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December 19, 2014
via electronic filing

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
44512th Street, SW, Room TW-A325
Washington, DC 20554

Re: Opposition to Petition for Exemption from the Commission's Closed
Captioning Rules
CGB Dkt. No. 06-181

Diocese of Gaylord
CGB-CC-0270

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), National Association of the Deaf (NAD), California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc. (CCASDHH), Cerebral Palsy and Deaf Organization (CPADO), Association of Late-Deafened Adults (ALDA), and Deaf Seniors of America (DFA), collectively, "Consumer Groups," respectfully submit this opposition to the Petition of

*Admitted to the Washington bar only;
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Diocese of Gaylord (Gaylord) to exempt its programming from the Commission's closed captioning rules.¹

Gaylord's Petition should be denied because it has failed to show that captioning its weekly mass would be economically burdensome. As recent FCC precedent shows, captioning is not economically burdensome when a petitioner has excess assets over multiple years that would allow it to pay for captioning. These precedents apply here and dispose of Gaylord's Petition, as it has had ample assets that could easily cover its quoted captioning costs.

I. Background

Gaylord has had a *de facto* waiver from captioning its weekly mass for nine years, as the programmer first filed a petition with the Commission in 2005.² Although the Consumer and Governmental Affairs Bureau ("Bureau") initially granted First Baptist's Petition, the full Commission reversed that decision in 2011. The Bureau then gave Gaylord the opportunity to refile its Petition, which it did on Jan. 18, 2012.³ Consumer Groups opposed the Petition because it lacked the necessary information. As a result, the Bureau sought additional information from Gaylord on Sept. 27, 2013.⁴ Gaylord responded to the Bureau on Nov. 12, 2013 with information on its captioning costs and financial resources, though the Bureau asked once more for supplemental information on

¹ *Request for Exemption from Commission's Closed Captioning Rules*, Public Notice, Dkt. No. 06-181, DA 14-1667 (Nov. 19, 2014) ("*2014 Public Notice*").

² The weekly mass is broadcast on Fox affiliate WFQX in Cadillac, Michigan. *Petition for Exemption from Closed Captioning Requirements*, Diocese of Gaylord (Dec. 26, 2005).

³ *See Anglers for Christ Ministries, Inc.*, Dkt No. 06-181, 26 FCC Rcd 14941 (Oct. 20, 2011) ("*Anglers 2011.*"); *See Letter From Office of the Secretary, FCC to Diocese of Gaylord* (Oct. 25, 2011); *Renewed Request for Exemption from Commission's Closed Captioning Rules*, Dkt. No. 06-181 (Jan. 18, 2012) ("*Renewed Waiver Request*").

⁴ *Letter from Office of the Secretary, FCC, to Diocese of Gaylord*, Dkt. No. 06-181 (Sept. 27, 2013).

May 30, 2014.⁵ After Gaylord responded with more information, the Bureau placed the Petition on Public Notice for comment on November 19, 2014.⁶

II. Legal Standard

Under Section 713(d)(3) of the Communications Act of 1934, as amended, a video-programming provider may petition the Commission for a full or partial exemption from the Commission's closed captioning requirements if compliance would be "economically burdensome."⁷ When determining whether a petitioner has made the required showing under the economically burdensome standard, the Commission 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.⁸ The Commission will look at a petitioner's assets, revenues, expenses, and other documentation "from which its financial condition can be assessed" that demonstrates that captioning would impose an undue economic burden.⁹

Recent FCC Orders — *First Lutheran Church of Albert Lea, First Baptist of Jonesboro,* and *Curtis Baptist Church* — have interpreted the economically standard and found that

⁵ Response to FCC Request for Supplemental Information, Dkt. No. 06-181 (Nov. 12, 2013) ("November 2013 Supplement"); Letter from Office of the Secretary, FCC, to Diocese of Gaylord, Dkt. No. 06-181 (May 30, 2014); Response to May 30, 2014 Supplemental Information Request from FCC, Dkt. 06-181 (June 27, 2014) ("June 2014 Supplement").

⁶ 2014 Public Notice.

⁷ 47 U.S.C. § 613(d)(3). The Commission interpreted the term "economically burdensome" as being synonymous with the term "undue burden" as defined in Section 713(e) of the 1934 Act, and ordered the Bureau to continue to evaluate all exemption petitions using the "undue burden" standard pursuant to Rule 79.1(f)(2)-(3).

Interpretation of Economically Burdensome Standard, 27 FCC Rcd 8831, 8835, ¶7 (2012).

⁸ *First Baptist Church, Jonesboro Arkansas*, Order, Dkt. No. 06-181, DA 14-1542, ¶3 (Oct. 24, 2014).

⁹ *Id.* at ¶¶ 13-14.; see *Curtis Baptist Church*, Order, Dkt. No. 06-181, DA 14-1774, ¶14 (Dec. 5, 2014); *First Lutheran Church of Albert Lea*, Order, Dkt. No. 06-181, 29 FCC Rcd 9326, ¶¶14-15 (2014).

when petitioners have excess revenue and/or net assets that could cover their captioning costs, compliance with the Commission's captioning requirements would not impose an undue burden.¹⁰ In all three cases, each petitioner's financial resources showed that they had multiple years of net profits and net assets. When the Commission subtracted the petitioners' quoted captioning costs from their net profits and assets, the petitioners each had excess profits or assets.¹¹ Because the petitioners would still have operated with excess profits or assets even after accounting for their closed captioning costs, the FCC found that it would not be economically burdensome to provide captions.¹²

III. Gaylord has Failed to Demonstrate that Captioning its Mass would be Economically Burdensome.

Gaylord's Petition should be denied because it has failed to show how captioning its programming would be economically burdensome, as it could provide captioning and still have excess assets. Gaylord's Petition is analogous to recent petitions the FCC denied in *First Lutheran Church of Albert Lea*, *First Baptist of Jonesboro*, and *Curtis Baptist Church*. In those cases, the petitioners had excess profits and/or assets that would cover their quoted captioning costs.¹³ Because Gaylord's excess assets would cover its captioning costs, just as the FCC found in three cases above, compliance with the Commission's captioning rules would not be economically burdensome.¹⁴ Gaylord is financially healthy, having operated with net assets in all years for which it provided information to the Commission. Thus Gaylord should comply with the Commission's closed captioning requirements.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Curtis Baptist Church* at ¶¶13-14 (Dec. 5, 2014); *First Baptist Church, Jonesboro Arkansas* at ¶¶13-14; *First Lutheran Church of Albert Lea* at ¶¶14-15.

¹⁴ *Id.*

Gaylord's captioning costs could be easily covered by its financial assets. Consumer Groups acknowledge that Gaylord's programming originates in a remote location in Northern Michigan and that the technical limitations of its local broadcast station and its liturgical requirements pose logistical difficulties.¹⁵ However, at least one provider has offered to work with Gaylord to provide live captioning, a solution that would obviate those concerns. According to that provider's quote, Gaylord's total costs for live captioning would be approximately \$11,300 annually.¹⁶ The costs would include a rate of \$125 per week and \$400 per month to rent an encoder that would be installed at WFQX to enable live captioning.¹⁷

Gaylord's financial statements show that it has sufficient assets to cover its captioning costs. Petitioner's financial statements indicate that it had net assets of \$16,863,044 in 2012, \$17,054,957 in 2011 and \$16,257,213 in 2010.¹⁸ Additionally, in 2011 Gaylord had excess revenue of \$797,744.¹⁹ That large carryover meant that even though Gaylord's expenses exceeded its revenues in 2012, it was still able to have net revenues at the end of that year.²⁰

When Gaylord's captioning costs are subtracted from its assets and revenues, Petitioner still has ample resources left over. For example, if Gaylord had paid \$11,300 to caption its programming from 2010 through 2012, it still would have had net assets of

¹⁵ See June 2014 Supplement at 3.

¹⁶ November 2013 Supplement, Ex. 8.

¹⁷ *Id.* The same quote suggests that Gaylord could purchase an encoder for roughly \$3,000, which would be less than the annual cost of renting one and would only have to be purchased once. Other quotes Gaylord received included estimates of \$529 per week to caption the mass, for an annual cost of \$27,508. See Renewed Waiver Request, Ex. 9. Gaylord also estimated that it would cost \$44,992 to caption its mass in-house. See *Id.* at Exs. 8, 10 (listing quotes for encoders, captioning software, and other items); Affidavit of Candace Neff, Diocese of Gaylord Director of Communications, at 5.

¹⁸ November 2013 Supplement, Ex. 10.

¹⁹ *Id.*

²⁰ *Id.*

\$16,245,913, \$17,043,657, and \$16,851,744, respectively. Additionally, Gaylord would have been left with excess revenues of \$786,444 in 2011 even after paying for captioning. That profit would have covered its excess revenue in 2012 and still paid for captioning over that timer period.

Because Gaylord's net assets and revenues could easily cover the cost to caption its weekly mass and still leave ample reserves, captioning would not be economically burdensome. Gaylord's financial records demonstrate that it has more than enough assets to pay for captioning and, therefore, the Commission should deny its Petition.

Gaylord raises a number of other arguments that the Commission need not reach should it determine that captioning would not be economically burdensome. In any event, Consumer Groups respond to two in particular. First, Gaylord claims that because it has a \$50,000 budget for its programming, captioning would be economically burdensome.²¹ But the Commission has consistently held that in analyzing an economically burdensome petition, "all of the petitioners' available resources should have been taken into consideration, not just the resources allocated for the programs for which exemptions were sought."²²

Second, Gaylord continues to argue that it qualifies for a categorical exemption to the Commission's closed captioning rules under 47 C.F.R. § 79.1(d)(8), stating that it is a video programming distributor (VPD).²³ Consumer Groups have previously shown that this argument is incorrect for a number of reasons, including that the categorical exemption in Section 79.1(d)(8) is self-implementing and that Gaylord is not a VPD. Nonetheless, it is worth repeating that Gaylord does not meet the definition of a VPD because it does not "deliver[] such programming directly to the home" as required by

²¹ November 2013 Supplement at 5-6.

²² *Anglers 2011*, 26 FCC Rcd at 14950, ¶17.

²³ November 2013 Supplement at 6-8.

Section 79.1(a)(12).²⁴ Instead, Gaylord relies on WFQX to broadcast its programming in Northern Michigan. Because Gaylord is not a VPD, it is ineligible to claim a categorical exemption under Section 79.1(d)(8).

IV. Conclusion

Gaylord cannot show that captioning its programming would be economically burdensome. Indeed, its financial resources indicate that it has ample assets to cover captioning costs and still have additional reserves left over. Thus, Consumer Groups ask the Commission to deny Gaylord's Petition and require it to begin captioning its programming.

Respectfully submitted,

_____/s/
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²⁴ 47 C.F.R. § 79.1(a)(2).

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CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on December 19, 2014, pursuant to the Commission's aforementioned Public Notice, a copy of the foregoing document was served by first class U.S. mail, postage prepaid, upon the Petitioner at the address listed below.

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_____/s/_____
Niko Perazich

December 19, 2014