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January 27, 2011

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
 Federal Communications Commission
 Office of the Secretary
 445 12th Street, S.W.
 Room TW-A325
 Washington, DC 20554

FILED/ACCEPTED

JAN 27 2011

Federal Communications Commission
 Office of the Secretary

Re: **Petition for Rulemaking**

Dear Secretary Dortch:

Pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. §1.401, enclosed for filing are an original and four (4) copies of a Joint Petition for Rulemaking to Amend the Commission's Rules to Eliminate Class Exemptions, submitted by Telecommunications for the Deaf and Hard of Hearing, Inc., Hearing Loss Association of America, Association of Late-Deafened Adults, American Association of the Deaf-Blind, American Association of People with Disabilities, Tucson Citizens for Better Captioning, Deaf and Hard of Hearing Consumer Advocacy Network, and California Coalition of Agencies Serving the Deaf and Hard of Hearing.

Please date-stamp and return the enclosed extra copy of this filing and return it in the self-addressed envelope provided. Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Claude L. Stout

Enclosure

Copy to (enclosed):

The Honorable Julius Genachowski
 The Honorable Michael J. Copps
 The Honorable Robert M. McDowell
 The Honorable Mignon Clyburn
 The Honorable Meredith Attwell Baker

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**"Promoting Equal Access to Telecommunications and Media for
 People who are Deaf, Late-Deafened, Hard-of-Hearing or Deaf-Blind"**

FILED/ACCEPTED

JAN 27 2011

Federal Communications Commission
Office of the Secretary

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

In the Matter of)
)
Telecommunications for the Deaf)
and Hard of Hearing, Inc. et al. Petition) RM -
to Amend the Commission's Rules)
to Eliminate Class Exemptions)

PETITION FOR RULEMAKING

of

**Telecommunications for the Deaf and Hard of Hearing, Inc.,
Hearing Loss Association of America,
Association of Late-Deafened Adults,
American Association of the Deaf-Blind,
American Association of People with Disabilities,
Tucson Citizens for Better Captioning,
Deaf and Hard of Hearing Consumer Advocacy Network, and
California Coalition of Agencies Serving the Deaf and Hard of Hearing.**

Dated: January 27, 2011

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SUMMARY

This Petition for Rulemaking is filed by eight national and state organizations representing individuals with hearing or speech disabilities, herein referred to as TDI, et al. By this Petition, TDI, et al. request that the Commission adopt new rules for closed captioning of video programming eliminating the broad class exemptions from captioning that now exist. Those exemptions have undermined the realization of Congress' vision of "full accessibility" to video programming for all Americans.

Through communications with their members, TDI, et al. are constantly made aware of the frustration felt by people with hearing loss when they experience deficient captioning of television broadcasts. In this petition, TDI, et al. explain the difficulties, disadvantages and deprivations Americans with hearing disabilities experience by reason of the following captioning exemptions that are permitted by the FCC's rules:

- Late night programming;
- Commercial and Political Advertising;
- Locally produced Non-News Programming;
- Interstitials, Promotional Announcements and Public Service Announcements;
- Channels Producing Revenues of Under \$3 Million.

In addition, TDI, et al. assert that the Electronic Newsroom Technique of captioning ("ENT") produces incoherent programming, risks public safety, and should not be counted toward compliance with captioning requirements. The use of unacceptable ENT captioning is prevalent in many large cities that do not happen to be among the "top 25" television markets.

In 2006, the FCC's Chief of the Consumer and Government Affairs Bureau improperly established a new class of exempt programming without a rulemaking proceeding. Now known

as the *Anglers Exemption Order*, this single decision overturned the Commission's long-standing approach to exemption petitions under the undue burden standard and ultimately resulted in the wrongful grant of hundreds of petitions for exemption. TDI and six other organizations filed an Application for Review of the *Anglers Exemption Order* in 2006, but that application has yet to be acted upon by the Commission. In addition to adopting new rules, TDI, et al. urge the Commission to rescind the *Anglers Exemption Order*.

In enacting Section 713 of the Communications Act, Congress understood that video programming has become an increasingly important part of the home, school and workplace, and expressed the intent that all Americans ultimately should have access to video services and programs. This Congressional goal has been undermined by excessive deference to programming distributors' complaints as to the costs of captioning. In fact, those costs have decreased substantially in the years since 1997, when the Commission issued its *Closed Captioning Order*. Moreover, the Commission's expectation of voluntary captioning by advertisers has not been realized. Accordingly, the Commission should recognize that the present exemptions are inequitable, unreasonable and unwarranted. A new rulemaking should be initiated to eliminate class exemptions.

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

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Telecommunications for the Deaf)
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to Amend the Commission’s Rules)
to Eliminate Class Exemptions)

PETITION FOR RULEMAKING

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), Hearing Loss Association of America (“HLAA”), Association of Late-Deafened Adults (“ALDA”), American Association of the Deaf-Blind (“AADB”), American Association of People with Disabilities (“AAPD”), Tucson Citizens for Better Captioning (“TCBC”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), and California Coalition of Agencies Serving the Deaf and Hard of Hearing, (“CCASDHH”) (hereinafter referred to together as “TDI, et al.”), petition the Federal Communications Commission (“Commission”), pursuant to 47 C.F.R. § 1.401, to initiate a rulemaking to eliminate the class exemptions that have impaired the effectiveness of universal captioning rules. TDI, et al. and their members have a paramount interest in advancing the integration of deaf, hard-of-hearing, late-deafened and deaf-blind persons into the mainstream of our communication-intensive society, and request that the Commission adopt new rules for closed captioning of video programming.

I. Statement of Interest

TDI, et al. are national and local non-profit organizations as well as grassroots advocacy coalitions that seek to promote equal access to telecommunications, including video

programming, for the 36 million Americans who are deaf, hard of hearing, late deafened, or deaf-blind so that they may enjoy the opportunities and benefits of the telecommunications revolution to which they are entitled. Exhibit A describes the organizations that are joining with TDI in submitting this Petition.

In Section 305 of the Telecommunications Act of 1996 (“1996 Act”),¹ a forward thinking Congress required that video programming be closed captioned, and added Section 713 of the Communications Act of 1934, as amended (“Communications Act”).² Notwithstanding this requirement, deaf and hard of hearing Americans often express to TDI, et al. their frustration that the promise of Section 713 has not been fully achieved, due in large part to the host of closed captioning exemptions the Commission adopted some 14 years ago.

Television is a visual and audio medium. Its influence on popular culture is enormous, notwithstanding competition from the Internet and other programming sources. According to Nielsen, as of the Fourth Quarter 2009, 292 million people in the U.S. with TVs spend on average 153 hours, 47 minutes each month watching television.³ In 2008-2009, the average total hours of television viewing per day for persons aged two years and above was 4 hours, 49 minutes; for households it was almost 8 and 1/2 hours. The average total hours of television viewing per day during prime time was 1 hour, 52 minutes.⁴

TDI, et al. have a strong interest in advancing the integration of deaf, hard of hearing,

¹ Section 305, Pub. L. 104-104, 110 Stat. 56 (1996).

² *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, MM Docket No. 95-176, FCC 97-279, Report and Order, 13 FCC Rcd 3272, 3273, ¶ 1 (rel. Aug. 22, 1997) (“*Closed Captioning Order*”); 47 C.F.R. § 79.1(e); Section 713 was codified at 47 U.S.C. § 613.

³ The Nielsen Company, “Three Screen Report” (Vol. 7, 4th Qtr. 2009), http://in.nielsen.com/site/documents/3Screens_4Q09_US_rpt.pdf (last visited Jan. 7, 2011).

⁴ The Nielsen Company, “Historical Daily Viewing Activity Among Households & Persons 2+” (Nov. 10, 2009), http://blog.nielsen.com/nielsenwire/media_entertainment/average-tv-viewing-for-2008-09-tv-season-at-all-time-high/ (last visited Jan 7, 2011).

late-deafened and deaf-blind persons into the mainstream of our communication-intensive society. By this Petition, TDI, et al. request that the Commission adopt new rules for closed captioning of video programming to realize Congress' vision of "full accessibility" to video programming for all Americans.⁵

II. Background

A. Section 713 of the Communications Act

Section 713 of the Communications Act, entitled "Video Programming Accessibility," requires that video programming be closed captioned to ensure that it is accessible to deaf and hard of hearing individuals, subject to exemptions that must be justified by demonstrating economic burden for a class exemption or undue burden for a specific exemption.⁶ Section 713 required the Commission to adopt and implement regulations to maximize closed captioning of video programming, regardless of the entity that provides the programming to consumers or the category of programming.

The Act distinguished between new programming and pre-rule programming. Section 713(b) charged the Commission with prescribing rules to establish implementation schedules to ensure that: (1) video programming first published or exhibited after the effective date of the regulations ("new programming") is "fully accessible" through the provision of closed captions, and (2) video programming providers or owners "maximize the accessibility" of video programming first published or exhibited prior to the effective date of such regulations ("pre-rule programming") through the provision of closed captions.⁷

B. The Closed Captioning Rules

⁵ 47 U.S.C. § 613(b).

⁶ 47 U.S.C. § 613(d)-(e).

⁷ 47 U.S.C. § 613(b).

In its *Closed Captioning Order* released on August 22, 1997, the Commission established rules that included an eight-year transition schedule to phase in closed captioning for “new” non-exempt video programming (for programs first shown on or after January 1, 1998).⁸ Pursuant to the Commission’s subsequent *Order on Reconsideration*, as of January 1, 2006, 100% of video programming distributors’ new non-exempt programming must be closed captioned unless it meets one of many exceptions.⁹ The Commission established a ten-year transition period for pre-rule programming,¹⁰ requiring that at least 30% of a channel’s pre-rule programming be captioned beginning on January 1, 2003¹¹ and 75% of all pre-rule programming delivered to consumers be captioned by January 1, 2008.¹²

The Commission also included a “no backsliding rule” requiring video programming providers to continue providing closed captioning at a level substantially the same as the average level they provided during the first six months of 1997, even if that amount of closed captioning would exceed the benchmarks.¹³

On July 23, 2004, TDI--together with ALDA, DHHCAN, HLAA (formerly Self-Help for Hard of Hearing People, Inc. or “SHHH”) and National Association of the Deaf (“NAD”)--filed a Petition for Rulemaking with the Commission requesting that a proceeding be initiated to establish additional enforcement mechanisms to better implement the closed captioning rules and to establish closed captioning quality standards to ensure high quality and reliable closed

⁸ *Closed Captioning Order*, 13 FCC Rcd at 3294, ¶¶ 44-45.

⁹ *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, MM Docket No. 95-176, 13 FCC Rcd 19973, 19976, ¶¶ 5-6 (rel. Oct. 2, 1998) (“*Order on Reconsideration*”).

¹⁰ “Pre-rule programming” is programming published or exhibited prior to January 1, 1998.

¹¹ *Order on Reconsideration*, 13 FCC Rcd at 19988.

¹² *Id.* at 19984-19988; 47 C.F.R. § 79.1(b).

¹³ *Id.* at 19983.

captioning.¹⁴ The Commission granted the petition for rulemaking and released a Notice of Proposed Rulemaking on July 21, 2005.¹⁵ That rulemaking resulted in a robust debate, producing numerous comments, reply comments and ex parte notices. At the conclusion of the proceeding, the Commission issued an order on November 7, 2008, adopting new complaint procedures and new rules requiring video programming distributors to make their contact information available to consumers.¹⁶ To the great disappointment of deaf and hard of hearing participants in the rulemaking, the Commission did not act on other issues raised in the 2005 Captioning NPRM, such as captioning quality standards. Although the Consumer and Governmental Affairs Bureau recently sought comments to refresh the record on the 2005 NPRM,¹⁷ it is not clear if or when the Commission will take action to conclude that rulemaking. TDI, et al. urge the Commission to address the outstanding issues raised in 2005 in addition to beginning a new rulemaking as requested herein.

C. *The Anglers Exemption Order*

Because of the *Anglers Exemption Order*, even the Commission's existing rules, already full of exemptions, are not being enforced in certain circumstances. On September 11, 2006, the Chief of the Consumer and Government Affairs Bureau, but not the Commission itself, granted two petitions for an exemption from closed captioning requirements ostensibly under the "undue burden" standard of Section 713(d)(3) that were filed by two non-profit religious ministry

¹⁴ *Closed Captioning of Video Programming—Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility, Petition for Rulemaking*, PRM04MB (filed July 23, 2004).

¹⁵ *Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc., Petition for Rulemaking*, Notice of Proposed Rulemaking, CG Docket No. 05-231, FCC 05-142 (2005) ("2005 Captioning NPRM").

¹⁶ *Closed Captioning of Video Programming*, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, CG Docket No. 05-231, FCC 08-255 (2008).

¹⁷ Public Notice, Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Notices of Proposed Rulemaking Regarding Closed Captioning Rules, CG Docket No. 05-231, ET Docket No. 99-254 (rel. Oct. 25, 2010) ("Public Notice").

organizations - Anglers for Christ Ministries, Inc. and New Beginning Ministries.¹⁸ In granting those petitions, the Bureau overturned its long-standing approach to exemption petitions under the undue burden standard and declared that:

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, and other activities important to its mission, we will be inclined favorably to grant such a petition because ... this confluence of factors strongly suggests that mandated closed captioning would pose an undue burden on such a petitioner.¹⁹

This decision improperly established a new class of exempt programming without a rulemaking proceeding as required by Section 713(d)(1) and the Administrative Procedure Act (“APA”),²⁰ and ultimately resulted in the wrongful grant of 297 petitions for exemption, in addition to the two granted in the *Anglers Exemption Order* itself.

On October 12, 2006, TDI, NAD, HLAA, ALDA, AAPD, DHHCAN and CCASDHH filed an Application for Review of the *Anglers Exemption Order* on the grounds that the Bureau went beyond its delegated authority, ignored the Commission’s rules and the Communications Act, disregarded the APA’s notice and comment requirements for adoption of new rules, and improperly and unilaterally established a new class of exempt programming.²¹ TDI, et al.

¹⁸ *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*”).

¹⁹ *Anglers Exemption Order*, at ¶ 13.

²⁰ 47 U.S.C. § 713(d)(1). Section 553 of the APA sets forth the procedures, including notice and comment, which the Commission must follow in order to adopt such exemptions by regulation. 5 U.S.C. § 553.

²¹ *Anglers for Christ Ministries, Inc.; New Beginning Ministries; Video Programming Accessibility; Petitions for Exemption from Closed Captioning Requirements*, CGB-0005, CGB-0007, Docket No. 06-181, Application for Review of Bureau Order, at 9 (2006) (“Application for Review”); 47 U.S.C. § 613(d)(1); 5 U.S.C. § 553; See, *In the Matter of Anglers for Christ Ministries, Inc.; New Beginning Ministries; Video Programming Accessibility; Petitions for Exemption from Closed Captioning Requirements*, CGB-0005, CGB-0007, Docket No. 06-181, Petitioner’s Reply to Opposition of Application of Review of Bureau Order, at 2-3 (Nov. 9, 2006) (“the Bureau’s *Angler’s Exemption Order* was not a clarification of the undue burden standard but rather an obfuscation of the standard”).

underscored that the Consumer and Government Affairs Bureau did not issue notice to the public that it might adopt such a general rule, nor did it seek comment from the public. By this action, the Bureau violated both Section 713 of the Communications Act and Section 553 of the Administrative Procedure Act (“APA”).²² To date, neither the Bureau nor the Commission have acted on TDI, et al.’s Application for Review. In addition to adopting new rules, TDI, et al. urge the Commission to rescind the *Anglers Exemption Order* and enforce existing rules.

D. *The Closed Captioning Rules 14 Years Later*

Representatives of the deaf and hard of hearing community experience ongoing dissatisfaction with the results of Commission rules. In the Spring, 2009, issue of *TDI World*, TDI’s instrument of communication to the deaf and hard-of-hearing population of America, Dr. Roy E. Miller, TDI’s Board President, decried the portions of the rules that render deaf and hard of hearing people “second class citizens,” and argued for captioning of “every word spoken on TV, with absolutely no waivers and no exemptions.”²³ The Commission is bound by requirements of the Communications Act, and persons who are deaf or hard-of-hearing are the intended beneficiaries of Section 713. However, other Americans benefit from universal captioning as well. For example, one party’s comments, submitted to the Commission in its recent inquiry to refresh the record, state that “captioning serves nearly 100 million Americans.”²⁴ Of those who benefit, 36 million are deaf and hard-of-hearing individuals, but

²² 47 U.S.C. § 613(d)(1); 5 U.S.C. § 553.

²³ Roy D. Miller, Ph.D, *Let’s Go From Dream to Reality*, *TDI World*, vol. 40, No. 1 (2009) at 6.

²⁴ *In re Closed Captioning of Video Programming, Telecommunications for the Deaf, Inc. Petition for Rulemaking*; Verizon Reply Comments, CG Docket No. 05-231 at n. 3 (Dec. 16, 2005)(submitted in the Commission’s proceeding to refresh the record on Nov. 24, 2010)(citing National Court Reporters Ass’n, white paper, “The Captioning Crisis” at 10 (rel. 2005) available at <http://www.ncraonline.org/NR/rdonlyres/B892DFF3-B9FC-4BCB-81E9-B91231123977/0/whitepaper.pdf> (hereinafter, “Verizon Reply Comments in 2005 Captioning NPRM”).

captioning also benefits persons learning to read and persons for whom English is a second language.

In its previous decisions, the Commission anticipated reexamination of captioning exemptions. For example, in its *Order on Reconsideration*, the Commission stated that it expected to reconsider the continued need for a captioning exemption for late night programming.²⁵ That reexamination of the late night programming exemption has not yet occurred, and its continuation is a frustration for deaf and hard of hearing Americans and others who rely on captioning. In addition, the Commission stated in the *Order on Reconsideration* that it would reassess its decision to impose real-time captioning only on the four major national broadcast networks and their affiliates in the top 25 television markets and non-broadcast networks serving 50% or more of the total number of MVPD households.

Through communications with their members and by their associations with other non-profit organizations and agencies serving deaf, hard of hearing, late-deafened, or deaf-blind Americans, TDI, et al. are constantly made aware of the difficulties people with hearing loss face in experiencing, enjoying and benefiting from video programs on television. For example, in response to a survey conducted by TDI, many deaf and hard of hearing persons were frustrated that political advertising is often not captioned and as a result felt that their votes simply were not important to the candidates.²⁶

In addition to the fundamental right of voting, captioning allows Americans with hearing disabilities to participate in our nation's popular culture. The same survey that found dismay that political advertising is often not captioned found the same dissatisfaction with programming on

²⁵ *Order on Reconsideration*, 13 FCC Rcd at 20018, ¶ 103.

²⁶ TDI Closed Captioning Survey, at 6, 11, 17 (Dec. 2010) ("Petitioner's Survey") (including a participant's statement that "I am unable to follow any of the political ads due to the fact NONE are captioned, I suppose my vote does not matter to these politicians."). Copies of the Survey results are available upon request.

the Sci Fi Channel, which is reported to often carry programs without captioning. TDI, et al. have received reports that television movies--particularly those classic movies shown on cable networks such as AMC, Hallmark and Turner--are frequently not captioned. In addition, while they are captioned, persons with hearing disabilities have commented multiple times that *The Daily Show* and *The Colbert Report* have such delayed captions as to be very difficult to watch. Programming of this sort is critical to understanding and participating in mainstream American culture.

E. *Changed Circumstances*

The Commission understood in 1997 that conditions would not be static. It was widely expected that the costs of captioning would decrease over time, due to new technology and other factors. Also, the exemption of late night broadcasts from the captioning requirement was premised on an understanding that viewership between 2:00 a.m. and 6:00 a.m. was low, and that advertising revenue was correspondingly limited. That conclusion was based on a “snapshot in time,” and may no longer be valid. The Commission was also concerned that captioning costs could impede development of the emerging producers of innovative cable television productions, but many of those nascent producers have proven to be successful, and have grown to be industry leaders. In fact, the changed circumstances anticipated by the Commission have come to pass, and it is time for an updated evaluation of captioning obligations.

In particular, the Commission was correct in anticipating that captioning costs would drop. Indeed, TDI, et al. have found evidence that off-line “pop-up” captioning now costs between 21 and 41 % less than it did in the mid-1990s.²⁷ Other data indicate that the cost of real

²⁷ See fn 119 and accompanying text.

time captioning in 2010 has dropped by as much as 85 %, adjusted for inflation.²⁸ These cost reductions provide evidence that the broad-based exemptions granted by the Commission in 1997 are no longer appropriate, and that the Electronic Newsroom Technique of captioning is now seldom, if ever, needed to hold down captioning costs.

TDI, et al. dispute that the exemption from captioning of late night programming was ever justified by the facts, but whatever reasons existed for that exemption in 1997 have diminished with time. Not only is this broad exemption challenged by the decline in captioning costs, but some time slots between 2:00 a.m. and 6:00 a.m. are growing in popularity. In 2009 a “national trend” was noted in which news broadcasts were commencing as early as 4:30 a.m.²⁹

Finally, the Commission should look again at whether the beneficiaries of captioning exemptions are actually the nascent broadcasters that the Commission feared would be burdened by unreasonable costs in 1997. Many of these companies have grown, their business plans having been validated by market success, and in some cases they have merged with larger companies. TDI, et al. believe that most are no longer in need of the extraordinary deference shown to them by the Commission in its previous rules.

III. Proposal for Rules

TDI, et al. respectfully submit that several of the exemptions have become outdated by the passage of time due to cost reductions in providing captioning and other developments. TDI, et al. urge the Commission to declare that a sufficient number of years have elapsed since the rules implementing Section 713 were first put into place, and that the time has come to launch the reexamination of several exemptions, as promised to the community of deaf and hard of hearing Americans.

²⁸ *Id.*

²⁹ See fn 36 and accompanying text.

A. Section 79.1(d)(5) of the Commission's Rules Should be Amended to Remove the Captioning Exemption for Late Night Programming

In its 1997 *Closed Captioning Order*, the Commission determined that late night programming should be exempted from captioning requirements, at least for a period of time.³⁰ Late night broadcasts are one of the entire classes of programming that the Commission has exempted based on the 1996 Act's "economically burdensome" standard.³¹ Section 613(d)(1) of the 1996 Act provides that "the Commission *may exempt by regulation* 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."³² The Commission determined that "at this time" (*i.e.*, 1997) low viewership and limited advertising revenue during the late night hours between 2:00 a.m. and 6:00 a.m., combined with the relative absence of residual market value of such programming and a perceived high cost of captioning, justified an exemption from the closed captioning requirement.³³ Commenters on behalf of deaf and hard of hearing citizens argued that the exemption was overly broad, but the Commission decided to retain it.³⁴

The late night exemption has the perverse effect of punishing programming providers who invest in the captioning of their programs aired at this time. TDI, et al. understand from industry sources that programming is available from multiple distributors, some programs are available either captioned or uncaptioned, and some programs that were previously captioned are now available only in uncaptioned versions. If the Commission did not permit uncaptioned

³⁰ *Closed Captioning Order*, 13 FCC Rcd at 3346, ¶ 155.

³¹ *Id.* at ¶ 90.

³² 47 U.S.C. § 713(d)(1).

³³ *Closed Captioning Order*, 13 FCC Rcd at 3346-3347, ¶ 155-156.

³⁴ *Order on Reconsideration*, 13 FCC Rcd at 20018, ¶¶ 99-102.

programming during late night hours, there would be no market in the United States for uncaptioned programs. The FCC's present rules allow distributors with less interest in reaching viewers who are deaf and hard of hearing to benefit financially by avoiding the cost of captioning for late night programming. In short, the late night exemption creates an economic disincentive to achieving the goal of universal captioning because programs without captions can still be aired during this time period.

Deaf and hard of hearing citizens abhor the late night exemption in part because the variety and quality of programming during non-traditional hours has expanded. Commission rules permit networks that serve multiple time zones in the United States to choose a 4-hour late night programming period that may differ slightly, so long as it commences no earlier than 12:00 a.m. and ends no later than 7:00 a.m. in each local time zone.³⁵ During the November 2009 ratings "sweeps" period, four local stations in Washington, D.C. introduced 4:30 a.m. newscasts, which precede their 5 am and 6 am newscasts. Called a "national trend," these early news broadcasts brought the four Washington stations more than 54,000 more viewers than their traditional fare of reruns and infomercials.³⁶

Apart from the early news broadcasts, much of the programming late at night is comprised of television reruns. It appears that the existence of unedited versions of rerun programs may often be a result of program distributors who chose to maximize their profits by editing and compressing videos in order to make time for more commercials when the program goes into syndication. This process of editing and compressing destroys the captioning data that previously existed in network programs, but if the program is intended to be broadcast after

³⁵ 47 C.F.R. § 79.1(d)(5).

³⁶ Lisa de Moraes, *A Plethora of Local News for Early Risers*, THE WASHINGTON POST, Jan. 2, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/02/AR2011010202585.html> (last visited Jan. 7, 2011).

midnight, distributors are under no obligation to restore what they've destroyed, leaving deaf and hard-of-hearing viewers with no access.³⁷ The beneficiaries of the FCC's current late night captioning exemption policy are the less responsible programming providers for whom incurring a small expense for deaf and hard of hearing viewers is simply not a priority.

TDI, et al. note that exempting late night programming from the captioning requirement does not just disadvantage insomniacs, but also those who watch the news before 6:00 a.m. because of long commutes to work, and those who work late shifts, often a class of people who are disadvantaged in other respects as well. Much of the work performed late at night imposes a multitude of inconveniences, not the least of which is the delinking the workers' schedules from those of their families. For an assembly line worker on the second shift, a waiter, nurse or office cleaner who gets home after midnight, the ability to relax by watching television for a couple of hours may be one of the small pleasures of life.

Hearing loss can be age related, and a relatively high percentage of older people use captioning. Retirees, as a group, commonly watch television very late at night. These older Americans, together with the deaf and hard of hearing workers who watch TV during non-traditional hours due to their employment, are deserving of equal benefit of the nation's commitment to captioning video programming. In a recent survey of 486 deaf and hard-of-hearing Americans, as well as their families and other interested persons, 26.4% of the participants said that they frequently or very frequently watch television between 2:00 a.m. and 6:00 a.m.³⁸ The Commission should renounce its previous statement that "for much of the

³⁷ Gary D. Robson, *The Closed Captioning Handbook*, 97 (Elsevier, 2004), Google Books at http://books.google.com/books?id=SdGUcz8QV9EC&pg=PA97&lpg=PA97&dq=video+compression+captioning&source=bl&ots=jcJuTdxYF4&sig=VL51R0HdAROfOTK8FvFc3BOzO0o&hl=en&ei=T84HTf-4HIH58Aa1pLDWCg&sa=X&oi=book_result&ct=result&resnum=9&ved=0CGEQ6AEwCA#v=onepage&q=video%20compression%20captioning&f=false (last visited Jan. 7, 2011).

³⁸ Telecommunications for the Deaf & Hard of Hearing, Inc., Captioning Survey dated Sept. 29,

history of television broadcasting, the late night hours were not occupied with programming at all,”³⁹ which rings of “be thankful for what you get.” Today’s world has changed, and businesses that are “Open 24 Hours” have become far more common, requiring more jobs outside the traditional 9 a.m. to 5 p.m. shift.

In its 1997 *Closed Captioning Order*, the Commission stated that it “may review [the late night programming] decision in the future to determine whether we should modify this exemption.”⁴⁰ In light of the dramatically lower costs of captioning today and broad availability of captioning personnel, as discussed below, the Commission should reconsider and eliminate this exemption immediately.

B. *Section 79.1(a)(1) of the Commission’s Rules Should be Amended to Remove the Exclusion of Advertisements of 5 Minutes or Less from the Definition of Video Programming.*

Market forces have not achieved the goal of captioning for advertisements. The Commission decided in the 1997 *Closed Captioning Order*, and confirmed in the *Order on Reconsideration*, that “short-form” advertising is different from “programming,” and is not subject to captioning obligations.⁴¹ By this single decision, the Commission scrapped the captioning requirement for 23% of the broadcast material that appears on commercial television.⁴² A few large national advertisers caption their advertisements voluntarily, but many

2010 (“2010 Captioning Survey”) (responding to the question “Some people watch TV very late at night. How often do you watch TV between 2:00 a.m. and 6:00 a.m.?”). In the survey, the term Frequently was defined as “once or twice a week,” and Very Frequently was defined as “several times a week.”

³⁹ *Closed Captioning Order*, 13 FCC Rcd at 3346-3347, ¶ 155.

⁴⁰ *Closed Captioning Order*, 13 FCC Rcd at 3346-3347, ¶ 155.

⁴¹ *Closed Captioning Order*, 13 FCC Rcd at 3325-3326, 3345-3346, ¶¶ 110-112, 152-153; *Order on Reconsideration*, 13 FCC Rcd at ¶¶ 103-107.

⁴² According to Kantar Media, in the Fourth Quarter 2009, the total average duration of network ad messages per hour for primetime, unscripted programs was 14 minutes, 5 seconds (“14:05”), and 14:06 for prime time scripted programs. During Late Night programming, total average duration of network ad messages per hour was 15:51. (Source: “Kantar Media Reports U.S. Advertising Expenditures Declined 12.3 Percent in 2009,” BusinessWire (March 17, 2010) available at

others do not. In TDI, et al.'s recent survey of captioning viewers, 79.7% of the respondents reported that only "some" or "very few" commercials are captioned. ⁴³

For example, even though in 2010 companies paid on average \$2.7 million for a 30 second advertisement during Super Bowl XLIV, which was viewed by an estimated 100 million Americans, about 8.6% of whom were likely people who are deaf or hard of hearing⁴⁴ (i.e., 8 million such viewers), at least 15 companies elected not to close caption their Super Bowl commercials. Those companies included General Motors (Chevrolet), McDonald's, Comcast, Mazda, Honda, Etrade, Qwest, Callaway Golf, Dairy Queen, Kemps, Skechers, and others.⁴⁵ Thus, deaf and hard of hearing persons were denied the shared experience of millions of Americans of evaluating, discussing, praising and criticizing Super Bowl commercials. Tellingly, many large companies did not recognize sufficient market incentives to close caption Super Bowl commercials that cost on average \$2.7 million to air and well over \$370,000 to produce, notwithstanding the opportunity to reach one of the largest annual television audiences in America and an average cost of only a few hundred dollars to add captions.

In 1997, when the first rules on captioning were issued, the Commission acknowledged the broadcast and advertising industry arguments that sufficient market incentives existed to encourage increased voluntary captioning of advertisements.⁴⁶ As demonstrated by the Super Bowl experience, those projected market incentives have not been sufficient to prompt many major corporations to caption their advertisements. The TDI, et al. survey of captioning viewers,

http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20100317005458&newsLang=en.)

⁴³ 2010 Captioning Survey (responding to the question "[i]n your experience, how many of the commercials on TV are captioned?").

⁴⁴ *Report to Congress*, 11 FCCR 19226, at ¶ 31.

⁴⁵ *See, Update for the 2010 Super Bowl*, Captions.com (Feb. 8, 2010), posted online at <https://www.captions.com>.

⁴⁶ *Closed Captioning Order*, 13 FCC Rcd 3272, 3325, ¶ 110.

and the 486 responses it received, amply demonstrates that the number of advertisements that are captioned remains small.

One participant in TDI, et al.'s 2010 captioning survey prepared a tally of a single one-hour episode of *All My Children*, broadcast in Arizona in October of 2010. That one hour of daytime television contained an astounding 43 commercials and 10 other interstitials, promoting both local and national products, services, events and other programs. Of this large number of commercials and interstitials, 35 were not captioned. The uncaptioned commercials included advertisements for such well known companies and products as Hasbro Playskool, Bufferin, Maybelline, Fisher-Price, Lysol, Hershey's, Nabisco, Arm & Hammer, Kmart, Toys R Us, and Progresso Soup. The hour also contained nine promotions for the ABC television network and the local ABC affiliate, none of which were captioned.⁴⁷

The Supreme Court has long recognized that advertising is a form of commercial speech, afforded protection under the Constitution of the United States, with a narrow exception for commercial speech that is misleading or proposes unlawful activity.⁴⁸ In fact, the Supreme Court has stated that the "commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."⁴⁹ The Supreme Court has recognized the "societal interests in broad access to complete and accurate commercial information that the First Amendment coverage of commercial speech is designed to safeguard."⁵⁰ The Court

⁴⁷ E-mail report to Mr. Jim House of TDI, listing advertisements and promotions distributed on a cable network in Flagstaff, Arizona, during the broadcast of *All My Children* between 12:00 and 1:00 PST, Oct. 27, 2010, attached hereto as Exhibit B.

⁴⁸ See, e.g., *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 561-564 (1980); *Edenfield v. Fane*, 507 U.S. 761, 765-766 (1993); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983) (It is well established that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it.").

⁴⁹ *Edenfield*, 507 U.S. 767.

⁵⁰ See, e.g., *Edenfield*, 507 U.S. 766; *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-765 (1976).

acknowledged that “[c]ommercial expression not only serves the interests of the speaker, but also *assists consumers and furthers the societal interest* in the fullest possible dissemination of information.”⁵¹

Beyond these long-standing constitutional principles, from the standpoint of deaf and hard of hearing people, advertising plays an important part in American society. Advertising is one of the ways that Americans form opinions as to the quality of products and other comparison factors. Television advertising often provides a means to compare prices and learn where the lowest priced products are available. Some advertising is required by regulatory agencies to contain warnings and disclosures, to ensure that risks to the public are known. Television advertising also carries much of the political information available to the public in advance of elections, and some advertising is even provided as a condition to settlement of lawsuits.

TDI, et al. acknowledge that television is only one medium for delivering an advertising message, competing with direct mail, newspapers, magazines, billboards, the Internet, social media and radio. However, television advertising has an outsized impact on the conduct of society in general, because of the enormous number of people it reaches. As an example, when prescription drug companies began marketing their products directly to consumers on television, sales skyrocketed, and many people believe that patients benefitted from the newfound knowledge of drug remedies available to them.⁵² Another example is the Super Bowl, which, according to reports in 2010, more people enjoy watching for the ads than for the game itself.⁵³

⁵¹ *Central Hudson Gas*, 447 U.S. 561-562 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising.”) (emphasis added).

⁵² Alix Spiegel, *Selling Sickness: How Drug Ads Changed Health Care*, NPR, Oct. 13, 2009, <http://www.npr.org/templates/story/story.php?storyId=113675737> (last visited Apr. 5, 2010).

⁵³ Nielsen.com, *Most Super Bowl Viewers Tune in for the Commercials*, Nielsen Says (Jan. 20, 2010), http://en-us.nielsen.com/main/news/news_releases/2010/january/most_super_bowl_viewers (last visited Apr. 5, 2010).

Moreover, paid television ads contain moral and political messages, along with important commentaries on modern life, as proved in Super Bowl XLIV, when abortion rights advocates demanded that an ad proposed by a conservative religious organization be rejected by CBS.⁵⁴

In 1997 and 1998, the Commission decided that short-form advertising is “separate from programming and thus not subject to the captioning obligation.”⁵⁵ However, more than a decade later, any argument that advertising is less important than other programming on television to deaf and hard of hearing Americans is belied by the facts and American cultural norms. The Commission determined to exempt short form advertisements in part because it believed there was a trend toward the voluntary captioning of commercials by advertisers, and “that this trend will increase.”⁵⁶ However, this trend has not materialized. While some people may hope never to see or hear another television ad, this should be a personal choice. Deaf and hard of hearing people who cannot hear television advertisements are being deprived of information available to others and a large part of popular culture in America, which is what Section 713 was intended to prevent.

TDI, et al. applaud the Production Management Committee of the Association of National Advertisers (“ANA”), which in December of 2010 announced a recommendation that all television commercials be closed captioned.⁵⁷ Quoted in the ANA’s recommendation is a statement of John Lick, Executive Producer of the Target Corporation, stating that: “The process is simple, the cost reasonable, and the benefit substantial. There really is no reason not to take

⁵⁴ Ed Stoddard & Ben Klayman, *Super Bowl Ad Stokes U.S. Abortion Controversy*, Reuters, Jan. 26, 2010, <http://www.reuters.com/article/idUSN2612635220100126> (last visited Apr. 5, 2010).

⁵⁵ *Closed Captioning Order*, 13 FCC Rcd at 3345-3346, ¶ 152; *Order on Reconsideration*, 13 FCC Rcd at ¶ 107.

⁵⁶ *Closed Captioning Order*, 13 FCC Rcd at 3345-3346, ¶ 152.

⁵⁷ Hearing Access Program News Release, “Association of National Advertisers Recommends All Television Commercials be Closed-Captioned,” (rel. Dec. 15, 2010) *available from* Janice Schacter, Chair, Hearing Access Program, Jschacter@nyc.rr.com, attached hereto as Exhibit C.

the inclusive approach to television advertising.”⁵⁸ While ANA’s recommendation is an enormous step forward, it is not binding on advertisers, and the goal of captioning 100% of all advertising is still a long ways off if it were ever to be achieved voluntarily. Responsible advertisers will caption their productions without pressure, but experience shows that many will not accept the recommendations of their own industry. Therefore, the Commission should issue rules that require captions on all television advertisements.

C. *Electronic Newsroom Technique (“ENT”) Produces Incoherent Programming, Risks Public Safety of Deaf and Hard of Hearing Persons, and Should Not Be Counted Toward Compliance with Captioning Requirements Under the Commission’s Rules.*

ENT captions are created by software from a news script computer or teleprompter.⁵⁹ A critical deficiency in ENT captioning is that only material that is scripted is broadcast with captions, resulting in no captioning of substantial portions of live programming.⁶⁰ Spontaneous commentary, live field reports, breaking news and weather updates—including pre-event warnings involving flash flooding, tornados, snowstorms, hurricanes and other critical information—will ordinarily not be captioned when the ENT technique is used.⁶¹ Most local news broadcasting is heavily dependent on live field reports, with ostensibly spontaneous discussion between news anchors and reporters in the field. Without having captioned access to those unscripted on-air discussions, the 36 million deaf and hard of hearing members of the

⁵⁸ *Id.*

⁵⁹ ENT “uses computer software that converts a script into closed captioning.” The Commission noted that ENT captioning is “virtually cost free once the equipment and software are purchased at a cost generally estimated to be between \$2500 and \$5000” in the mid-90s. *Implementation of Section 305 of the Telecommunications Act of 1996 - Video Programming Accessibility*, Report, MM Docket No. 95-176, FCC 96-318, 11 FCC Rcd 19214, 19220, at ¶ 16 (rel. July 29, 1996) (“*Report to Congress*”).

⁶⁰ *Closed Captioning Order*, 13 FCC Rcd at 3311-3312, ¶ 84.

⁶¹ *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996: Video Programming Accessibility*, MM Docket No. 95-176, FCC 01-81, Clarification Order, ¶ 5 (rel. March 2, 2001) (“*Clarification Order*”) (“Only material that is scripted can be captioned using this technique and, thus, within a program live field reports, breaking news, sports and weather may remain uncaptioned.”).