

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

In the Matter of
San Fernando Cathedral of San Antonio, TX
Application for Review
CGB-CC-0949
CG Docket No. 06-181

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 2016

Released: February 2, 2016

By the Commission: Commissioner Pai issuing a separate statement.

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we address the Application for Review (Application) filed by the San Fernando Cathedral of San Antonio, Texas (SFC), regarding the Consumer and Governmental Affairs Bureau’s (Bureau) dismissal of its petition for an exemption from, or a waiver of, the Federal Communications Commission’s (FCC or Commission) closed captioning requirements for its program, La Santa Misa. For the reasons explained below, we deny the Application in all respects except one.1 Although we agree with SFC that the Bureau failed to address its waiver request, we deny the waiver request below. In light of our action, closed captioning must be provided for this program no later than May 2, 2016, which is 90 days from the date of the release of this Order.

II. BACKGROUND

2. General. Pursuant to section 713 of the Communications Act of 1934, as amended (the Act), the Commission has established requirements for closed captioning of video programming to ensure access to such programming by people who are deaf or hard of hearing.2 The Commission’s closed captioning rules currently require video programming distributors, absent an exemption, to caption 100 percent of all new English and Spanish language programming.3

3. Individual Exemptions. Section 713(d)(3) of the 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.”4 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

1 See 47 CFR § 1.115(g).

2 47 U.S.C. § 613. “Video programming” means “programming by, or generally considered comparable to programming provided by a television broadcast station.” 47 U.S.C. § 613(h)(2). See 47 CFR § 79.1.

3 47 CFR § 79.1(b)(1)(iv), (b)(3)(iv).

4 47 U.S.C. § 613(d)(3), (e). See also 47 CFR § 79.1(f)(2).

79.1(f) of the Commission's rules.⁵ While a petition is pending, the programming subject to the request for exemption is considered exempt from the closed captioning requirements.⁶

4. *Categorical Exemptions.* In addition to providing for individual exemptions, section 713(d)(1) of the Communications Act allows the Commission to establish categorical exemptions from the television closed captioning requirements for categories of programming for which the Commission has determined that the provision of captions would be economically burdensome.⁷

5. *Procedural history.* On December 23, 2009, SFC filed a petition for an individual closed captioning exemption for *La Santa Misa*, a SFC-produced Sunday Mass program that is broadcast weekly on Sunday mornings on satellite and "various TV Networks, Cable services, and independent stations."⁸ In 2012, after the Commission issued the *Anglers Reversal MO&O*,⁹ the Bureau notified SFC and other petitioners of the need to file updated information with respect to their pending petitions to meet the requirements of that decision and the Commission's captioning rules.¹⁰ On July 5, 2012, SFC supplemented its petition.¹¹ On November 5, 2013, the Bureau determined that it required additional and updated information to enable it to determine whether the programming described in the petition should be exempt from the Commission's closed captioning obligations.¹² SFC again supplemented its Petition on December 4, 2013.¹³ On February 11, 2014, the Bureau determined that the Petition remained incomplete, and dismissed the Petition without prejudice.¹⁴ On March 13, 2014, SFC filed an application for review to reverse the dismissal of its Petition and to request administrative relief.¹⁵

⁵ 47 CFR § 79.1(f)(1). 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." *Id.*

⁶ 47 U.S.C. § 613(d)(3); 47 CFR § 79.1(f)(11).

⁷ 47 U.S.C. § 613(d)(1).

⁸ Petition for Exemption and/or Waiver of San Fernando Cathedral of San Antonio, Texas, at 2 (filed Dec. 24, 2009) (Petition).

⁹ *Anglers for Christ Ministries, Inc., et al.*, Memorandum Opinion and Order, 26 FCC Rcd 14941 (2011) (*Anglers Reversal MO&O*).

¹⁰ *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*, Public Notice, 27 FCC Rcd 3106 (CGB 2012) (alerting petitioners of the need to affirm that information previously provided is still accurate and up-to-date; to update that information; or to withdraw their petitions) (*2012 Public Notice*). See also Letter from Kris Anne Monteith, Acting Chief, CGB, to Robert Lewis Thompson, Smithwick & Belendiuk, P.C., Counsel for SFC, CGB-CC-0949 (Apr. 5, 2012) (*2012 Bureau Letter*).

¹¹ SFC, Supplement to Petition for Exemption and/or Waiver, CGB-CC-0949 (filed Jul. 5, 2012) (Petition 2012 Supplement). The Petition 2012 Supplement largely reiterated the information presented in the Petition and added a claim that requiring SFC to caption its program would violate its rights to free exercise of religion under the First Amendment.

¹² Letter from Suzy Rosen Singleton, Disability Rights Office, CGB, to Robert Lewis Thompson, Smithwick & Belendiuk, P.C., Counsel for SFC, CGB-CC-0949 (Nov. 5, 2013) (*CGB 2013 Request for Supplemental Information*).

¹³ SFC, Response and Further Supplement to Petition, CGB-CC-0949 (filed Dec. 4, 2013) (Petition 2013 Supplement).

¹⁴ Letter from Roger Holberg, Disability Rights Office, CGB, to Robert Lewis Thompson, Smithwick & Belendiuk, P.C., Counsel for SFC, CGB-CC-0949 (Feb. 11, 2014) (*CGB Dismissal Without Prejudice Letter*).

¹⁵ SFC, Application for Review, CGB-CC-0949 (filed Mar. 13, 2014) (Application).

III. DISCUSSION

6. *First Amendment grounds.* We reject SFC's argument that application of the captioning rules to SFC violates the Free Exercise Clause of the First Amendment.¹⁶ SFC, by availing itself of a means for dissemination of its programming governed by Commission regulation (specifically, "video programming"),¹⁷ has subjected that programming to requirements that apply to such video programming generally.¹⁸ A generally applicable requirement, such as the closed captioning requirement, that has the incidental effect of impacting religious conduct is analyzed under the Free Exercise Clause of the First Amendment. As established in *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."¹⁹ Thus, SFC's First Amendment claim fails.²⁰

7. SFC's reliance on *Hosanna-Tabor* is misplaced.²¹ *Hosanna-Tabor* addressed only the ministerial exception to employment discrimination laws.²² While SFC reads this case broadly to hold that no federal law may interfere with a religious organization's "sensitive internal judgments," which SFC claims includes the visual format of its Sunday Mass telecast,²³ *Hosanna-Tabor* pertains only to the employment relationship between a religious institution and its ministers.²⁴ *Hosanna-Tabor* does not apply here because the captioning rules do not interfere with religious organizations' selection of ministers.

8. *Categorical Exemptions.* We find no error in the Bureau's having chosen not to address SFC's claims that it is entitled to a categorical exemption. Unlike the individual exemptions, which are

¹⁶ To the extent that SFC 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) (without disturbing D.C. Circuit's dictum suggesting the constitutionality of closed captioning regulations). See also *MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002); *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 803-04, para. 25 & n.117 (2012); *Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd 15230, 15255, para. 63 (2000).

¹⁷ 47 CFR § 79.1(a)(1).

¹⁸ *Id.* § 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).

¹⁹ *Employment Div., Dept. of Human Resources of Ore. V. Smith*, 494 U.S. 872, 879 (1990).

²⁰ SFC claims that the Bureau failed to discuss or distinguish a case applying the Religious Freedom Restoration Act (RFRA). Application at 4 (citing Petition 2013 Supplement at 4 n.11); 42 U.S.C. § 2000bb *et seq.* Because SFC did not advance any argument as to how applying the closed captioning requirements to SFC would violate the RFRA, the Bureau did not err in not addressing this issue.

²¹ *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

²² *Id.* at 705-07.

²³ Application at 5-6. In any event, SFC failed to show that captioning requirements adversely affect in any manner the visual presentation of its Sunday Mass. Captions are simply added to the preexisting visual content if a viewer affirmatively chooses to view them. Although the Application initially claimed that the guidelines of the U.S. Conference of Catholic Bishops strictly prohibit the "distortion" allegedly caused by captions (*id.* at 5-6), SFC later withdrew this claim. Reply to Consumer Groups Opposition at 4 n.7.

²⁴ See *Hosanna-Tabor*, 132 S. Ct. at 706 ("The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.").

granted based on a showing that closed captioning requirements would be economically burdensome, the categorical exemptions are self-implementing.²⁵ While there have been occasions when the Bureau or the full Commission has exercised its discretion, in deciding individual exemption requests, to address a petitioner's claim that a categorical exemption also applied,²⁶ there is no requirement to do so.

9. In the instant case, moreover, based on the facts alleged by SFC, we find no basis to conclude that *La Santa Misa* would qualify for either of the categorical exemptions it claims is applicable. While SFC claims a "late hours" categorical exemption, which depends on the time of broadcast, SFC did not provide any specifics concerning the markets where the Sunday Mass is allegedly broadcast before 6:00 a.m.²⁷ Further, the "locally produced programming" categorical exemption, which SFC claims is also applicable, pertains only to programming locally produced "by the video programming distributor," among other requirements.²⁸ We find no basis to conclude that SFC is a video programming distributor within the meaning of the FCC's Rules. In any event, according to SFC, the program is not only locally delivered, but also distributed by satellite to a variety of communities spanning a number of time zones.²⁹

10. *Economically burdensome exemption.* We affirm the Bureau's denial of SFC's request for an individual exemption based on economic burden. In the *Anglers Reversal MO&O*, the Commission discussed the material that must be provided with such a petition to address the four factors set forth by Congress in section 713 of the Act.³⁰ Specifically, a petitioner must: (1) provide documentation of its financial status to demonstrate its inability to afford closed captioning; (2) verify that it has obtained information about the costs it would incur to caption their programming; (3) verify that it has sought closed captioning assistance from its video programming distributors, noting the extent to which such assistance has been provided or rejected; (4) indicate whether it has sought additional sponsorship sources or other sources of revenue for captioning; and (5) show that it does not have the means to provide captioning for its programming.³¹ These evidentiary requirements were appropriately relied on by the Bureau in its review of the Petition.³²

²⁵ *Anglers Reversal MO&O*, 26 FCC Rcd at 14944, para. 3 & n.13; see also *id.* at 14951, para. 19; *Closed Captioning and Video Description of Video Programming et al.*, Report and Order, 13 FCC Rcd 3272, 2228, n.16 (1997) (*Closed Captioning Report and Order*).

²⁶ See, e.g., *Anglers Reversal MO&O*, 26 FCC Rcd at 14950, para. 17 n.63; *Gerald Bryant TV, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 9335, para. 7 n.25 (CGB 2014).

²⁷ See 47 CFR § 79.1(d)(5).

²⁸ *Id.* § 79.1(d)(8) (emphasis added); see *id.* § 79.1(a)(2) (defining "video programming distributor"). Cf. *Anglers Reversal MO&O*, 26 FCC Rcd at 14950, para. 17 n.63 (explaining that the "locally produced programming" categorical exemption applies to distributors, not programmers).

²⁹ Application at 9; Petition 2012 Supplement at 8; Petition at 2. See *Anglers Reversal MO&O*, 26 FCC Rcd at 14950, para. 17 n.63 ("it is not clear that the programming produced by New Beginning was distributed only locally").

³⁰ *Anglers Reversal MO&O*, 26 FCC Rcd at 14955-56, para. 28. The four factors that are to be considered by the Commission in determining whether captioning would create an economic burden are: (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. See 47 U.S.C. § 613(e). "Failure to support an exemption request with adequate explanation and evidence to make these showings will result in dismissal of the request." *Anglers Reversal MO&O*, 26 FCC Rcd at 14956, para. 28 (citing *The Wild Outdoors et al.*, Memorandum Opinion and Order, 16 FCC Rcd 13611, 13614, para. 12 (CSR 2001)).

³¹ *Anglers Reversal MO&O*, 26 FCC Rcd at 14956, para. 28. The Commission also gave the Bureau the discretion to seek further information and documentation that it deemed appropriate and necessary. *Id.* at 14957, n.105. In addition, the Bureau has issued specific guidance on the information and documentation needed to support a petition and to allow the Bureau to make reasoned and consistent determinations. See CGB, *Required Information and*

(continued....)

11. SFC failed to provide, either in the initial petition or supplemental filings, adequate evidence to support its request for an individual exemption.³³ Regarding its financial status, for example, the documentation provided by SFC only purported to show the operating budget for the Sunday Mass broadcast effort and did not address the overall financial resources available to SFC.³⁴ Further, this insufficiency was never corrected, despite repeated requests by the Bureau.³⁵ Similarly, despite repeated Bureau requests,³⁶ SFC failed to identify any sources or price quotes to verify the cost it would incur to caption *La Santa Misa*³⁷ or to demonstrate the unavailability of financial support for captioning from its video programming distributor or other parties.³⁸ In summary, SFC's filings in support of its request for a closed captioning exemption failed to provide the type of financial information and documentation we require of petitioners seeking an economically burdensome exemption from the captioning requirements.

12. "Good cause" waiver. We conclude that the Bureau erred by declining to address Petitioner's "good cause" waiver request, and therefore grant the Application to that extent. Nonetheless, we deny SFC's waiver request. It is well settled that "[a]n applicant for waiver faces a high hurdle even

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Documentation to Provide in Filing a New Petition to be Exempt from the Television Closed Captioning Requirements, < https://apps.fcc.gov/edocs_public/attachmatch/DOC-323421A1.pdf> (last visited Jan. 29, 2016).

³² Cf. Application at 6-7, 8 (objecting to dismissal letter's reliance on "the Bureau's four new evidentiary 'items'").

³³ *CGB Dismissal Without Prejudice Letter* at 1 (explaining that SFC failed to provide documentation of its financial status, verification of the costs associated with providing captioning of its program, and verification of efforts to obtain closed captioning assistance from its video programming distributor and other sponsorship sources).

³⁴ Petition. See *Anglers Reversal MO&O*, 26 FCC Rcd at 14950, para. 17 (all of a petitioner's available resources should be taken into consideration, not just the resources allocated for the programs for which exemptions are sought).

³⁵ 2012 Bureau Letter; *CGB 2013 Request for Supplemental Information* at 2-3 (requesting, among other things, that SFC document "money received from all sources for your entire organization, not just the video program(s)"). Although SFC's 2012 supplement provided additional information regarding the budget for the Sunday Mass program and the amounts contributed specifically for its support, it never provided the necessary financial documentation regarding SFC's overall resources. Petition 2012 Supplement, Appx. A.

³⁶ 2012 Bureau Letter; *CGB 2013 Request for Supplemental Information* at 2, 4.

³⁷ SFC initially estimated the annual cost of captioning the Sunday Mass to be \$500 per week and later increased that estimate to \$600-\$800 per telecast, but never identified any sources or price quotes verifying these estimates. Petition at 3; Petition 2012 Supplement, Appx. A. See *Anglers Reversal MO&O*, 26 FCC Rcd at 14956, para. 28 (petitioners "should verify in their requests that they have obtained information about the costs they would incur to caption their programming") & n.101 (citing earlier decisions on the need to verify captioning costs with price quotes and information from various sources).

³⁸ The Petition did not describe any actual attempts made by SFC to solicit support from video programming distributors or other parties; instead, it relied on general statements that "SFC is a self-sustaining Church and cannot look to any other organization for additional funding for the closed captioning of its Sunday Mass" (Petition at 4) and that "[f]unds from other sources are SIMPLY not available" (Petition 2012 Supplement, Appx. A) (emphasis original). See *Anglers Reversal MO&O*, 26 FCC Rcd at 14953, para. 24 ("soliciting funds from [video programming distributors] is necessary to meeting one's captioning obligations, [and] evidence of such solicitation is required before a petitioner may qualify for a captioning exemption") (emphasis added), 14956, para. 28 (petitioners should verify "that they have sought closed captioning assistance from their video programming distributors, as well as note the extent to which such assistance has been provided or rejected") & n. 103 (citing earlier decisions regarding the need to seek support for captioning from video programming distributors). See also *id.* at 14956, para. 28 ("each petitioner must indicate whether it has sought additional sponsorship sources or other sources of revenue for captioning") & n.103 (citing earlier decisions regarding the need to demonstrate that additional sources of support are not available).

at the starting gate.”³⁹ SFC did not “plead with particularity [any] facts and circumstances that would warrant” a waiver in this case.⁴⁰

13. Although SFC argued generally that it is a non-profit, eleemosynary entity that must “balance the financial resources that it has in choosing how to serve its worshippers,”⁴¹ this alone cannot justify grant of a waiver.⁴² Further, to the extent that SFC is seeking a waiver because of a claimed adverse effect on SFC’s non-programming activities, the Commission has specifically rejected such an impact as a valid consideration for relief from captioning requirements.⁴³ Rather, any additional factors that the Commission considers “must focus on the impact that captioning will have on the petitioner’s programming activities – for example the extent to which *programming* might not be shown if program owners or providers are required to provide captions – not other activities or missions that are unrelated to that programming.”⁴⁴ For these reasons and consistent with the policy underlying this guidance, we will not consider any alleged impact on SFC’s non-programming activities in making a determination whether to waive SFC’s captioning obligation.⁴⁵ Further, to the extent that SFC is arguing that it lacks sufficient financial resources to caption its video program, the argument has been considered and properly rejected for lack of documentation in the context of the economically burdensome analysis above.

14. Finally, in arguing that a waiver is justified by the Commission’s policies favoring locally produced programming, SFC failed to explain why such policies, to the extent that they would merit a waiver, are not sufficiently addressed by the Commission’s locally produced programming exemption.⁴⁶ Further, SFC has not shown how granting a waiver to SFC would advance the availability of local programming, given that its particular program is not only locally delivered, but also distributed by satellite to a variety of communities spanning a number of time zones.⁴⁷ *La Santa Misa* would be local programming only to the extent that it is received in the community where it is produced, and even with respect to that community, SFC has not demonstrated how relief from captioning would advance the Commission’s local programming policies.

³⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁴⁰ *Id.*, citing *Rio Grande Radio Fellowship Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968).

⁴¹ Petition at 5.

⁴² The Commission previously considered whether to adopt a general exemption from captioning for non-profit entities and did not adopt such an exemption. See *Closed Captioning and Video Description of Video Programming et al.*, Report and Order, 13 FCC Rcd 3272, 3348-51, paras. 160-68 (1997). Similarly, the Commission has rejected any general presumption that exemptions from captioning should be granted to “non-profit entities for whom the provision of closed captions would ‘curtail other activities important to [their] mission.’” *Anglers Reversal MO&O*, 26 FCC Rcd at 14951, para. 19, quoting *Anglers for Christ Ministries, Inc., et al.*, Memorandum Opinion and Order, 21 FCC Rcd 10094, 10097, para. 11 (CGB 2006).

⁴³ *Anglers Reversal MO&O*, 26 FCC Rcd at 14951-52, paras. 20-21. As the Commission stated in that order, the impact on a petitioner’s non-programming activities is not included in the statutory articulation of captioning policy, is too vague to support a workable exemption standard, and would impermissibly allow “regulated parties to decide whether it is more important to comply with captioning requirements or to use their resources for other non-programming related purposes.” *Id.* at 14952, para. 21.

⁴⁴ *Id.* at 14952, para. 20.

⁴⁵ See *WAIT Radio*, 418 F.2d at 1159 (“sound administrative procedure contemplates waivers ... granted only pursuant to a relevant standard ... [which is] best expressed in a rule that obviates discriminatory approaches”); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990) (when granting waivers, the Commission must “articulate identifiable standards”).

⁴⁶ 47 CFR § 79.1(d)(8). See *supra* para. 9 & note 28.

⁴⁷ Application at 9; Petition 2012 Supplement at 8; Petition at 2.

15. In summary, SFC has not provided sufficient justification for granting the sought waiver. Accordingly, we deny the waiver request.⁴⁸

IV. ORDERING CLAUSES

16. Accordingly, pursuant to section 1.115 of the Commission's rules,⁴⁹ IT IS ORDERED that the Application for Review filed by SFC IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

17. IT IS FURTHER ORDERED that SFC's request for waiver of the closed captioning rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁸ In light of our conclusion that SFC has failed to justify a waiver, we need not decide here whether we have authority to grant a waiver of the captioning requirements pursuant to section 1.3 of our rules in light of the statutory mandate requiring the Commission to prescribe regulations that "shall ensure" that video programming is captioned, "except as provided" in the statutory exemptions. 47 U.S.C. §§ 613(b), (d).

⁴⁹ 47 CFR § 1.115.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *San Fernando Cathedral of San Antonio, Texas Application for Review*, CGB-CC-0949, CG Docket No. 06-181, Memorandum Opinion and Order.

While I am sympathetic to many of the arguments advanced by San Fernando Cathedral of San Antonio, Texas (San Fernando), I agree with the Commission that its Application for Review should be denied. As explained in the *Order*, pursuant to the standard adopted by the FCC in 2011, San Fernando failed to provide the Commission with sufficient evidence to obtain an individual exemption from closed captioning requirements based on economic burden. That having been said, I believe that the 2011 standard is probably too stringent, at least as applied to religious organizations, and would be open to revisiting it in an appropriate proceeding.

San Fernando separately argues that applying our closed captioning rules to it would run afoul of the First Amendment. Given relevant U.S. Supreme Court jurisprudence, most notably, *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Commission correctly rejects that claim. We would have faced a closer question had San Fernando argued in its Application for Review that requiring the church to close caption its Sunday Mass broadcast violated the Religious Freedom Restoration Act (RFRA). But San Fernando did not advance that claim before the Commission so we appropriately do not address that issue here. Nothing in our *Order* therefore should be interpreted as speaking to the interplay between RFRA and our closed captioning requirements.