 2012,³³ and June 30, 2011.³⁴ For fiscal year 2012, Gaylord reports total income of \$4,716,698.00, total expenses of \$4,908,611.00, and an excess of expenses over revenue (net loss) of \$191,913.00.³⁵ For fiscal year 2011, Gaylord reports total income of \$5,055,660.00, total expenses of \$4,257,916.00, and an excess of revenue over expenses (net profit) of \$797,744.00.³⁶

10. Gaylord also submitted balance sheets for fiscal years 2012 and 2011. For 2012, Gaylord reports current assets as of June 30, 2012 of \$9,517,622.00 and current liabilities of \$737,572.00, resulting in net current assets of \$8,780,050.00.³⁷ Gaylord also reports current assets as of June 30, 2011 of \$9,227,843.00 and total current liabilities of \$402,124.00, resulting in net current assets of \$8,825,719.00.³⁸

11. Gaylord reports that it requested captioning assistance from its video programming distributor, WFQX; however, WFQX was unable to offer captioning assistance.³⁹ Gaylord has also specifically sought captioning assistance from individuals and businesses through both its broadcast “sign off” at the conclusion of its weekly Mass, where it posts a written announcement seeking assistance for closed captioning, and through a banner on its diocesan website⁴⁰ Gaylord reports that neither of these efforts has resulted in assistance.⁴¹ Gaylord asserts that, absent an exemption from the captioning requirements, Gaylord would have to take funds from other ministries and delay the broadcast in order to caption.⁴² Gaylord asserts that it “greatly fear[s]” that “if forced to provide closed captioning . . . at this point in [its] history, it will not be possible, and [it] would have to take the Mass off the air. . . .”⁴³ It therefore requests a three-year exemption to “allow time for the appointment of a new Bishop, and to further explore, plan for and secure funding for equipment, infrastructure, and needed expertise” in order to implement a plan to caption its program.⁴⁴

12. Gaylord further claims that a requirement that it provide closed captioning on its broadcast would impinge on its free exercise of religion, because it would require it to delay Mass, “thereby neglecting the liturgical and doctrinal importance of timely liturgical prayers, gospels and

³³ See November 2013 Petition Supplement, Exhibit 10 at 1-2.

³⁴ See *id.* at 3-7.

³⁵ *Id.* at 2.

³⁶ *Id.*

³⁷ *Id.* at 6. Gaylord’s net current assets as of June 30, 2012 are computed as follows: \$9,517,622.00 (current assets as of June 30, 2012) minus \$737,572.00 (current liabilities as of June 30, 2012) = \$8,780,050.

³⁸ *Id.* at 5, 7. Gaylord’s net current assets as of June 30, 2011 are computed as follows: \$9,227,843.00 (current assets as of June 30, 2011) minus \$402,124.00 (current liabilities as of June 30, 2011) = \$8,825,719.00.

³⁹ November 2013 Petition Supplement, Exhibit 1 at 5, Exhibit 9.

⁴⁰ June 2014 Petition Supplement at 3-4.

⁴¹ *Id.*

⁴² *Id.* at 4. See also November 2013 Petition Supplement, Exhibit 1 at 7; Petition at 7-8.

⁴³ November 2013 Petition Supplement, Exhibit 1 at 4. See also Petition at 9.

⁴⁴ November 2013 Petition Supplement, Exhibit 1 at 8. See also ¶ 7, *supra*. Gaylord also points to the fact that its broadcast is “locally produced non-news programming with limited repeat value,” of a nature intended to be exempt under 47 C.F.R. 79.1(d)(8). November 2013 Petition Supplement at 3-7; see also Petition at 6-8. While Gaylord acknowledges that this exemption is limited to video programming distributors, it nevertheless urges that the *Sunday Mass* meets such criteria so this exemption should be granted. November 2013 Petition Supplement at 3-7.

readings,” force it to terminate the broadcast, or force it to take funds from other ministries, which “impedes [its] practice of [its] faith.”⁴⁵

13. Consumer Groups, which were the only parties to comment on the Petition in response to the 2014 *Public Notice*, contend that Gaylord has had a “‘*de facto*’ waiver from captioning its program for nine years,” because the Petition was first filed in 2005.⁴⁶ Consumer Groups argue that Gaylord failed to satisfy the statutory and regulatory requirements to demonstrate that captioning would be economically burdensome on several grounds.⁴⁷ First, Consumer Groups argue that Gaylord’s captioning costs could easily be covered by its financial assets.⁴⁸ They cite to the lowest provider quote, and note that this quote allows captioning to be provided for approximately \$11,300.00 annually, which cost could be reduced even further if an encoder were purchased rather than rented.⁴⁹ Consumer Groups compare this cost to Gaylord’s considerable assets in the years 2012, 2011 and 2010,⁵⁰ and conclude that such assets would be “sufficient . . . to cover its captioning costs.”⁵¹ Consumer Groups also point to Gaylord’s excess revenue over income in 2011 in the amount of \$794,744.00, which, even when combined with its loss in 2012, they claim is sufficient to provide for captioning with “ample resources left over.”⁵² Next, Consumer Groups argue that there would be no economic burden in requiring Gaylord to caption its programming, despite Gaylord’s claim that it has only a \$50,000.00 budget for its programming,⁵³ because Gaylord’s ability to provide closed captions on its program must be assessed with respect to “all of the petitioners’ available resources. . . , not just the resources allocated for the programs for which exemptions were sought.”⁵⁴

14. *Determination.* As an initial matter, the Bureau has considered, and rejects Gaylord’s First Amendment claims. Requiring video programming to be closed captioned does not violate the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act (RFRA).⁵⁵ Gaylord,

⁴⁵ Petition at 7; *see also* June 2014 Petition Supplement at 4.

⁴⁶ Consumer Groups Opposition at 2.

⁴⁷ *Id.* at 3-7.

⁴⁸ *Id.* at 5-6.

⁴⁹ *Id.* at 5-6, and n. 17.

⁵⁰ Consumer Groups incorrectly cite Gaylord’s assets as \$16,863,044.00 in 2012, \$17,054,957.00 in 2011 and \$16,257,213.00 in 2010. *Id.* at 5. These figures reflect Gaylord’s total assets, including land, buildings and equipment, and not Gaylord’s current assets. *See* November 2013 Supplement, Exhibit 10. In determining the petitioner’s available financial resources, we do not consider relevant such non-current assets. Gaylord’s net current assets for 2012 were \$8,780,050.00, and its net current assets for 2011 were \$8,825,719.00. *See* ¶ 10, *supra*.

⁵¹ Consumer Groups Opposition at 5-6.

⁵² *Id.*

⁵³ *See id.* at 6, citing November 2013 Petition Supplement, Exhibit 1 at 3-5, in which Gaylord asserts that “[o]ur annual total budget for production and television broadcast of the Mass is approximately \$50,000.” *Id.* at 3.

⁵⁴ *Id.* at 6, citing *Anglers Reversal MO&O* (“*Anglers 2011*”), 26 FCC Rcd at 14950, ¶ 17. Consumer Groups Opposition at 6. Consumer Groups also note that Gaylord is not, despite its arguments, entitled to a categorical exemption under Section 79.1(d)(8) of the Commission’s closed captioning rules, 47 C.F.R. § 79.1(d)(8), because it does not meet the definition of a video programming distributor. Consumer Groups Opposition at 6-7.

⁵⁵ To the extent that Gaylord is alleging that the closed captioning rules violate its free speech rights under the First Amendment, the D.C. Circuit has rejected the argument that captioning requirements regulate program content in violation of protected free speech rights, finding that closed captioning “would not significantly interfere with program content.” *Gottfried v. FCC*, 655 F.2d 297, 311 n. 54 (1981), *rev’d in part*, 459 U.S. 498 (1983) (Supreme Court did not disturb dictum of D.C. Circuit suggesting the constitutionality of closed captioning regulations). *See*

by availing itself of a means for dissemination of its programming governed by Commission regulation (specifically, “video programming”⁵⁶), has subjected itself to requirements that apply to all FCC-regulated “video programming providers” generally.⁵⁷ A generally applicable requirement such as the closed captioning requirements that has the incidental effect of impacting religious conduct is analyzed under the Free Exercise Clause of the First Amendment and the RFRA. As established in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, the Free Exercise Clause of the First Amendment “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.”⁵⁸ Post-*Smith*, Congress passed the RFRA, which applies heightened scrutiny to generally applicable laws.⁵⁹ A generally applicable requirement that complies with the RFRA necessarily complies with the less stringent Free Exercise standard set forth in *Smith*.⁶⁰ Under the RFRA, a claimant must demonstrate that its right to the free exercise of religion has been “substantially burden[ed].”⁶¹ We find no substantial burden here. Gaylord alleges that the costs of captioning may preclude broadcasting of its services or require reallocation of funds intended for other purposes.⁶² As discussed below, however, we find that Gaylord has failed to demonstrate that the cost of closed captioning is economically burdensome.

15. Gaylord also explains that the National Conference of Catholic Bishops’ Guidelines for Televising the Liturgy require that, whenever possible, the liturgy should be telecast live or taped on a date as close as possible to the dates of the actual telecast.⁶³ Gaylord claims that it may not be able to comply with this requirement if it has to lengthen the time between the service and the broadcast of the service in order to obtain affordable captioning.⁶⁴ However, Gaylord has provided information from captioning firms indicating that captions can be added to its one hour program without requiring Gaylord to lengthen the current gap between each liturgy and the broadcast of each of these services.⁶⁵ In any

also *MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002); *Closed Captioning of Internet Protocol-Delivered Video Programming*, Report and Order, 27 FCC Rcd 787, 803-04, ¶ 25 & n.117 (2012); *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230, 15255, ¶ 63 (2000).

⁵⁶ 47 C.F.R. § 79.1(a)(1).

⁵⁷ 47 C.F.R. § 79.1(a)(3). *Cf. King’s Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974) (“[T]he Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.”), *cert. denied*, 419 U.S. 996 (1974).

⁵⁸ *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990).

⁵⁹ 42 U.S.C. § 2000bb-1 (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except [if the burden] . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

⁶⁰ *Cf. Priests for Life v. U.S. Dept. of Health and Human Servs.*, 772 F.3d 229, 267 (D.C. Cir. 2014).

⁶¹ *Priests for Life*, 772 F.3d at 246 (“[a] substantial burden exists when government action puts ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs.’”) (*quoting Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (*quoting Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981))); *id.* (“A burden does not rise to the level of being substantial when it places ‘[a]n inconsequential or *de minimis* burden’ on an adherent’s religious exercise.”) (*quoting Kaemmerling*, 553 F.3d at 678 (*citing Levitan v. Ashcroft*, 281 F.3d 1313, 1320–21 (D.C. Cir. 2002))).

⁶² Petition at 7.

⁶³ November 2013 Petition Supplement I, Exhibit 4.

⁶⁴ *See*, e.g. January 2012 Petition Supplement, at 8-9, November 2013 Petition Supplement I, Exhibit 1 at 2, and Exhibit 4.

⁶⁵ *See* ¶ 8, *supra*.

event, Gaylord has various means to disseminate its services, including through means that are not subject to closed captioning requirements.⁶⁶

16. Moreover, Gaylord's reliance on *Hosanna-Tabor* is misplaced.⁶⁷ *Hosanna-Tabor* addressed only the ministerial exception to employment discrimination laws.⁶⁸ *Hosanna-Tabor* does not apply here because the captioning rules do not interfere with religious organizations' selection of ministers. Similarly, the other cases cited by Gaylord were relied on in *Hosanna-Tabor* and relate to state involvement in disputes regarding internal church governance.⁶⁹ Those cases do not apply here because the captioning rules do not interfere with matters of internal church governance.

17. As we have stated previously,⁷⁰ the captioning requirement is consistent with the free speech clause of the First Amendment because the rules are content-neutral and serve an important government interest without burdening substantially more speech than necessary. In order to minimize the potential impact of the captioning requirements on speech, the rules permit an entity to petition the Commission for an exemption pursuant to Section 79.1(f) of the Rules if providing captioning would be economically burdensome. The issue before the Bureau is therefore whether Gaylord has made the showing required to warrant such an exemption.⁷¹

⁶⁶ See, e.g., *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (fact that shopkeepers could engage in other commercial activities was one factor in finding no substantial burden from law requiring shopkeepers who observed Saturday as the Sabbath to close on Sundays); *Henderson v. Kennedy*, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (regulation banning t-shirts sales on National Mall did not amount to substantial burden because individuals had many means to spread the gospel, including selling t-shirts on streets surrounding National Mall), *cert. denied sub nom. Henderson v. Mainella*, 535 U.S. 986 (2002); *United States v. Any and All Radio Station Equip.*, 93 F.Supp.2d 414, 419 (S.D.N.Y. 2000) (fact that there were alternative means to disseminate church's message was one factor in finding no substantial burden from requiring church to obtain an FCC license to use broadcast spectrum).

⁶⁷ Petition at 7-8 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (*Hosanna-Tabor*)); see ¶ 11, *supra*.

⁶⁸ See *Hosanna-Tabor*, 132 S. Ct. at 705-07.

⁶⁹ *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696 (1976) (holding that State Supreme Court's inquiry into whether the Church had followed its own procedures in removing bishop amounted to an "unconstitutional[] undertak[ing of] the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of the Church); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952) (holding that state law requiring Russian Orthodox churches to recognize the determination of the governing body of the North American churches as authoritative, rather than the Supreme Church Authority in Moscow, was unconstitutional; explaining that the controversy at issue over the right to use a cathedral was "strictly a matter of ecclesiastical government"). Petitioner also cites an Establishment Clause case which is not applicable to its Free Exercise claim. See Petition at 7 (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Amos*, 483 U.S. 327 (1987)).

⁷⁰ *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230, 15254-15256, ¶¶ 60-65 (2000).

⁷¹ Gaylord also asserts that *Sunday Mass* qualifies for the exemption established under section 79.1(d)(8) of the Commission's rules for locally produced and distributed non-news programming with no repeat value. See n.44, *supra*. We agree with Consumer Groups that Gaylord's programming does not qualify for a self-implementing exemption under section 79.1(d)(8) of the Commission's rules, 47 C.F.R. § 79.1(d)(8). See n.54, *supra*. This rule categorically exempts from the closed captioning requirements "[p]rogramming that is locally produced by the *video programming distributor*, has no repeat value, is of local public interest, is not news programming, and for which the electronic newsroom technique of captioning is unavailable." 47 C.F.R. § 79.1(d)(8). In this context, the Commission defines "video programming distributor" as "any television broadcast station licensed by the Commission and any multichannel video programming distributor, and "any other distributor of video programming

18. After a careful review of the record, the Bureau further finds that Gaylord has not demonstrated that the provision of closed captioning for *Sunday Mass* would be economically burdensome. As noted by the Consumer Groups, economic burden is not determined by comparing the cost of closed captioning to the program's production costs.⁷² Instead, the Commission has previously determined that, when conducting an economically burdensome analysis, "all of the petitioners' available resources" must be taken into consideration.⁷³ The Commission has rejected suggestions "to consider only the resources available for a specific program" in making the determination of whether provision of closed captioning is economically burdensome.⁷⁴ Accordingly, consistent with prior Commission orders, we have considered the overall financial resources available to Gaylord in making our determination as to whether it would be economically burdensome for Gaylord to comply with the Commission's closed captioning requirements.

19. According to the information and documentation it has provided, Gaylord operated with a net profit of \$797,744.00 in fiscal year 2011, but a net loss of \$191,913.00 in fiscal year 2012.⁷⁵ Notwithstanding this end of year net loss in 2012, in both 2011 and 2012, Gaylord had considerable net current assets. Specifically, as of June 30, 2011, Gaylord reports that it had net current assets of \$8,825,719.00 and as of June 30, 2012, these assets were \$8,780,500.00.⁷⁶ When we compare the lower of the annual closed captioning estimates submitted by Gaylord of \$11,300.00,⁷⁷ to Gaylord's net current assets in either of these years, we conclude that such assets were sufficient to cover the cost of captioning *Sunday Mass*. Specifically, Gaylord could have provided closed captioning and still have operated with net current assets nearing nine million dollars in either of these years. Based on this review and analysis of the information provided, we conclude that closed captioning would not be economically burdensome for Gaylord.

IV. ORDERING CLAUSES

20. 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,⁷⁸ IT IS ORDERED that the Petition filed by Gaylord, requesting an exemption from the Commission's closed captioning rules, IS DENIED.

21. IT IS FURTHER ORDERED that the programming that is the subject of its Petition must be captioned no later than October 19, 2015, which is 90 days from the release of this Order.

22. IT IS FURTHER ORDERED that Gaylord must inform the Commission of the date on which the program is closed captioned in accordance with this Order and the Commission's rules by e-mail to captioningexemption@fcc.gov, which the Commission will make available for public

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)(2). As such, based on Gaylord's submissions, we conclude that *Sunday Mass* is not exempt under this rule because Gaylord is not a "video programming distributor" as so defined.

⁷² See ¶ 13, *supra*.

⁷³ *Anglers Reversal MO&O*, 26 FCC Rcd at 14950, ¶ 17 (explaining that consideration of a petitioner's request for exemption must take into account "the overall financial resources of the provider or program owner").

⁷⁴ *Id.*

⁷⁵ November 2013 Petition Supplement, Exhibit 10 at 2. See ¶ 9, *supra*.

⁷⁶ See ¶ 10, *supra*.

⁷⁷ See ¶ 8, *supra*.

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

inspection.⁷⁹ The e-mail attachment must reference Case Identifier CGB-CC-0270 and will be posted on the docket in order to be publicly available.

FEDERAL COMMUNICATIONS COMMISSION

Karen Peltz Strauss
Deputy Chief
Consumer and Governmental Affairs Bureau

⁷⁹ See *Notice of New Electronic Filing Procedures for Television Closed Captioning Exemption Requests*, Public Notice, 29 FCC Rcd 3960 (CGB 2014).