

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Anglers for Christ Ministries, Inc.	)	CGB-CC-0005
	)	
New Beginning Ministries	)	CGB-CC-0007
	)	
Video Programming Accessibility	)	Docket No. 06-181
	)	
Petition for Exemption from Closed Captioning Requirements	)	

To: The Commission

**PETITION FOR EMERGENCY STAY**

Pursuant to sections 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a) of the Commission’s Rules,<sup>1</sup> Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), Deaf and Hard of Hearing Consumer Advocacy Network, National Association of the Deaf, Hearing Loss Association of America, Association of Late Deafened Adults, Inc., American Association of People with Disabilities, and California Coalition of Agencies Serving the Deaf and Hard of Hearing (collectively, the “Parties”), hereby request that the Commission stay the *Anglers Exemption Order* issued by the Chief of the Consumer & Governmental Affairs Bureau (“Bureau”)<sup>2</sup> and all exemption petitions granted based on that Order pending action on the Parties’ Application for Review of the Bureau’s Order. The Parties are simultaneously filing an Application for Review of the Bureau’s decision to be inclined to grant closed captioning exemption petitions involving a non-profit organization that does not receive compensation for

---

<sup>1</sup> 47 C.F.R. §§ 1.41, 1.43, 1.44(e), 1.45(d)-(e), and 1.298(a).

<sup>2</sup> *In the Matter of Anglers for Christ Ministries, Inc.; New Beginning Ministries; Video Programming Accessibility; Petitions for Exemption from Closed Captioning Requirements*, Memorandum Opinion and Order, DA 06-1802 (CGB 2006) (“*Anglers Exemption Order*”).

airing its programming if such organization merely represents that it may terminate or substantially curtail its programming, and/or other activities important to its mission if required to curtail its programming. The Parties are seeking to have the Commission (1) rescind the *Anglers Exemption Order* and all grants of exemption based on the Bureau's decision, (2) require the Bureau to individually review each undue burden exemption petition to determine if an undue burden will result before granting such petition, and (3) require the Bureau to place all current and future exemption petitions on public notice.

## I. ARGUMENT

It is well settled by the United States Court of Appeals for the D.C. Circuit that “[a]n order maintaining the *status quo* is appropriate when a serious legal question is presented, when little harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.”<sup>3</sup> This standard requires the Commission to examine “whether: (1) petitioners are likely to succeed on the merits; (2) petitioners will suffer irreparable injury absent a stay; (3) a stay would substantially harm other interested parties; and (4) a stay would serve the public interest.”<sup>4</sup> Courts have considered these factors to be elements of a “sliding scale,” such that when “the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas” are less compelling.<sup>5</sup> This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending Commission review of the *Anglers Exemption Order*. Indeed, the Commission has in the past

---

<sup>3</sup> *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). *See also*, *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>4</sup> *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Holiday Tours, Inc.*, 559 F.2d at 843.

<sup>5</sup> *See Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998).

indicated that a stay maintaining the *status quo* should be granted “when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm.”<sup>6</sup>

**A. The Parties will Succeed on the Merits**

The analysis as to whether to issue a stay begins with an evaluation of the likelihood of the petitioner’s success on the merits. However, because the four factors originally established in *Virginia Petroleum Jobbers* are applied on a sliding scale, there is no rigid requirement that a petitioner demonstrate “a mathematical probability of success.”<sup>7</sup> In this case, the Parties will succeed on the merits because, as explained in the Parties’ Application for Review, the Bureau violated Section 713(d) of the Communications Act of 1934, as amended (the “Act”) and Section 553 of the Administrative Procedure Act (“APA”) with its decision in the *Anglers Exemption Order*.<sup>8</sup>

Section 713(d)(1) of the Act allows the Commission to adopt exemptions “by regulation [for] programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming.”<sup>9</sup> Section 553 of the APA sets forth the procedures that an agency must follow to adopt a new regulation, including notice and comment.<sup>10</sup> In the *Anglers Exemption Order*, the Bureau departed from long practice and improperly established a new class of programming that is exempt from the closed captioning requirements without proper notice and

---

<sup>6</sup> *Florida Public Serv. Comm’n*, 11 FCC Rcd 14324, 14325-26 & n. 11 (1996).

<sup>7</sup> *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d at 844.

<sup>8</sup> 47 U.S.C. § 613(d); 5 U.S.C. § 553.

<sup>9</sup> 47 U.S.C. § 613(d)(1). See also, 47 C.F.R. § 79.1(f)(1).

<sup>10</sup> 5 U.S.C. § 553.

comment. Therefore, the Bureau violated Section 713 of the Act and Section 553 of the APA with its decision.

In addition, the Bureau's actions to grant the exemption petitions based on the *Anglers Exemption Order* involved other egregious abuses of process, including failure to place petitions on public notice or failure to justify waiver of the public notice requirement, as well as developing an unclear standard. The Commission's rules require that all closed captioning petitions for exemption based on the undue burden standard be placed on public notice and that any interested persons may file comments or oppositions to such petitions.<sup>11</sup> However, the Bureau did not put all petitions for exemption on public notice, and unsuccessfully attempted to fix the error by including a waiver of the rules in the letters granting the exemption through a general statement that does not explain why deviation from this rule serves the public interest. Moreover, the standard adopted by the Bureau is unclear because it does not include the "economically burdensome" or "undue burden" standards in the statute, includes a new factor of curtailing mission activities that is not considered in the statute, does not identify whether it applies to both distributors and programmers, and does not include temporary exemptions even when requested.

The Bureau also arbitrarily overruled a Commission precedent without articulating any rationale. Moreover, the Bureau does not have delegated authority to create new rules or categories of exemptions, but only has authority to administer and enforce rules and policies already created at the Commission level. Instead, the Bureau was required to individually analyze each exemption petition based on the undue burden standard. The Bureau however

---

<sup>11</sup> 47 C.F.R. § 79.1(f)(5), (6).

applied its new class exemption to several hundred petitions that requested exemption based on the undue burden standard and failed to analyze if an undue burden would result.

As discussed in further detail in the Parties' Application for Review, the Commission must rescind the *Anglers Exemption Order* and all exemption petitions grants based on the Bureau's decision and require the Bureau to individually review each undue burden exemption petition to determine if an undue burden will result before granting such petition.

**B. The Parties and their Constituents will Experience Irreparable Injury**

In applying the irreparable injury prong of the test for granting a stay petition, the Commission must find that the "injury is certain and great; it must be actual and not theoretical."<sup>12</sup> Further, the injury must be imminent such that "there is a clear and present need for equitable relief."<sup>13</sup>

The Parties are harmed because they and their constituents rely on closed captioning to have full access to video programming. The Bureau's decision is currently injuring the Parties and its constituents by exempting hundreds of programs from the captioning requirements. Further, the Bureau's new standard could have an even greater effect as hundreds or thousands of programmers already providing captioning could become eligible for a captioning exemption and therefore cease providing such services by filing an exemption petition.<sup>14</sup> Therefore, failure to stay the *Anglers Exemption Order* and all of the exemptions granted based on the order will result in a certain and great injury to the Parties' members and their constituents.

---

<sup>12</sup> *Wisconsin Gas v. FERC*, 758 F. 2d 669, 674 (DC Cir. 1985).

<sup>13</sup> *Id.*

<sup>14</sup> See Letter to Kevin J. Martin, Chairman from Matthew Cook and Becky Issacs, Aberdeen Captioning, Inc. (September 20, 2006) attached hereto as Exhibit A.

### **C. A Stay Would Not Substantially Harm Other Interested Parties**

The Commission should grant the requested stay because “little if any harm will befall other interested persons.”<sup>15</sup> During the pendency of an undue burden determination, the programming subject to the exemption request is considered exempt from the closed captioning rules.<sup>16</sup> Thus, staying the effect of the *Anglers Exemption Order* and the grants based on it will not affect the *status quo* because each of the petitioners will not have to caption while the Commission reviews the Parties’ Application for Review. However, a stay will ensure that no further petitions are granted based on this improperly adopted class of exempted programming until the Commission has a chance to review the Application for Review and determine that the *Anglers Exemption Order* violated Section 713 of the Act and Section 553 of the APA among other egregious abuses of process.

### **D. The Equities and the Public Interest Favor a Stay**

For the final prong of the test for granting a stay petition, the Commission must consider the equities and the public interest. The general public would experience harm if the Bureau’s *Anglers Exemption Order* is allowed to stand because many more petitions for exemption are expected based on this decision. As discussed in the Parties’ Application for Review, other individuals and entities have already filed and sent many statements expressing concern about the *Anglers Exemption Order* and the effect it may have on programmers currently captioning their programming.

In addition, because the Parties are likely to prevail on the merits, the members of the deaf and hard of hearing communities are likely to suffer significant, immediate and irreparable

---

<sup>15</sup> *Holiday Tours* at 844.

<sup>16</sup> 47 C.F.R. § 79.1(f)(11).

injury if a stay is not granted, and other interested parties would not be harmed, a grant of a stay would serve the public interest. Therefore, since all factors favor a stay, the equities favor a grant of a stay by the Commission.

## II. CONCLUSION

For these reasons discussed herein, the Commission should stay the effectiveness of the *Anglers Exemption Order* and all exemptions grants based on the order pending Commission action on the Parties' Application for Review.

Claude L. Stout  
Executive Director  
Telecommunications for the Deaf  
and Hard of Hearing, Inc.  
8630 Fenton Street, Suite 604  
Silver Spring, MD 20910

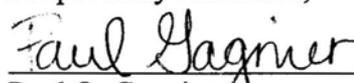
Cheryl Heppner  
Vice Chair  
Deaf and Hard of Hearing  
Consumer Advocacy Network  
3951 Pender Drive, Suite 130  
Fairfax, VA 22030

Brenda Battat  
Associate Executive Director  
Hearing Loss Association of America  
7910 Woodmont Avenue, Suite 1200  
Bethesda, MD 20814

Jenifer Simpson  
Senior Director, Telecommunications  
and Technology Policy  
American Association of People  
with Disabilities  
1629 K Street N.W., Suite 503  
Washington, DC 20006

Dated: October 12, 2006

Respectfully submitted,



Paul O. Gagnier  
Troy F. Tanner  
Danielle C. Burt  
Bingham McCutchen LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
*Counsel to Telecommunications for the  
Deaf and Hard of Hearing, Inc.*

Nancy J. Bloch  
Executive Director  
National Association of the Deaf  
814 Thayer Avenue  
Silver Spring, MD 20190-4500

Dr. Jane Schlau  
President  
Association of Late Deafened Adults, Inc.  
8038 Macintosh Lane  
Rockford, IL 61107

Ed Kelly, Chair  
California Coalition of Agencies Serving  
the Deaf and Hard of Hearing  
6022 Cerritos Ave  
Cypress, CA 90630

**EXHIBIT A**

# Aberdeen Captioning

committed to the **WORD**

September 20, 2006

Kevin J. Martin, Chairman  
Michael J. Copps, Commissioner  
Jonathan S. Adelstein, Commissioner  
Deborah Taylor Tate, Commissioner  
Robert M. McDowell, Commissioner

Dear Commissioners,

We are extremely concerned about the decisions taken by the Federal Communications Commission (FCC) on September 12, 2006 and particularly the following comment: *"in the future, when considering an exemption petition filed by a non-profit organization that does not receive compensation from video programming distributors from the airing of its programming, and that, in the absence of an exemption, may terminate or substantially curtail its programming, or curtail other activities important to its mission, we will be inclined favorably to grant such a petition"* This statement appears to open the door to eliminate closed captions from nearly all religious and non-profit programming. This action appears to reverse the FCC position and not comply with the Americans with Disabilities Act which has established closed captioning access to all. We respectfully ask that the FCC reverse its September 12, 2006 decisions and position regarding television captioning waivers.

Our company, Aberdeen Captioning Inc., has specialized in providing closed captioning services to religious video producers and television stations since June 2001. We've built our business (25 employees and contract employees) based on the laws and position established by the FCC requiring captions and have seen great success serving both small and large ministries. We are able to provide captioning for as little as \$60 per 30 min show for live and \$150 for 30 min show for post production – 50% less than most other companies. This reduced pricing has allowed ministries to provide closed captioning while still carrying on business and maintaining their mission. We can show, without question, that non-profit and ministry organizations can and should be required to provide closed captioning services on their video programming. Aberdeen has over 100 clients captioning weekly or daily programs ranging from KTBN, Daystar, Cornerstone Television to smaller churches. We would be glad to provide our entire customer list and books to show that these companies are actually captioning and paying Aberdeen to perform this service. Nearly all these programmers receive donations/offerings from their viewers.

The larger concern is the precedence that will be set if exemptions are granted just because a non-profit states captioning costs will affect their mission. Every one of the companies we caption for could justify that they could provide additional services (mission essential) with the money that they could save from not captioning. It is our position that this reasoning should not be used solely as a reason to grant an exemption because this would most likely lead to all non-profit religious organizations filing for an exemption. In speaking with Thomas Chandler of the FCC, I was made aware of several hundred exemption requests that are not posted on the website. Since previous requests have been posted on the FCC website, how are advocates of closed captioning able to provide feedback to the FCC if we are not made aware of the enormous number of exemption requests prior to the decision being implemented? More importantly, will the non-profit/religious programmers that are currently captioning be granted an exemption? In your due-diligence process of an exemption request, are you asking if they are currently captioning? It surely would be a major disservice to the hearing-impaired community if programs that are currently captioned were allowed to become exempt.

Over the past 5 years the video/television industry has seen incredible growth with additions of channels beyond our imagination 10-20 yrs ago. The United States of America has grown because we are a capitalistic society which invites ingenuity and creativity. Rules/regulations are

22362 Gilberto, Suite 230, Rancho Santa Margarita, CA 92688  
Phone 800-688-6621 Fax 949-858-4405  
[www.abercap.com](http://www.abercap.com)

established and businesses/consumers find ways to meet these rules. This has been the case thus far with captioning. There has been no decline in programming because captioning is necessary. By granting an exemption to video program producers, you are effectively taking airtime away from programmers that would provide captions. By doing so, you are going against the very standards and goals you uphold – closed captioning access to all!

The following are comments by yourselves, the FCC Commissioners, supporting captioning and meeting the needs of the hearing-impaired:

Statements by commissioners in regards to 07-20-05  
FCC Launches Review of Closed Captioning Rules.  
Notice of Proposed Rulemaking (CG Docket No. 05-231, FCC 05-142)

**Quotes from the STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Those consumers that rely on Telecommunications Relay Services and Closed Captioning Services must not be left out of the telecommunications revolution.*

*The Commission is more committed than ever to ensuring that the goals of the ADA are achieved. The actions we take today join the many others that the Commission has taken over the years to eradicate the barriers that stand in the way of functional equivalency. Functional equivalency means individuals with disabilities having access to the same services as everyone else. This equal access is vital to accessing jobs, education, public safety, and simple communications with family, friends, and neighbors.*

**Quotes from the STATEMENT OF  
COMMISSIONER KATHLEEN Q. ABERNATHY**

*One of our most important responsibilities is to make sure that there are no telecom "have-nots," and that the wealth of services provided by today's new technologies are available to all consumers."*

*"Lou Ann Walker, a noted advocate for the hearing-impaired, once said that the inability to hear is a nuisance, but the inability to communicate is a tragedy. ...we are helping to turn tragedies into nuisances."*

**Quotes from the STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*"Functional equivalency" may sound like Washington jargon, but for 54 million Americans it translates into equal opportunity, equal rights and fuller participation in society.*

*By granting the petition for rulemaking filed by Telecommunications for the Deaf, the National Association of the Deaf, Self Help for Hard of Hearing People, the Association for Late Deafened Adults and the Deaf and Hard of Hearing Consumer Advocacy Network, we make an effort to keep our rules current and ensure that video programming is accessible to everyone.*

**Quotes from the STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*I fully support this Notice to seek comment on the adequacy of our current closed captioning rules and on how the rules can be made more effective and efficient.*

*Both Congress and the Commission have recognized how important it is that all people have access to video programming, which is increasingly affecting how we operate in the home, at the office, and at school.*

22362 Gilberto, Suite 230, Rancho Santa Margarita, CA 92688  
Phone 800-688-6621 Fax 949-858-4405  
www.abercap.com

*we must remain committed to ensuring that video programming is not only accessible, but also high quality.*

*Today's rulemaking takes another step forward toward ensuring that the hearing-impaired community receives functionally equivalent video programming services. I commend my colleagues for their dedication to confronting these issues that are so important for the deaf and hard of hearing community*

Our country, the United States of America, was founded on the pursuit of religious freedom. If the FCC begins to grant exemptions in mass numbers to non-profit/religious organizations, entire segments of many television station's air day will be without captions. This goes against every comment made above by the commissioners that video programming be accessible to everyone. Those hearing-impaired individuals that watch religious programming will be left behind and that would be a tragedy!

Churches make up a very important part of every community. It is within their mission to support the basic needs of all people within their reach. Nearly all religious programming asks for donations or offerings at some point in the show or season. By providing captions to meet the needs of a significant population group, the churches will find themselves with an expanded TV viewership, which will lead to an increase in their membership and other support from the community. When children and adults are able to read captions on religious programs, they are influenced to live up to high moral standards and contribute their part to the community. Hearing loss is the number one growing disability among senior citizens - they are finding themselves depending on captioning to listen to the message.

All video programmers have had ten years to prepare for the captioning regulations now in place, and temporary waivers when appropriate. When you give permanent exemptions to the two programmers, it reverses all the access we have worked on for years. We ask that the FCC reconsider that a cost of as little as \$60 per program is truly an undue burden and worth the risk of tragically eliminating captions from religious programming.

Thank you for your consideration,

Sincerely,

Matthew Cook  
President/Owner  
Aberdeen Captioning, Inc.  
22362 Gilberto, Suite 230  
Rancho Santa Margarita, CA 92688  
Cell Phone – 949-412-7335  
Email: [mbcook@cox.net](mailto:mbcook@cox.net)

Becky Isaacs  
VP/Owner  
Aberdeen Captioning, Inc.  
22362 Gilberto, Suite 230  
Rancho Santa Margarita, CA 92688  
Office Phone – 949-858-4415  
Email: [becky@abercap.com](mailto:becky@abercap.com)

cc:

Monica Desai, Chief, Consumer & Governmental Affairs Bureau; Jay Keithley, Deputy Chief (Policy), Consumer & Governmental Affairs Bureau; Tom Chandler, Chief, Disability Rights Office  
Cheryl King, Deputy Chief, Disability Rights Office

US Congressman, Gary G. Miller  
US Senators, Dianne Feinstein and Barbara Boxer

22362 Gilberto, Suite 230, Rancho Santa Margarita, CA 92688  
Phone 800-688-6621 Fax 949-858-4405  
[www.abercap.com](http://www.abercap.com)