

FCC Overturns Hundreds of Closed Captioning Undue Burden Exemptions and Provides, Seeks Comment on, Interpretation of Related “Economically Burdensome” Standard

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The Federal Communications Commission (“FCC” or “Commission”) has reversed a five-year-old decision by its Consumer and Governmental Affairs Bureau (“CGB” or “Bureau”) that had granted certain video programmers “undue burden” exemptions from the FCC’s closed captioning rules. The reversed Bureau decision had changed the criteria for undue burden exemptions and permanently exempted two video programmers from compliance with closed captioning rules on the basis of the new criteria. Finding the Bureau’s new criteria deviated from both the statute and FCC precedent, the Commission overturned the decision, reversed 296 subsequent exemptions that had been granted by the Bureau in reliance thereon, and reinstated the original criteria for captioning exemptions.

In addition, the Commission’s Order clarifies its rules and procedures governing consideration of petitions for undue burden exemptions, providing guidance to video programming providers and distributors who may be interested in seeking such exemptions for both television and online programming going forward. Importantly, the Order offers a provisional interpretation of the term “economically burdensome” as that term is used in the recent Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”). The Commission essentially concluded that although the CVAA uses the term “economically burdensome,” Congress did not intend to fundamentally change the existing standard for assessing individual exemptions based on undue burden. The interpretation is “provisional” because the Commission seeks comment on proposed amendments to its rules to make the interpretation permanent.

Reversal of Undue Burden Exemptions

In overturning the undue burden exemption CGB approved in 2006, the Commission found numerous faults with both the Bureau’s initial decision and its handling of hundreds of subsequent petitions seeking similar exemptions. As originally enacted, Section 713 of the Communications Act of 1934, as amended, which required the FCC to adopt rules requiring closed captioning of television programming, allowed for individual exemptions if a petitioner could show compliance constituted an “undue burden,” defined by the statute as “significant difficulty or expense.”

Such petitions for individual exemptions were to be reviewed by the Commission on a case-by-case basis after opportunity for public comment and were to consider four factors: (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. It was under this standard that the CGB ostensibly considered and granted undue burden exemptions to two programming providers in 2006. However, in reaching its decision, the Bureau deviated from previous Commission decisions by expanding the scope of the factors considered. In particular, its decision relied primarily on the non-profit status of programming providers and that the programming was not produced for primarily commercial purposes. Further, the Bureau found captioning programs would constitute a “significant hardship” and that there was a significant risk that mandating captioning would cause the video programming provider to cancel the programming.

Following its initial decision, the Bureau proceeded to grant over three hundred permanent undue burden exemptions in 2006 based on similar criteria. Despite the requirement that each such petition be considered on a case-by-case basis and be subject to public notice and comment, the vast majority of

were not placed on public notice prior to grant, and were issued en masse, rather than considered individually. In addition, many of the petitions lacked detailed supporting documentation justifying an exemption under the four guiding factors.

As a result of the reversal, the existing exemptions granted by the Bureau will expire in 90 days, or by Jan. 18, 2012. Any party that previously received an undue burden exemption (whom the Order identifies in an Appendix) will need to file a new petition in those intervening 90 days, and provide evidence demonstrating its inability to provide closed captioning if it wishes to retain its exempt status.

The Commission's decision restores the focus of the undue burden standard on the four factors originally articulated by Congress. As part of the required showing, petitioners will need to provide documentation regarding financial status, the costs of captioning, and that they have sought captioning assistance from video programming distributors. The Commission will consider each such petition on a case-by-case basis after appropriate public notice.

Interpretation of Economically Burdensome Standard

In addition to addressing earlier actions taken by the CGB under delegated authority, the Commission also provides guidance regarding the standard for evaluating requests for individual closed captioning exemptions for television and covered IP delivered programming going forward. By the recent CVAA, which among other things charges the FCC with adopting rules for captioning online programming, Congress amended Section 713 to replace the term "undue burden" with the term "economically burdensome." In what it calls an Interim Standard Order that accompanies the reversal of the Bureau decision, the Commission concludes that in enacting the CVAA, Congress intended to retain the original four factors applied under the undue burden standards.

After consideration of the legislative history and the changes made to the statute by the CVAA, the Commission concludes that "notwithstanding the switch to the 'economically burdensome' nomenclature for evaluating individual exemptions, Congress did not intend for the Commission to make a substantive change in the way that it assesses these case-by-case exemption requests under [the Act]." Accordingly, the Commission interprets economically burdensome as synonymous with the term "undue burden" and will continue to apply the original four factors in the manner clarified by this Order. This approach is consistent with the FCC's interpretation of the term "economically burdensome" adopted in the recent video description rules, as well as with the interpretation it has proposed in the open rulemaking regarding closed captioning for video programming provided over the Internet.

The Commission provisionally adopts this interpretation and proposes – by an accompanying Notice of Proposed Rule Making ("NPRM") – to make conforming changes to its closed captioning rules to clarify the standard for consideration of individual exemptions of the captioning requirements on the basis that compliance would be economically burdensome.

Comments in response to the NPRM are due 30 days after it appears in the Federal Register, and replies are due 15 days after the initial comment deadline. If any of these issues may affect your operations, you might consider filing comments. For more information about this proceeding, or for assistance in filing, please contact any of the Communications attorneys at DWT.

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