



Virginia Association of Broadcasters Legal Review



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FCC REVERSES INDIVIDUAL EXEMPTIONS FOR CLOSED CAPTIONING; PROPOSES NEW RULES FOR “ECONOMICALLY BURDENSOME” STANDARD

The FCC recently reversed nearly 300 individual exemptions for program providers (primarily religious and church organizations) from the closed captioning rules and will now require those petitioners to file new petitions for an “undue burden” exemption. As discussed further below, stations that air programming provided by one of the providers whose exemption has been reversed should immediately contact the program provider to ascertain the status of their exemption and petition—any station that airs non-exempt programming without closed captions is at risk for being found in violation of the closed captioning rules.

This proceeding makes apparent the Commission’s renewed emphasis on enforcement of the closed captioning rules. Stations should take steps now to ensure that their programming is in compliance with closed captioning requirements. The details of the *Order* setting aside the exemptions and the *Notice of Proposed Rulemaking* proposing the new standard are discussed below.

I. Order Reversing Individual Exemptions

In 2006, the FCC issued an order (“*Anglers Order*”) granting certain individual petitioners a permanent exemption from the closed captioning rules based on an undue burden. The *Anglers Order* found that the program providers, which had non-profit status, would face “significant hardship” without an exemption and “significant risk that mandated closed captioning would cause [them] to terminate their programming.” Since the *Anglers Order*, the FCC granted 296 more individual exemption requests on the same “substantial hardship” grounds.

The Commission has now reversed all of these individual exemptions in the new *Order*, finding that the exemptions were not evaluated or granted using appropriate criteria. Each petitioner who previously received an exemption based on these criteria was notified by the FCC and will be required to file a new undue burden exemption petition. These entities have until January 18, 2012, to file a new petition. The 26-page list of the affected entities is too lengthy to attach to this memorandum, but every television station should check the list of petitioners available on the FCC’s website at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1123/FCC-11-159A1.pdf to determine whether it airs any of an affected entity’s programming. If a station airs programming affected by the *Order*, the programming must either be closed captioned or the program provider must file a new petition by January 18, 2012—otherwise, the station airing such programming runs the risk of being found in violation of the closed captioning rules. *Note:* Any time a program provider advises a station that its programming is exempt from closed captioning, the station should require the programmer to provide documentation that confirms the exemption to the station’s satisfaction.

The FCC’s closed captioning rules provide for two types of exemptions from their requirements: categorical exemptions and individual exemptions. Individual exemptions are considered by the Commission on a case-by-case basis. The FCC concluded that by granting permanent exemptions to hundreds of petitioners on the same grounds as the *Anglers Order*, the effect was to create an additional, unofficial categorical exemption. Moreover, the FCC concluded that these exemptions were granted on impermissible or generalized criteria rather than on an analysis of individual, case-by-case circumstances.

II. Analysis of Individual Exemptions

In addition to reversing the individual exemptions already granted, the *Order* also rejected the criteria applied in the *Anglers Order* and affirmed, instead, the “undue burden” analysis previously applied in decisions predating the *Anglers Order*. The key points of the analysis are as follows:

* *All Resources Considered.* First, the *Order* clarifies that the analysis of petitions for individual exemptions based on undue burden should consider all of a

petitioner's available resources, not just resources allocated for particular programming for which the entity seeks an exemption.

* *Non-Profit Status Not Determinative.* Second, the *Order* stated that exemptions should not place "substantial reliance" on a petitioner's non-profit status. According to the *Order*, the closed captioning rules apply to all entities, including those that are non-profit, and analysis of petitions for exemptions will consider revenue-based criteria of economic strength. The non-profit status of a program provider or station will not be a determinative factor.

* *Individual Circumstances.* Third, the FCC rejected the notion that an individual exemption (such as the *Anglers Order*) establishes a presumption for future petitions. The *Order* emphasizes that, unlike categorical exemptions, the process for individual exemptions is designed to consider the unique, individual circumstances of each petitioner on a case-by-case basis. The *Order* also rejected consideration of the potential burden on a petitioner's other, non-programming activities to further its mission, which was permitted in the *Anglers Order*. Instead, the *Order* emphasized that the Commission will consider the potential burden on the production and distribution of programming.

* *Limited Duration of Exemptions.* The *Order* reaffirmed the practice of granting exemptions for only limited periods of time. Prior to the *Anglers Order*, no petitioner had ever received a permanent exemption from the closed captioning rules. The *Order* strongly suggested that, going forward, the Commission will disfavor permanent exemptions from the closed captioning rules.

* *Captioning Assistance.* Finally, the FCC noted that evidence of solicitation of captioning assistance from video programming distributors is *required* before a petitioner will qualify for a captioning exemption. According to the *Notice*, petitioners were previously encouraged—and are now required—to seek funds from outside entities to meet their captioning obligations as a precondition to receiving an undue burden exemption.

III. "Economically Burdensome" Standard

Along the same lines, the Commission also issued a *Notice of Proposed Rulemaking* ("*Notice*") with proposed modifications to the closed captioning rules. The *Notice* seeks to clarify the "economically burdensome" standard under which petitions for individual exemptions will be evaluated going forward. Since the *Anglers Order* exemptions, the Communications Act was amended to articulate the standard for individual exemptions according to "economic burden" instead of "undue burden." However, the FCC tentatively concluded that the terms are synonymous. In other words, the FCC is proposing that its analysis of individual exemptions will apply the same factors to determine "economic burden" as it did under the "undue burden" standard prior

to the *Anglers Order*. The *Notice* proposes to amend the closed captioning rules accordingly, and the FCC seeks comment on this proposal.

The *Notice* also proposes to amend the rules to reflect the following familiar factors for analysis of petitions for individual exemptions: (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. The *Notice* seeks comment on these proposed criteria, which it will apply tentatively to undue burden petitions while this proceeding is pending.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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