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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Anglers for Christ Ministries, Inc.	)	CGB-CC-0005
	)	
New Beginning Ministries	)	CGB-CC-0007
	)	
Petitioners Identified in Appendix A	)	CG Docket No. 06-181
	)	
Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission's Rules; Video Programming Accessibility	)	CG Docket No. 11-175

MEMORANDUM OPINION AND ORDER, ORDER, AND NOTICE OF PROPOSED RULEMAKING

Adopted: October 20, 2011 **Released: October 20, 2011**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission:

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I. INTRODUCTION

1. The Federal Communications Commission ("Commission") has before it an Application for Review[1] of the Consumer and Governmental Affairs Bureau's ("CGB" or "Bureau") Order ("*Anglers Order*") granting closed captioning exemptions to Anglers for Christ Ministries, Inc. ("Anglers") and New Beginning Ministries ("New Beginning").[2] The Application for Review also challenges 296 additional closed captioning exemptions granted by the Bureau, each of which relied on the reasoning contained in the *Anglers Order*. In this Memorandum Opinion and Order ("*MO&O*"), we grant the Application for Review and reverse the two exemptions granted in the *Anglers Order* and the 296 exemptions subsequently granted in reliance on the *Anglers Order*.[3] Any petitioner whose petition is subject to dismissal[4] that wishes to continue receiving an individual exemption from the closed captioning rules must file a new petition, within 90 days from the release date of this *MO&O*, with updated information to support a claim that providing closed captions would be economically burdensome, in accordance with the guidance provided in the instant order[5] and the definition of this standard in the

[1] *See* Application for Review of the Bureau Order, CG Docket No. 06-181, CGB-CC-0005 and CGB-CC-0007, filed by Telecommunications for the Deaf and Hard of Hearing ("TDI"), the National Association of the Deaf ("NAD"), Deaf and Hard of Hearing Consumer Advocacy Network ("DHHCAN"), Hearing Loss Association of America ("HLAA"), the Association of Late Deafened Adults, the American Association of People with Disabilities, and the California Coalition of Agencies Serving the Deaf and Hard of Hearing (collectively "Consumer Organizations"), filed Oct. 12, 2006 ("Application for Review"). Consumer Organizations also filed a Petition for Emergency Stay, requesting that the Commission stay the *Anglers Order* and the related closed captioning exemptions, pending review of the Application for Review. Petition for Emergency Stay, CG Docket No. 06-181, filed Oct. 12, 2006 ("Petition for Stay"). Because we now reverse actions granting the exemptions to Anglers, New Beginning, and the petitioners listed in Appendix A, we now dismiss the Petition for Stay as moot.

[2] *Anglers for Christ Ministries, Inc., New Beginning Ministries, Video Programming Accessibility, Petitions for Exemption from Closed Captioning Requirements*, CGB-CC-0005 and CGB-CC-0007, Memorandum Opinion and Order, 21 FCC Rcd 10094 (*Anglers Order*) (CGB 2006).

[3] Although the Application for Review lists 298 grants in total, Commission records show that a total of 303 exemptions were granted – two in the *Anglers Order* and 301 by subsequent orders. The reason that this MO&O reverses 298 (and not 303) exemptions is that there were five exemptions that the Consumer Organizations did not challenge, which became final. These petitions were: (1) CGB-CC-0334, filed Jan. 10, 2006 by Video Inspirations; (2) CGB-CC-0348, filed Dec. 21, 2005 by Holy Trinity House of God; (3) CGB-CC-0349, filed Jan. 9, 2006 by Christ is the Rock, Inc; (4) CGB-CC-0366, filed Dec. 30, 2005 by Frazer Memorial Methodist Church; and (5) CGB-CC-0435, filed Feb. 16, 2006 by Media Group International "Robby Mitchell Ministries." We do not address these five exemptions in the context of this proceeding. All petitioners whose exemptions are reversed by this *MO&O* are identified in Appendix A, attached hereto.

[4] All such petitions are listed in Appendix A.

[5] *See* ¶¶ 16-29, *infra*.

accompanying *Interim Standard Order.*[6] In the accompanying *Interim Standard Order,* the Commission interprets on a provisional basis the term "economically burdensome," as used in section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"), to be synonymous with the term "undue burden" formerly used in section 713(e) of the Communications Act.[7] In the *Notice of Proposed Rulemaking*, the Commission seeks comment on proposed amendments of the Commission's rules to make permanent the provisional interpretation of "economically burdensome," in ruling on individual closed captioning exemption requests in order to conform the Commission's rules to section 202 of the CVAA.

II. BACKGROUND

A. Closed Captioning Exemptions

2. In 1996, Congress added section 713 to the Act, setting forth requirements for closed captioning of video programming to ensure access by persons with hearing disabilities to television programming,[8] and directing the Commission to prescribe rules to carry out this mandate.[9] In 1997, the Commission adopted such rules, establishing implementation schedules for closed captioning that became effective on January 1, 1998.[10] The Commission's closed captioning rules currently require video programming distributors ("VPDs")[11] to caption 100% of all new, non-exempt English and Spanish language programming.[12]

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[6] *See* Section III.C., *infra,* which addresses the future treatment of the petitions reversed in this *MO&O*, and Section IV, the *Interim Standard Order,* which addresses the new economically burdensome standard.

[7] CVAA, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.). *See also* Amendment to CVAA, Pub. L. 111-265, 124 Stat. 2795 (2010), which makes technical corrections to the CVAA. Both the CVAA and its technical amendments were enacted on October 8, 2010.

[8] Section 305 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613) ("1996 Amendments").

[9] 47 U.S.C. §§ 613(b), (c).

[10] 47 C.F.R. § 79.1; *see 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, Report and Order, 13 FCC Rcd 3272 (1997) (*"Closed Captioning Report and Order"), 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, Order on Reconsideration, 13 FCC Rcd 19973 (1998) (*"Closed Captioning Reconsideration Order"*).

[11] A "video programming distributor" is defined as (1) any television broadcast station licensed by the Commission; (2) any multichannel video programming distributor (MVPD) as defined in Section 76.1000(e); and (3) any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. 47 C.F.R. § 79.1(a)(2). An "MVPD" is "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS [Broadband Radio Service, formerly known as the Multipoint Distribution Service (MDS)/Multichannel Multipoint Distribution Service (MMDS) and Educational Broadband Service, formally known as the Instructional Television Fixed Service (ITFS)] provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities." 47 C.F.R. § 76.1000(e). *See also* 47 U.S.C. § 522(13).

[12] 47 C.F.R. § 79.1(b). The effective date of the requirement for all nonexempt, new programming to be captioned was January 1, 2006 for English language programming, and January 1, 2010 for Spanish language programming.

(continued....)

3. Section 713 of the Act allows the Commission to grant two types of exemptions from its captioning mandates: categorical exemptions and individual exemptions. The exemptions at issue in this *MO&O* are individual exemptions, which are considered on a case-by-case basis upon submission of a petition to the Commission.[13] Section 713(d)(3), as originally enacted, permitted the Commission to grant such individual closed captioning exemptions to a provider,[14] owner, or producer of video programming that petitioned the Commission upon a showing that the closed caption requirements would "result in an undue burden."[15] Section 713(e) of the Act defines "undue burden" to mean "significant difficulty or expense,"[16] and directs the Commission to consider the following factors in making an undue burden determination: (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.[17] The petitioner also may present for the Commission's consideration "any other factors the petitioner deems relevant to the Commission's final determination," including alternatives that might constitute a reasonable substitute for closed captioning.[18]

4. Commission rules require the Commission to place any petition seeking an individual exemption from the closed captioning requirements under section 713(d)(3) of the Act on public notice, after which parties are given an opportunity to provide comments and petitioners are given an opportunity

(Continued from previous page)
Id. at §§ 79.1(b)(1)(iv), (b)(3)(iv). For pre-rule language programming (programming that first aired prior to the effective date of the Commission's closed captioning regulations adopted in 1998), the benchmarks require 75% of all nonexempt English programming to be captioned, and 30% of nonexempt Spanish language programming to be captioned, with the latter to increase to 75% on January 1, 2012. *See* 47 C.F.R. § 79.1(b)(2); *Closed Captioning Report and Order*, 13 FCC Rcd at 3301-02, ¶¶ 61-63; 47 C.F.R. § 79.1(b)(4)(ii).

[13] 47 U.S.C. § 613(d). The other type of exemptions, categorical exemptions, are permitted under Section 613(d)(1) of the Act. 47 U.S.C. § 613(d)(1) (allowing the Commission to "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"). Pursuant to this authority, in 1997, the Commission created thirteen categorical exemptions. 47 C.F.R. § 79.1(d). The *Anglers Order* referred to these as "self-implementing" exemptions. *Anglers Order*, 21 FCC Rcd at 10095, ¶ 3.

[14] A "video programming provider" is defined as "[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to broadcast or nonbroadcast television network and the owners of such programming." 47 C.F.R. § 79.1(a)(3). The House Conference Report to the 1996 Amendments further explained that the term "provider" refers to the "specific television station, cable operator, cable network or other service that provides programming to the public." H. Rep. No. 104-204, 104th Cong., 1st Sess. (1995) at 183.

[15] 47 U.S.C. § 613(d)(3); 47 C.F.R. § 79.1(f)(1). Any entity in the programming distribution chain, including the producer or owner of the programming, may petition the Commission for an individual exemption under section 79.1(f) of the Commission's rules. A petitioner may seek an exemption for "a channel of video programming, a category or type of video programming, an individual video service, a specific video program or a video programming provider." .

[16] 47 U.S.C. § 613(e); *see also* 47 C.F.R. §§ 79.1(f)(1), (2).

[17] 47 U.S.C. § 613(e). The Commission's rules mirror these statutory criteria for making undue burden determinations. 47 C.F.R. §79.1(f)(2)(i) – (iv).

[18] 47 C.F.R. § 79.1(f)(3).

to reply to those comments.[19] During the pendency of the petition, the programming that is the subject of the petition is exempt from the closed captioning rules.[20]

5. From 1997, when the Commission first adopted its closed captioning rules, until mid-2005, the Commission received fewer than 75 petitions for undue burden exemptions.[21] From October 2005 through August 2006, the Commission received approximately 600 such petitions.[22] CGB granted two of these petitions in the *Anglers Order*, and during the two weeks that followed, granted an additional 301 petitions in reliance on the reasoning of that *Order*.[23]

6. Since issuance of the *Anglers Order* and the grants of exemption that followed, Congress amended section 713(d)(3) to require petitioners for individual closed captioning exemptions to make a supported showing that providing captions would be "economically burdensome."[24]

B. *Anglers Order*

7. On October 12, 2005, Anglers filed a petition for an undue burden exemption from the closed captioning rules for its program, *The Christian Angler Outdoors Television Show*.[25] Anglers asserted that it was a non-profit organization, and that it began airing this program in January 2005, operating solely on contributions, but without a base of continued contributions.[26] According to Anglers, its program was produced in-house by a volunteer staff of Anglers, and was aired without compensation to Anglers. Anglers claimed that requiring closed captioning for its show would create an undue burden because this obligation would "possibly cause [it] to stop production."[27] However, Anglers also stated that it hoped to obtain closed captioning sponsorship, and to be able to provide closed captioning by 2007 for its production.[28] CGB placed the Anglers Petition on public notice on February 3, 2006.[29] No comments or oppositions were filed in response.

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[19] 47 C.F.R. §§ 79.1(f)(5); (6).

[20] 47 C.F.R. § 79.1(f)(11). Section 202(c) of the CVAA amends Section 713(d)(3) of the Act include this automatic exemption for programming that is the subject of an individual petition. Pub. L. No. 111-260 §202(c).

[21] During this period, the Commission's Media Bureau handled all closed captioning exemption requests that came to the Commission.

[22] The increase in filings during this period was a result of the January 1, 2006 effective date for captioning all new non-exempt English language programming. In the four and a half years since *Anglers* was decided, the Commission has received more than 500 additional undue burden exemption petitions, and at least 15 new petitions are filed each month.

[23] CGB assumed the responsibility for deciding closed captioning exemption petitions late in 2005.

[24] 47 U.S.C. § 613(d)(3), as amended by CVAA, Pub. L. No. 111-260 § 202(c).

[25] *Anglers for Christ Ministries, Inc. Request for Exemption from Commission's Closed Captioning Rules*, Case No. CGB-CC-0005, filed Oct. 12, 2005 ("Anglers Petition").

[26] *Id.* at 1. *See also* Letter from Tony Sellars, CEO, Anglers for Christ Ministries, Inc., to Amelia Brown, FCC, Case No. CGB-CC-0005 (Jan. 20, 2006) ("Anglers Supplement") (describing its show as "a faith-based outdoor show consisting of outdoor segments, along with a segment hosted by kids called *Reel Kids in the Outdoors*").

[27] Anglers Supplement at 1.

[28] *Id.* at 1.

[29] *Request for Exemption from Commission's Closed Captioning Rules*, CGB-CC-0005, Public Notice, 21 FCC Rcd 1124 (CGB 2006).

8. On November 1, 2005, New Beginning filed its undue burden petition with the Commission for a 30-minute television program titled *In His Image*, which aired once per week.[30] New Beginning alleged that captioning of this show would impose an undue burden *at this time* because its program would have to be sent to an outside source for captioning, and the added production cost would make production unaffordable, resulting in a negative impact on its ability to meet air-date deadlines.[31] New Beginning also asserted that it was a donor supported, non-profit organization, and that it would have been forced to discontinue its program and cease broadcast operations if it was required to provide closed captions.[32] In addition to requesting an undue burden exemption, New Beginning claimed that *In His Image* was a locally produced and distributed non-news program with no repeat value, and thus merited a categorical exemption pursuant to section 79.1(d)(8) of the Commission's rules.[33]

9. CGB placed the New Beginning Petition on public notice on December 20, 2005.[34] On January 19, 2006, TDI, NAD, DHHCAN and HLAA (collectively referred to as "TDI") filed a Consolidated Opposition to the New Beginning Petition, challenging the petitioner's failure to provide sufficient information to merit an undue burden exemption.[35] TDI also stated that New Beginning had failed to establish that *In His Image* qualified for a categorical exemption under section 79.1(d)(8), because it had not proven that its program was "truly local" in nature, as required for this categorical exemption.[36] In support, TDI pointed to New Beginning's statement that *In His Image* is shown nationwide on a weekly basis over the Sky Angel network, as well as on CTN in Eastern and Western Florida.[37]

10. On September 11, 2006, CGB issued the *Anglers Order*, granting permanent exemptions to Anglers and New Beginning.[38] The *Anglers Order* stated that both petitioners had demonstrated that an obligation to closed caption their programming would cause "significant hardship," and that there was a "significant risk that mandated closed captioning could cause both organizations to terminate their

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[30] New Beginning Ministries Request for Exemption from Commission's Closed Captioning, Case No. CGB-CC-0007 (Nov. 1, 2005) ("New Beginning Petition").

[31] *Id.* at 1 (emphasis added).

[32] *Id. See also id.*, Attachment, Affidavit of Costs (reporting that the substantial majority of its annual expenses consisted of payments to the Christian Television Network (CTN), *i.e.*, $750 per week to CTN to air its show, and alleging that it would cost $300 per episode to provide captioning).

[33] New Beginning Petition at 1.

[34] *Request for Exemption from Commission's Closed Captioning Rules*, CGB-CC-0007, Public Notice, 20 FCC Rcd 20126 (CGB 2005).

[35] Consolidated Opposition of TDI, NAD, DHHCAN, and HLAA to the Petition for Exemption from Closed Captioning Requirements Filed by New Beginning, Case No. CGB-CC-0007, filed Jan. 19, 2006 ("TDI Opposition"). Specifically, TDI asserted that New Beginning (1) failed to provide documentation to support its assertion that adding closed captioning would increase the per-episode production costs by $300, or to verify its claims regarding total income and production costs; (2) failed to provide a financial analysis to support its assertion that having to send the program to an outside source for captioning would "make production unaffordable" and require petitioner to "cease broadcast operations"; and (3) failed to provide information about revenue derived from the nationwide satellite and regional cable distribution of *In His Image*. *Id.* at 6-9.

[36] *Id.* at 10. 47 C.F.R. § 79.1(d)(8) exempts "programming that is locally produced by the video programming distributor, has no repeat value, is of local public interest, is not news programming, and for which the "electronic news room" technique of captioning is unavailable."

[37] *Id.* at 8-10.

[38] *Anglers Order*, n.1, *supra*.

programming."[39] It went on to state that neither Anglers nor New Beginning was producing its programming primarily for a commercial purpose. The exemptions granted in the *Anglers Order* also relied on the non-profit status of each of the petitioners, as well as the fact that the subject programming was "'not remunerative in itself,' insofar as the programming owners either [were] offering it free to providers, or paying for its exhibition."[40] The Order concluded 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, or curtail other activities important to its mission, we will be inclined favorably to grant such a petition because, as the petitions of Anglers and New Beginning demonstrate, this confluence of factors strongly suggests that mandated closed captioning would pose an undue burden on such a petitioner.[41]

11. Based on the reasoning of the *Anglers Order*, CGB subsequently granted 301 additional individual exemption requests from the closed captioning rules.[42] Of the 301 requests, 238 were not placed on public notice prior to being granted.[43] Petitioners were notified of their exemptions by letters sent by postal mail ("Bureau Letter Orders"), none of which were noticed to the public. The content of each of these Bureau Letter Orders was virtually identical, and each relied on the analysis set forth in the *Anglers Order*.[44] None of the Bureau Letter Orders addressed the extent to which each individual petitioner demonstrated that captioning would result in an undue burden.[45] Additionally, although each Bureau Letter Order spelled out the procedures contained in the Commission's rules governing consideration of undue burden closed captioning petitions, including the requirements for petitions to be placed on public notice and contain detailed facts supported by affidavit, each Order concluded, without further explanation concerning the specific circumstances of each petitioner's request, that "waiving these requirements in the instant case is consistent with the public interest."[46]

C. Application for Review

12. On October 12, 2006, the Consumer Organizations filed an Application for Review requesting the Commission to rescind the *Anglers Order* and the hundreds of exemptions that were based on that Order. They assert that the *Anglers Order* unilaterally and without the notice and comment

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[39] *Anglers Order*, 21 FCC Rcd at 10097, ¶ 9.

[40] *Anglers Order*, 21 FCC Rcd at 10097, ¶ 10 (inside quotations in original), quoting language from the Commission's discussion of the need for an exemption for locally produced, non-news programming in the *Closed Captioning Report and Order*, 13 FCC Rcd at 3347, ¶158.

[41] *Anglers Order*, 21 FCC Rcd at 10097, ¶ 11.

[42] Letters from Thomas E. Chandler, Chief, Disability Rights Office, FCC (dated Sept. 11 through Sept. 22, 2006) ("Bureau Letter Orders").

[43] *See* Application for Review at 12. According to the Application for Review, only 59 of the petitions granted during this period had been placed on public notice prior to being granted. Application for Review at Appendix A1.

[44] *See, e.g.*, Letter from Thomas E. Chandler, Disability Rights Office, FCC to First Apostolic Church, CGB-CC-0294 (dated Sept. 11, 2006); Letter from Thomas E. Chandler, Disability Rights Office, FCC to Bull Street Baptist Church, CGB-CC-0257 (dated Sept. 12, 2006); Letter from Thomas E. Chandler, Disability Rights Office, FCC to Fort Worth Bible Students, CGB-CC-0248 (dated Sept. 12, 2006).

[45] *Id.*

[46] *See* Bureau Letter Orders, n. 42, *supra* and examples listed at n. 44, *supra*.

required by the Administrative Procedure Act, established a new category of exempt programming for "non-profit organizations that do not receive compensation from video programming distributors for airing . . . programming and [who] represent that they may terminate or substantially curtail their programming or curtail other activities important to their mission if they are required to caption."[47] According to the Consumer Organizations, this standard is "unclear and unworkable" and creates an exempted class of programmers that is "impermissibly broad" in that it covers programmers who might in the future be able to provide captioning.[48] They also claim that it is "unclear how the Commission [will] determine what activities are 'important' to a petitioner's mission."[49] Finally, the Consumer Organizations argue that the Anglers and New Beginning petitions should not have been granted on a permanent basis, because each had requested time-limited waivers.[50]

13. With respect to the hundreds of exemptions that relied on the *Anglers Order*, the Consumer Organizations assert that failure to place most of the petitions on public notice deprived interested persons of an opportunity to comment on or oppose the petitions.[51] They further allege that the individual merits of each petition should have been considered,[52] and that in many cases, petitioners had failed to produce evidence to support their claims of undue burden.[53] They argue against the permanent exemptions granted, instead maintaining that temporary waivers "might have been more appropriate to the scenarios presented."[54] Finally, the Consumer Organizations argue that the failure of the *Anglers Order* to follow Commission precedent directing programmers to seek assistance from their distributors was arbitrary and capricious.[55]

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[47] Application for Review at 2-3, 9-10 (alleging a violation of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553). The Consumer Organizations also allege a violation of section 713(d)(1) of the Act, 47 U.S.C. § 613(d)(1), which requires the Commission to adopt categorical exemptions by regulation. Application for Review at 2-3, 10.

[48] Application for Review at 3, 19. For this reason, Consumer Organizations suggest that the new standard "threatens to allow a huge and totally unwarranted number of exemptions." *Id.* at 5. *See also* Reply to Opposition of Application for Review of Bureau Order, CG 06-181, filed Nov. 9, 2006 at 3, in which the Consumer Organizations also express concern that non-profit organizations that already caption might now be inclined to request exemptions, under the newly adopted theory that continuing to caption would "curtail other activities important to their mission." NRB filed a *"Response to Reply of Opposition of Application for Review of Bureau Order, or, in the Alternative, Request for Permission to File a Late Document"* on November 21, 2006, which only addressed the contention of the Consumer Organizations that the *NRB Opposition* had not been timely filed.

[49] *Id.* at 18-19. In this regard, the Consumer Organizations also state that the Commission failed to advise programmers on the evidence that would be needed to meet the new criteria when filing future exemption requests.

[50] *Id.* at 10.

[51] *Id.* at 3, 11-14, citing 47 C.F.R. § 79.1(f)(5),(6).

[52] *Id.* at 14.

[53] *Id.* at 4, 14.

[54] *Id.* at 19.

[55] *Id.* at 4, citing a footnote in the *Anglers Order* in which the Bureau departed from the ruling in *The Wild Outdoors, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements,* Case No. CSR 5949, Memorandum Opinion and Order, 20 FCC Rcd 11873, 11874, n. 25 (MB 2005) (*Wild Outdoors 2005*). The Consumer Organizations also contend that the Bureau's action, while neutral on its face, was intended to create a blanket exemption for religious programming from the captioning mandates in violation of the First Amendment's Establishment Clause. *See* Application for Review at 19, n.58. This *MO&O* does not reach these constitutional issues because, as discussed below, we grant the Application for Review on other grounds.

14. In an Opposition to the Application for Review, the National Religious Broadcasters ("NRB") argues that, rather than create a new class of exempt programming, the *Anglers Order* clarified "the meaning of 'undue burden' in a manner that is consistent with the expressed intent of Congress that non-profit organizations be considered for exemption, and that the detrimental impact of closed captioning costs be weighed in terms of [the] resultant potential for decrease in programming or diminution of mission-important activities."[56]

15. In November 2006, CGB placed 494 petitions for individual captioning exemptions on public notice.[57] At the same time, CGB held all of the exemptions at issue in the Application for Review in abeyance until the comment cycle on these petitions had ended.[58] On March 26, 2007, the Consumer Organizations submitted oppositions to nearly all of these posted petitions.

III. MEMORANDUM OPINION AND ORDER

16. We grant the relief sought in the Application for Review to the extent discussed below, and reverse exemptions granted to Anglers and New Beginning in the *Anglers Order*. We conclude that the reasoning used in that *Order* for evaluating requests for exemption from the closed captioning rules on the basis of undue burden under section 713(d)(3) is not supported by the Act, its legislative history, or the Commission's implementing regulations and Orders. Accordingly, the Commission rejects the undue burden criteria used in *Anglers*, and affirms instead the undue burden analyses previously applied to decisions that predate the *Anglers Order*. In addition, we reverse the 296 exemptions that were based on the rationale in the *Anglers Order*.[59] Each of the petitioners affected by this *MO&O* shall be provided with a copy of this *MO&O* and notified, by letter sent certified mail, return receipt requested, that it may file a new petition for a closed captioning exemption, consistent with the requirements of the Commission's rules and the instant order.[60]

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[56] *National Religious Broadcasters Opposition to Application for Review,* filed Oct. 30, 2006, at 3 ("*NRB Opposition*"). *See also id.* at 8.

[57] *See Consumer and Governmental Affairs Bureau Action Request For Exemption From Commission's Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 21 FCC Rcd 13142 (CGB 2006) (*November 7, 2006 PN*). This number included the 296 petitions at issue in the Application for Review as well as all other petitions for an undue burden exemption pending before the Commission at that time. *See also Extension of Comment Period on Petitions for Exemption From Commission's Closed Captioning Rules*, CG Docket No. 06-181, Public Notice, 21 FCC Rcd 13487 (CGB 2006) ("*November 21, 2006 PN*") (extending the deadline for filing comments regarding the Petitions noticed in the *November 7, 2006 PN*).

[58] *November 21, 2006 PN.*

[59] The undue burden exemptions that are the subject of this *MO&O* were granted to individual video programming providers that contracted with a VPD for carriage of a particular program, usually for a fee. *See, e.g., St. Mark Baptist Church,* CGB-CC-0041 (requesting an exemption for its program "Light of the World"); *Calvary Chapel, Bangor, ME*, CGB-CC-0031 (requesting an exemption for its program "Godsword"); *Outland Sports, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 5443, Memorandum Opinion and Order, 16 FCC Rcd 13605, 13609, ¶ 12 (MB 2001). To the extent that the subject exemption was for specific programs, the exemption applied to all episodes of those programs exhibited by the petitioner. In those cases where petitions did not identify specific programming, the subject exemption was granted for any and all programming provided by that petitioner. This MO&O reverses each exemption with respect to any programming for which it was granted.

[60] As discussed below, ¶¶ 28-29 *infra*, entities that receive a letter will not automatically continue to be exempt from the Commission's rules without filing a new exemption request and supplementing the record with current and supported information about their inability to provide closed captioning. *See generally* 47 C.F.R. §§ 79.1 (f)(2);(3).

A. Reversal of the Exemptions Granted to Anglers and New Beginning

17. For the following reasons, we reverse the exemptions granted to Anglers and New Beginning. First, we conclude that it was not appropriate to grant exemptions in reliance on the non-commercial nature and lack of remunerative value of Angler's and New Beginning's programming. Rather, in conducting the undue burden analysis, 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. Section 713(e)(3) of the Act provides that one of the factors to be considered in an undue burden exemption determination is the "financial resources of *the provider or program owner.*"[61] In the *Closed Captioning Report and Order*, the Commission rejected suggestions by some commenters to consider only the resources available for a specific program in making undue burden exemption determinations, finding that "this approach could unnecessarily limit the availability of captioning and would thus also frustrate Congressional intent," and noting the need to "examine the overall budget and revenues of the individual outlet *and not simply the resources it chooses to devote to a particular program.*"[62] Accordingly, consideration of the petitioners' exemption claims should have taken into account the overall financial resources of the provider or program owner.[63]

18. Second, the *Anglers Order* should not have placed substantial reliance on Anglers' and New Beginning's non-profit status. While a petitioner's financial resources is one of several factors for determining whether it should be excused from the captioning obligations,[64] in the *Closed Captioning Report and Order*, the Commission specifically rejected requests by commenters to adopt a categorical exemption for all non-profit entities based solely on their non-profit status.[65] The Commission chose instead to adopt revenue-based exemption standards that would focus on the economic strength of each

[61] 47 U.S.C. § 613(e)(3) (emphasis added).

[62] *Closed Captioning Report and Order,* 13 FCC Rcd at 3365-66, ¶ 204 (emphasis added). *See also Outland Sports*, 16 FCC Rcd 13605, 13607, ¶ 6 applying ¶ 204 of the *Closed Captioning Report and Order* (citing "the overall budget and revenues of the individual outlet, and not simply the resources [a petitioner] chooses to devote to a particular program" as relevant to deciding an undue burden petition).

[63] In addition, the *Anglers Order* identified three characteristics – the non-remunerative nature of the programming, the failure to produce programming primarily for a commercial purpose, and the non-profit status of the petitioners – as common to programmers who qualify for categorical captioning exemptions for locally produced and distributed non-news programming with no repeat value under section 79.1(d)(8) of the Commission's rules and ITFS licensees under section 79.1(d)(7) of these rules. *Id.* at ¶¶ 10-11. Presumably, this was in part a response to New Beginning's request for an exemption under 47 C.F.R. §79.1(d)(8). We note, however, that neither the Anglers nor New Beginning programs would qualify for a section 79.1(d)(8) exemption because, among other reasons, this categorical exemption specifically requires that such "locally produced and distributed non-news programming" be produced *by the video programming distributor*, not programmers like these petitioners. Moreover, it is not clear that the programming produced by New Beginning was distributed only locally. Although New Beginning reported in its Petition that *In His Image* was broadcast on CTN, New Beginning Petition at 1, in their Opposition Comments, Consumer Organizations noted that their research indicated that *In His Image* aired nationwide on a weekly basis over the Sky Angel satellite network, and on a weekly basis to a large geographic area within the state of Florida via CTN. *See* ¶ 9, *supra.*

[64] *See* 47 U.S.C. § 613(e)(3).

[65] *See Closed Captioning Report and Order,* 13 FCC Rcd at 3349, ¶ 162 ("[P]rofit and nonprofit entities may significantly overlap in the functions they perform, [and] specific programs may individually garner limited audiences or economic support but may be important loss leaders or brand identifiers."); *cf. id.* at 3317-3318, ¶ 95, noting the request of some commenters to exempt all nonprofit program networks from the captioning requirements.

provider,[66] and noted that this test would require all entities (including those that are non-profit) "to do some captioning; that is, they will be required to caption to the extent that such a requirement is not economically burdensome."[67] Such a result, the Commission concluded, would be more equitable, in that it would not favor one type of network or service provider over another.[68] The decision in the *Anglers Order* to grant Anglers and New Beginning favorable exemption treatment because of their non-profit status was inconsistent with this Commission precedent.

19. Third, we reverse the *Anglers Order* because it created a presumption that future exemptions would be granted to non-profit entities for whom the provision of closed captions would "curtail other activities important to [their] mission."[69] Establishing a presumption that would apply to future petitions was contrary to Commission precedent, as established in the *Closed Captioning Report and Order*, wherein the Commission rejected suggestions to rely on specific presumptions when evaluating undue burden exemption petitions.[70] The Commission explained that such presumptions "might well prevent [the Commission] from examining the effect our closed captioning requirements would have on a specific video programming provider or even a class of programmers."[71] Unlike the categorical exemptions that are adopted by rulemaking and are of general applicability, the process for determining closed captioning exemptions on the basis of purported undue burden is designed to consider the unique, individual circumstances of each petitioner on a case-by-case basis.[72]

20. We also reject the *Anglers Order*'s conclusion that the extent to which the provision of captioning would "curtail other activities important to [a petitioner's] mission" is an appropriate factor in making an undue burden determination. In making determinations under sections 713(d)(3) and (e) of the Act, the Commission's job is to "balance the need for closed captioned programming against the potential for hindering *the production and distribution of programming*."[73] While the Commission may consider additional factors besides those specifically set forth in section 713(e) of the Act when making a

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[66] Under these standards, no video programming provider is required to spend more than 2 percent of the annual gross revenues received from the channel during the prior calendar year, and no video programming provider with annual gross revenues of less than $3,000,000 during the prior calendar year is required to spend any money to caption its programming channel (other than complying with requirements to pass through programming already captioned when received). *Closed Captioning Report and Order,* 13 FCC Rcd at 3350, ¶ 164; *see* 47 C.F.R. §§ 79.1(c), (d) (11)-(12). *See also Closed Captioning Report and Order,* 13 FCC Rcd at 3349, ¶ 163 (these tests would eliminate the need to become engaged in "difficult accounting issues that might . . . be associated with a profitability analysis," and would "operate[] in a flexible fashion so that as revenues increase the amount of captioning increases.").

[67] *Id.* at ¶ 163.

[68] *Id.*

[69] *See Anglers Order*, 21 FCC Rcd at 10097, ¶ 11.

[70] For example, the Commission specifically rejected rebuttable presumptions for this purpose proposed by the Weather Channel, the Game Show Network, and the Association of Public Television Stations. *Closed Captioning Report and Order*, 13 FCC Rcd at 3364-65, ¶ 202; *cf. id.* at ¶198.

[71] *Id.*, 13 FCC Rcd at 3364-65, ¶ 202.

[72] *See id.*, 13 FCC Rcd at 3314-15 ¶ 90 ("Section 713(d)(3) provides for the Commission to establish a procedure to consider exemptions from our closed captioning rules on a case-by-case basis and to tailor a remedy to fit those circumstances."). In the *Closed Captioning Report and Order*, the Commission made clear its intention to allow petitioners seeking an exemption under section 713(d)(3) of the Act "sufficient discretion to demonstrate burdens that are unanticipated in the generally applicable rules and [categorical] exemptions." *Id.*, 13 FCC Rcd at 3364-65, ¶ 202.

[73] H. Conf. Rep. No. 104-458 at 183; H. Rep. No. 104-204, 104th Cong., 1st Sess. (1995) at 115.

determination for an individual closed captioning exemption,[74] legislative guidance and Commission policy make clear that any such additional factors must focus on the impact that captioning will have on the petitioner's programming activities – for example, the extent to which *programming* might not be shown if program owners or providers are required to provide captions – not other activities or missions that are unrelated to that programming.[75] Accordingly, the *Anglers Order* erred in directing consideration of the extent to which the provision of captioning would have impacted the petitioners' non-programming activities.

21. Moreover, we agree with the Application for Review that consideration of whether the provision of captioning would "curtail other activities important to [a petitioner's] mission" creates an unworkable standard.[76] Specifically, it is not clear how the Commission can be expected to determine an organization's "mission," define which non-programming related activities would be important to that mission, or assess the extent to which the importance of ensuring television access through the provision of captioning should be balanced against that mission. For these reasons, this factor is impermissibly vague and inappropriate for closed captioning exemption determinations. In effect, applying such a factor would enable regulated parties to decide whether it is more important to comply with captioning requirements or to use their resources for other non-programming-related purposes.

22. Fourth, we find that neither Anglers nor New Beginning should have received permanent exemptions. In the *Closed Captioning Report and Order*, the Commission emphasized the need to consider the length of an exemption on a case-by-case basis. In this regard, the Commission recognized that "changes in technology, the economics of captioning, or the financial resources of a video programming provider may affect the justification of an undue burden exemption" over time, and concluded that "it is better to maintain the flexibility to limit the duration of an undue burden exemption if the facts before us indicate that the particular circumstances of the petition warrant a limited exemption."[77] Similarly, in the *Closed Captioning Reconsideration Order*, the Commission stated its intention to "consider time limits . . . when evaluating requests for undue burden exemptions on the basis of the information regarding individual circumstances."[78]

23. Consistent with this approach, prior to the *Anglers Order*, no petitioner had ever received a permanent exemption from the captioning rules. For example, of the approximately 75 undue burden petitions received by the Commission between 1997 and 2005, only three were granted, one for a period

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[74] *See* 47 C.F.R. § 79.1(f)(3).

[75] *See* 47 U.S.C. § 613(e)(1) (a factor to consider is the "nature and cost of the closed captions *for the programming*") (emphasis added); *Closed Captioning Report and Order*, 13 FCC Rcd at 3363-64, ¶ 199 (reiterating that "[t]he legislative history of section 713(d)(3) instructs the Commission to consider the potential for hindering the production and distribution *of video programming,*" and directing program producers, owners and distributors to abide by this standard in making requests for exemptions) (emphasis added); *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, Notice of Proposed Rulemaking, 12 FCC Rcd 1044, 1082-83, ¶ 90 (1997) ("*Closed Captioning NPRM*") ("According to the legislative history [underlying section 713(d)(3) of the Act], Congress intended to permit the Commission to balance the need for closed captioned programming *against the possibility of inhibiting the production and distribution of programming and thereby restricting the diversity of programming available to the public.*") (emphasis added).

[76] Application for Review at 17.

[77] *Closed Captioning Report and Order*, 13 FCC Rcd at 3366, ¶ 205.

[78] *Closed Captioning Reconsideration Order*, 13 FCC Rcd at 20022, ¶ 112 ("prescribing specific durations for such petitions [by rulemaking] partially defeats the purpose for the exemption. While a specific time limit may be appropriate for some cases, a longer or shorter period may be appropriate in others.")

of three years, and two for a period of one year each.[79] Determinations of these exemption petitions held fast to the principle that an exemption from the closed captioning obligations "is not designed to perpetually relieve a petitioner of its captioning obligation."[80] In the instant case, both of the *Anglers Order* petitioners signaled their intent to revisit their ability to provide captioning at a future point, neither requested a permanent exemption, and neither demonstrated the need for an exemption in perpetuity.[81] Accordingly, we affirm the prior practice of granting exemptions for limited periods of time, and find that here, justification was lacking to grant the petitioners exemptions on a permanent basis.

24. Finally, the *Anglers Order* failed to consider whether petitioners solicited captioning assistance from their video programming distributors.[82] Although programmers were encouraged to solicit captioning assistance from distributors, the *Order* concluded that they were under no obligation to conduct such a solicitation as a precondition for receiving an undue burden exemption.[83] The Commission believes that the solicitation policy is appropriate to an undue burden determination because responsibility for captioning ultimately rests with VPDs.[84] As noted in the *Anglers Order*, "unsuccessful solicitations may constitute evidence in support of an undue burden petition."[85] Accordingly, we affirm earlier Media Bureau precedent that soliciting funds from these responsible entities is necessary to meeting one's captioning obligations, and that evidence of such solicitation is required before a petitioner may qualify for a captioning exemption.[86]

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[79] *See Outland Sports*, 16 FCC Rcd 13605,13609, ¶ 12 (rather than grant the full exemption requested, the Media Bureau granted a one year exemption and explained, "we believe a partial exemption is appropriate to allow Petitioner relief from the captioning requirements for a limited period during which, if they so choose, they may request a broader exemption on a more complete record."); *The Wild Outdoors 2001*, 16 FCC Rcd 13611 (1 year); *WDLP Broadcasting Co, LLC, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 6296, Memorandum Opinion and Order, 20 FCC Rcd 13531 (MB 2005) (*WDLP Broadcasting*) (3 years).

[80] *See, e.g., The Wild Outdoors 2005*, 20 FCC Rcd 11873 at 11874, ¶ 3; *See also, Jim Hanley's Northeast Outdoors, Inc., Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 5861, Memorandum Opinion and Order, 20 FCC Rcd 10021, 10022, ¶ 3 (MB 2005); *Adventure Bound Outdoors, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 5832, Memorandum Opinion and Order, 20 FCC Rcd 10029, 10030, ¶ 3 (MB 2005); *Awakening Ministries, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 6287, Memorandum Opinion and Order, 20 FCC Rcd 10740, 10741, ¶ 4 (MB 2005).

[81] As noted above, ¶ 7, *supra*, Anglers' petition stated that it "hope[d] to obtain closed caption sponsorship within the next fiscal year, which [would] enable [it] to provide this service beginning January 2007." Anglers Petition at 1. Similarly, New Beginning stated that "the added cost [of captioning] would be an undue burden on the ministry *at this time*." New Beginning Petition at 1 (emphasis added).

[82] *See* Media Bureau Orders discussed at n. 102 and n.103, *infra*. *See also Anglers*, 21 FCC Rcd at 10097, n. 25 citing *The Wild Outdoors 2005,* 20 FCC Rcd at 11873-74, ¶ 4 (implicit in a showing of a petitioner's financial resources under section 79.1(f) of the Commission's rules, is "the extent to which the distributors of [its] programming can be called upon to contribute towards the captioning expense"); *Engel's Outdoor Experience*, 19 FCC Rcd 6867, 6868, ¶ 3 (relying on *The Wild Outdoors 2005*); *Commonwealth Productions, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 5992, Memorandum Opinion and Order, 19 FCC Rcd 5381, 5382, ¶ 3 (MB 2005).

[83] *Anglers Order*, 21 FCC Rcd at 10097, ¶ 9 n.25.

[84] *See* 47 C.F.R. §79.1(b)(1).

[85] *Anglers Order*, 21 FCC Rcd at 10097, ¶ 9 n.25.

[86] *See* ¶ 28, *infra*.

B. Reversal of Exemptions that Relied Upon the *Anglers Order*

25. As a substantive matter, each of the exemptions granted in the Bureau Letter Orders and challenged by the Application for Review cannot stand because each relied entirely on the *Anglers Order's* rationale for granting the exemption.[87] Accordingly, all of these exemptions are reversed because we reverse the Anglers and New Beginning exemptions.

26. In addition, we reverse the Bureau Letter Orders because none of the orders analyzed the individual circumstances of the petitioners under the "undue burden" criteria, as required under the Act and the Commission's rules.[88] Rather, hundreds of exemptions were granted *en masse* without any indication that such reviews took place. Indeed, a subsequent review of the original petitions show that many did not provide any documented information about the petitioner's financial resources, or provide any substantiation that the petitioners would be forced to terminate or curtail programming if required to provide closed captions.[89] In fact, some petitioners appear to have had substantial resources that could have provided sufficient financing to support compliance with the captioning rules.[90] It would have been appropriate and consistent with prior practice to have dismissed or denied such petitions because of these deficiencies.[91]

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[87] In this regard, each Order relied on the confluence of factors stated in paragraph 11 of the *Anglers Order*, *See* ¶ 11, *supra*; *Anglers Order*, 21 FCC Rcd at 10097, ¶ 11. *See also*, n.44, *supra,* for examples of Bureau letter Orders.

[88] 47 U.S.C. §613(e); 47 C.F.R. §§79.1(f)(2),(petition must be "supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would cause an undue burden"). *See also Closed Captioning Report and Order*, 13 FCC Rcd at 3364; ¶ 200 (same). For example, failure to conduct the required individualized assessments resulted in granting exemptions to at least three petitioners that had previously been notified that their petitions were dismissed, and at least one exemption granted to a for-profit entity, even though a principal justification for granting the exemptions was the non-profit status of the petitioners. *See United Methodist Hour of MS*, CGB-CC-0042 (dismissed June 14, 2006, via PN; received Bureau Letter Order granting exemption Sept. 22, 2006); *Request for Exemption from Commission's Closed Captioning Rules Dismissed CGB-CC-0042,* Public Notice, 21 FCC Rcd 6587, (CGB 2006); *Second Baptist Church*, CGB-CC-0165 (dismissed April 5, 2006 via letter; received Bureau Letter Order granting exemption Sept. 12, 2006); *Temple Baptist Church*, CGB-CC-0173 (dismissed May 4, 2006 via letter; received Bureau Letter Order granting exemption Sept. 12, 2006); Letter from Thomas E. Chandler, Disability Rights Office, FCC to Lush Productions, LLC, CGB-CC-0426 (dated Sept. 11, 2006) (for-profit entity).

[89] Prior to Anglers, petitions lacking such supporting documentation were rejected. *See e.g., Divine Faith Ministries*, CGB-CC-0206 (rejecting an exemption because petitioner failed to offer any information that compliance with the captioning rules would result in its programs being sent to an outside agency for captioning, which would in turn "add significant production costs, thus, making production unaffordable as well as impact [the petitioner's] ability to meet air-date deadlines"). *See also* n.91, *infra.*

[90] *See, e.g., Diocese of Lake Charles, Louisiana Request for Exemption from the Commission's Closed Captioning Rules*, CGB-CC-0275 (total assets for 2004 were $14,475,542, total support and revenue for 2004 was $7,034,612, and its estimated costs of captioning per program were $120-$780); *Geyer Springs First Baptist Church*, CGB-CC 0060 (2006 budget was over $3.4 million).

[91] Past practice was to routinely deny petitions that were deficient in providing information about their ability, financial or otherwise, to provide captions. *See e.g., Engel's Outdoor Experience*, 19 FCC Rcd at 6868, ¶ 3 (noting that it was "impossible for the Commission to determine whether Outdoor Experience has sufficient justification supporting an exemption" because the petitioner had failed "to disclose detailed information regarding its finances and assets." *See also Outland Sports*, 16 FCC Rcd 13605 at 13607, ¶ 7 ("Petitioner . . .does not provide details regarding its financial resources. . . Without additional information on the financial resources of Petitioner, or other possible means of gaining captioning, the impact of implementing closed captioning is difficult to determine."); *New Life Team*, 20 FCC Rcd 3679 at 3680-81, ¶ 4 ("[A]lthough New Life Team indicates it is 'not funded or granted in any way by outside sources' and it 'depends on support from individual donors from New Life Church'

(continued....)

27. The Bureau Letter Orders also were procedurally flawed because they waived, without justification, the Commission's public notice requirements for undue burden exemption petitions.[92] As discussed above,[93] the process for determining closed captioning exemptions on the basis of purported undue burden requires notice to the public in order to afford the public an opportunity to comment on whether grant of these petitions was in the public interest.[94]

C. Future Treatment of the Petitions Reversed in this *MO&O*

28. We recognize that because several years have passed since these petitions were first filed, it is likely that many of the petitioners' circumstances have changed and they may no longer need an exemption from the closed captioning requirements.[95] However, to the extent a petitioner listed in Appendix A wishes to continue receiving an individual captioning exemption under the new economically burdensome standard, it must file a new petition within 90 days of the release date of this *MO&O* with updated evidence, supported by affidavit, demonstrating its inability to provide closed captioning.[96] Specifically, each petition should contain current documentation in accordance with the original factors outlined in section 713(e) of the Act and 79.1(f) of Commission's rules,[97] to support a claim that providing closed captions would be economically burdensome (would result in a "significant difficulty or expense") as defined by the following criteria: (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

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without documentation, it is impossible for the Commission to determine whether New Life Team has sufficient justification supporting an exemption from the closed captioning requirements for its television program."); *Vision for Souls Family Worship Center*, CGB-CC-0568 (rejecting petitioner's exemption because petitioner had failed to provide documentary support or affidavit for its claim that it was unable to provide captions because it received less then $3 million per year in donations, and that it had received quotes of $300 per half hour of captioning).

[92] Generally, the Commission's rules may be waived only for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). None of the Bureau Letter Orders analyzed the individual circumstances of the petitioners to determine whether a public interest waiver of the public notice requirement was warranted.

[93] *See* ¶ 4, *supra*.

[94] 47 C.F.R. §79.1(f)(5). Although, as noted above, ¶ 15, *supra*, in November 2006, after the Application for Review was submitted, the Bureau subsequently placed all of the petitions on public notice, its failure to do so prior to granting these exemptions violated the Commission's procedures for handling exemption requests.

[95] As noted above, *see* ¶ 4, *supra*, programming that is the subject of an exemption petition remains exempt from the captioning rules while the petition is pending. 47 C.F.R. § 79.1(f)(11).

[96] 47 C.F.R. § 79.1(f)(9). *See e.g.*, The Wild Outdoors, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements, Case No. CSR 5444, Memorandum Opinion and Order, 16 FCC Rcd 13611 at 13614, ¶ 12 (MB 2001) ("[W]e advise Petitioners that our rules require a detailed showing for each prong of the undue burden exemption supported by record evidence."). We note that the programming subject to this MO&O has remained exempt from the closed captioning requirements since the subject petitions were first filed in 2005 and 2006. In this regard, these petitioners have benefited from their exemptions for a significant period of time. CGB may grant an extension of the 90-day filing deadline to individual petitioners upon a showing of good cause for such extension.

[97] 47 U.S.C. §613(e); 47 C.F.R. §79.1(f).

owner.[98] In addition, each petitioner may describe other factors that it deems relevant to an exemption determination, as well as any alternatives that could be a reasonable substitute for the closed captioning requirement.[99] In order to make such a showing, each petitioner must provide documentation of its financial status to demonstrate its inability to afford closed captioning.[100] In addition, petitioners seeking an exemption should verify in their requests that they have obtained information about the costs they would incur to caption their programming,[101] and that they have sought closed captioning assistance from their video programming distributors, as well as note the extent to which such assistance has been provided or rejected.[102] Finally, each petitioner must indicate whether it has sought additional sponsorship sources or other sources of revenue for captioning[103] and show that it does not have the means to provide captioning for its programming.[104] Failure to support an exemption request with adequate explanation and evidence to make these showings will result in dismissal of the request.[105]

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[98] 47 U.S.C. § 613(e). In addition to updating the record, given that many of the original petitions may have lacked the information needed by the Commission to make an exemption determination under these criteria, this updated information will facilitate the Commission's task of determining whether an exemption is appropriate for each of the petitioners.

[99] 47 C.F.R. §79.1(f)(3).

[100] *See e.g., Survivors of Assault Recovery (SOAR), Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 6358, Memorandum Opinion and Order, 20 FCC Rcd 10031 at 10032, ¶ 3 (MB 2005) (discussing the need for the petitioner to provide "detailed information regarding finances and assets, gross or net proceeds, or sponsorships solicited for assisting in captioning," and concluding that without such documentation from which the petitioner's financial condition could be assessed, it was impossible for the Commission to determine whether an exemption was justified); *New Life Team, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 6294, Memorandum Opinion and Order, 20 FCC Rcd 3679 at 3680, ¶ 4 (MB 2005) (*New Life Team*) ("[W]ithout documentation, it is impossible for the Commission to determine whether New Life Team has sufficient justification supporting an exemption . . .").

[101] *See, e.g., Outland Sports,* 16 FCC Rcd 13605 at 13607, ¶ 7 (noting the importance of demonstrating efforts "to seek information from various sources on the cost of captioning."); *The Wild Outdoors 2001,* 16 FCC Rcd 13611 at 13614, ¶ 7 ("Without additional information on the financial resources of Petitioners, their efforts to find companies that provide captioning at a reasonable cost, a listing of various prices quoted, or information concerning other possible means of gaining captioning, the impact of implementing closed captioning is difficult to determine.").

[102] *See, e.g., Engel's Outdoor Experience, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements*, Case No. CSR 5882, Memorandum Opinion and Order, 19 FCC Rcd 6867at 6868, ¶ 3 (MB 2004) (*Engel's Outdoor Experience*) (noting that implicit in the requirement to show a petitioner's financial resources is a showing of the extent to which the distributors of the subject programming "can be called upon to contribute towards the captioning expense."); *The Wild Outdoors 2005*, 20 FCC Rcd 11873 at 11874, ¶ 4 (noting the same principle). On the other hand, a showing of unsuccessful solicitations may constitute evidence *in support of* an undue burden exemption petition.

[103] *See e.g., Yellow House Entertainment, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements,* Case No. CSR 5957, Memorandum Opinion and Order, 19 FCC Rcd 11254 at 11255, ¶ 3 (MB 2004) (noting that the petitioner had failed to indicate whether it had "sought out additional sponsorship sources or whether it was indeed able to secure additional sources of revenue for the continued operation of its program."); *Outland Sports,* 16 FCC Rcd 13605 at 13607, ¶ 7 (denying petitioner's exemption request because it did "not address whether [petitioner] has sought any means to recoup the cost of closed captioning such as through grants of sponsorships, or through arrangements with The Outdoor Channel or program distributors (e.g. cable systems").

[104] *See e.g., Lewis Memorial Baptist Church, Video Programming Accessibility, Petition for Waiver of Closed Captioning Requirements,* Case No. CSR 6283, Memorandum Opinion and Order, 20 FCC Rcd 12434 at 12436, ¶ 4 (MB 2005) (*Lewis Memorial Baptist)* (While the ultimate responsibility to provide captioning is assigned to program

(continued....)

29. Each new petition that provides sufficient information will be placed on public notice. The Bureau will conduct an individual review of each petition to determine the extent to which providing captioning would be economically burdensome for the petitioner, based on information provided in the petition and any comments received. All parties whose petitions were previously granted under *Anglers* or the *Anglers*' reasoning that do not file a new petition within 90-days must come into full compliance with the Commission's closed captioning rules on the 91st day after release of this *MO&O*.[106] In the event that a petitioner (whether listed in Appendix A or any future petitioner) files an exemption petition and such petition is denied, we direct that such petitioner be given a reasonable time period to come into compliance. In the past, petitioners whose exemption requests were denied were directed to come into compliance within 90 days.[107] We anticipate following this precedent, where appropriate. In order to ensure that all petitioners subject to this *MO&O* (listed in Appendix A) are aware of this *MO&O*, we will send a copy by certified mail, return receipt requested to each petitioner at its last known address.

IV. ORDER

30. In this Order ("*Interim Standard Order*"), we provide guidance on how the Commission will construe, on an interim basis, the term "economically burdensome" for purposes of evaluating requests for individual exemptions under section 713(d)(3) of the Act, as amended by the CVAA. For the reasons discussed below, we conclude that Congress, when it enacted the CVAA, intended for the Commission to continue using the undue burden factors contained in 713(e), as interpreted by the Commission and reflected in Commission rules and precedent, for individual exemption petitions, rather than to make a substantive change to this standard.

31. As originally enacted, section 713(d)(3) of the Act authorized the Commission to grant an individual exemption upon a showing that providing closed captioning "would result in an undue burden."[108] Congress provided guidance to the Commission on how it should evaluate these captioning exemptions by setting forth, in section 713(e) of the Act, the following "four factors to be considered" in determining whether providing closed captioning "would result in an undue economic burden": (1) the nature and cost of the closed captions for the programming; (2) the impact on the operation of the

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distributors, it is expected that "distributors would likely incorporate closed captioning requirements into their contracts with producers and owners to negotiate for an efficient allocation of captioning responsibilities.").

[105] *See e.g.*, *The Wild Outdoors 2001*, 16 FCC Rcd 13611 at 13614, ¶ 12 ("Failure to support a future exemption request with adequate evidence will result in the dismissal of their petition."). Alternatively, CGB has the discretion to seek further information and documentation from a petitioner if the Bureau deems it appropriate and necessary.

[106] We also address here the unusual circumstances associated with the petition filed by Second Baptist Church, CGB-CC-0165 (filed Dec. 30, 2005). On September 12, 2006, Second Baptist Church received a Bureau Letter Order that contained two errors. First, the letter contained Second Baptist Church's file number, CGB-CC-0165, but was addressed to Macon Road Baptist Church, CGB-CC-0099, and specifically responded to Macon Road's exemption petition. Second, CGB previously had dismissed Second Baptist Church's exemption petition on April 4, 2006, upon this petitioner's request. Although the Application for Review lists CGB-CC-0165 as having received a captioning exemption, the prior dismissal of this petitioner's exemption request means that this petitioner never received an exemption grant. However, given the confusion associated with this petition, we will treat it like all other petitioners subject to this *MO&O*. Specifically, if Second Baptist Church wishes to continue receiving an exemption from the closed captioning mandates, it may file a new petition with the requisite supporting documentation, *see* ¶ 34, *infra*, within 90 days. If it does not file a new petition by that time, it must begin providing closed captioning of its programming beginning on the 91st day after release of this *MO&O*.

[107] *See, e.g.*, *Wild Outdoors 2005*, 20 FCC Rcd 11873; *New Life Team*, 20 FCC Rcd 3679.

[108] 47 U.S.C. § 613(d)(3).

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.[109]

32. In the CVAA, Congress amended section 713(d)(3) of the Act by replacing the term "undue burden" with the term "economically burdensome."[110] Amended section 713(d)(3) provides as follows:

> A provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome.

Congress described the above change as a "conforming amendment," without offering specific guidance on what it meant by this term.[111] However, it is noteworthy that the CVAA did not also amend section 713(e), which sets forth the definition of the term "undue burden" and lists the factors to be considered in an "undue economic burden" analysis;[112] nor did it define the term "economically burdensome" in the statute. In addition, the legislative history of the CVAA does not suggest that Congress intended the nomenclature change to "economically burdensome" to require application of different criteria than the Commission applied under the prior "undue burden" standard. To the contrary, the legislative report of the Senate Committee on Commerce, Science, and Transportation on the CVAA states that "[t]he Committee encourages the Commission, in its determination of 'economically burdensome' to use the [undue burden] factors listed in section 713(e)."[113]

33. We recognize that the term "economically burdensome" is applied differently for the purpose of deciding, by rulemaking, which *categories* of programs are to be exempt from the captioning rules under section 713(d)(1) of the Act.[114] But Congress's handling of the two types of captioning exemptions in 1996, together with its recent actions under the CVAA, indicate 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 section 713(d)(3).

34. Congress's directives to the Commission in 1996 – when the closed captioning obligations first became law – and the Commission's past practice in reviewing and deciding individual exemption petitions are instructive in this regard. Specifically, in the legislative history of the 1996 Amendments to the Act, Congress drew a clear distinction between how it expected the Commission to determine categorical exemptions adopted by regulation under section 713(d)(1) of the Act, and how it

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[109] 47 U.S.C. § 613(e); 47 C.F.R. §79.1(f)(2)(i) – (iv).

[110] The CVAA made two additional changes to section 713(d). First, *supra*, the new law codifies the Commission's policy that during the pendency of an exemption petition, a provider or owner shall be exempt from having to provide closed captioning. Second, Congress directed the Commission to act upon exemption petitions filed under section 713(d) within six months after receiving these petitions, unless the Commission finds that an extension of this period is necessary to determine whether the captioning requirements are economically burdensome. Pub. L. No. 111-260 § 202(b), amending 47 U.S.C. § 613(d)(3).

[111] Pub. L. No. 111-260 § 202(c).

[112] 47 U.S.C. § 613(e).

[113] S. Rep. No. 111-386, 111th Cong., 2nd Sess. (2010) at 14.

[114] Under section 713(d)(1), the Commission is permitted to exempt by regulation programs, classes of programs, or services when the provision of closed captioning would be "economically burdensome" to the provider or owner of such programming. 47 U.S.C. § 613(d)(1). *See also* ¶ 4, *supra*.

expected the Commission to assess individual exemptions submitted under section 713(d)(3). For the former, Congress directed the Commission to consider several factors, including "(1) the nature and cost of providing closed captions; (2) the impact on the operations of the program provider, distributor, or owner; (3) the financial resources of the program provider, distributor, or owner and the financial impact on the program; (4) the cost of the captioning, considering the relative size of the market served or the audience share; (5) the cost of the captioning, considering whether the program is locally or regionally produced and distributed; (6) the non-profit status of the provider; and (7) the existence of alternative means of providing access to the hearing disabled, such as signing."[115] While some of the undue burden factors under section 713(d)(3), namely the nature and cost of providing closed captions, the impact on the operation of the provider or program owner, and the financial resources of the provider or program owner,[116] are the same as factors applied under section 713(d)(1), the other factors used for deciding categorical exemptions go beyond the undue burden factors used in evaluating individual exemption requests, focusing on considerations other than the provider's costs and resources.[117]

35. In accordance with the above legislative directive, the Commission has always treated consideration of the two types of captioning exemptions – categorical and individual – differently. For example, when first seeking comment in 1996 on how best to adopt general exemption rules under the economically burdensome standard of section 713(d)(1), the Commission asked commenters to consider factors such as "market size, degree of distribution, audience ratings or share, programming budgets or revenue base, lack of repeat value, or a combination of such factors."[118] The Commission's 1997 *Closed Captioning Report and Order* explained the relevance of such information to carving out exemptions of general applicability: "[t]he video programming marketplace has evolved to the point where there are now a large number of service providers providing programming for a very specific limited local audience or directing their programming to very limited segments of a national or regional audience."[119] By contrast, the Commission has never relied on factors pertaining to an entity's audience or market share, its geographic or non-profit status [120] or the existence of alternative means of providing access in making its individual undue burden determinations under section 713(d)(3). Similarly, the Media Bureau decisions on individual exemption petitions predating the *Anglers Order* decisions never considered the extra factors applicable to the economically burdensome standard of section 713(d)(1).[121]

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[115] *See* H. Conf. Rep. No. 104-458 (Jan. 31, 1996) at 183.

[116] *See* 47 U.S.C. §§ 613(e)(1), (2) and (3).

[117] *See Closed Captioning Report and Order,* 13 FCC Rcd at 3342, ¶ 143.

[118] *Closed Captioning Report and Order,* 13 FCC Rcd at 3342, ¶144; *Closed Captioning NPRM*, 12 FCC Rcd at 1075-76, ¶ 71.

[119] *Id.,* 13 FCC Rcd at 3343, ¶ 145.

[120] While consideration of an entity's non-profit status may be an indication of an entity's inability to provide captions, by itself, it is not enough to conclude that an exemption is merited. As noted above, the Commission has rejected this as a threshold criteria for determining individual exemption requests. *See* ¶ 18, *supra.*

[121] *See, e.g., Outland Sports*, 16 FCC Rcd 13605 at 13606, ¶¶ 3-4 ("When determining if the closed captioning requirements will impose an undue burden, the statute requires the Commission to consider the following 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 operation of the provider or program owner. . . . Petitions must include information that demonstrates how the statutory factors are met"); 16 FCC Rcd 13607-8, ¶¶ 7-10 (evaluation of the petition against each of the four factors). *See also Wild Outdoors 2005,* 20 FCC Rcd 11873-74, ¶ 2.

36. Congress was well aware of the existence of the additional categorical exemption criteria under section 713(d)(1) at the time that it enacted the CVAA, and that the Commission had never applied these factors in the context of individual exemption determinations. Had it intended for these additional factors to apply to individual captioning exemption determinations, it presumably would have directed the Commission to do so. Rather than provide such direction, however, Congress specifically suggested the opposite, *i.e.*, that the Commission continue to utilize the original undue burden factors of section 713(e) when deciding individual captioning exemption petitions under section 713(d)(3), and said nothing about the 713(d)(1) factors at all.[122] Based on the legislative history of sections 713(d)(1) and (d)(3) – both to the 1996 Amendments and more recently to the CVAA – it appears that Congress contemplated that the Commission would use different criteria in applying the "economically burdensome" standard to the different contexts of individual and categorical exemptions.[123] Because we believe that Congress did not intend any substantive change to the criteria that the Commission consistently has used for individual closed captioning petitions, this is the approach that we provisionally adopt and propose to make permanent in Section 79.1 of the Commissions rules in the accompanying *Notice of Proposed Rulemaking*. Accordingly, as an interim measure, we interpret the term "economically burdensome" in section 713(d)(3) of the Act, as amended by the CVAA, to be synonymous with the term "undue burden" as this section was originally drafted in the 1996 Amendments, and as it is defined by the original four undue burden factors contained in section 713(e). We note that this interpretation is consistent with the manner in which the Commission has interpreted the term "economically burdensome" in the Commission's recently adopted video description rules, also required by the CVAA.[124]

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[122] Although our rules governing undue burden exemptions permit a petitioner to also "present for the Commission's consideration 'any other factors the petitioner deems relevant to the Commission's final determination,'" 47 C.F.R. § 79.1(f)(3), the additional factors used for determining categorical exemptions in the 1997 *Closed Captioning Report and Order*, such as audience and market share, are not relevant to individual exemption requests. Indeed, it is possible for a resource-rich entity to be able to produce and distribute individual programming with captioning regardless of its market or audience size. The same can be said about its geographical or non-profit status, or its ability to provide video programming access via signing or some other means.

[123] *Compare* S. Rep. No. 111-386, 111th Cong. 2nd Sess. (2010) at 14 *with* H. Conf. Rep. No. 104-458 (Jan. 31, 1996) at 183. Although the term "economically burdensome" is used with regard to categorical exemptions in section 713(d)(1) of the Act, we cannot assume that Congress intended for this term to have the same meaning in both contexts. Federal courts have upheld agency decisions to assign the same term different meanings in different contexts when to do so would best effectuate Congressional intent. *See, e.g.*, *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14998-15001, ¶¶ 16-23 (2005) (interpreting "information services" in the Communications Assistance for Law Enforcement Act differently from the interpretation of the similarly defined term in the Communications Act), *aff'd sub nom. Am. Council on Educ. v. FCC*, 451 F.3d 226, 232 (D.C. Cir. 2006) (noting that the Commission's "interpretation of CALEA reasonably differs from its interpretation of the 1996 Act, given the differences between the two statutes"); *see also Bright House Networks, LLC v. Verizon Cal. Inc.*, 23 FCC Rcd 10704, 10919-20, ¶ 41 (2008) (holding that two entities were "telecommunications carriers for purposes of section 222(b) of the Act" but leaving open the possibility that they are not telecommunications carriers "for purpose of all other provisions of the Act"), *aff'd sub nom. Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009) (noting that agencies can interpret imprecise terms differently in separate sections of a statute that have different purposes); *U S West Communications, Inc. v. FCC*, 177 F.3d 1058, 1059-60 (D.C. Cir. 1999) (noting that the term "provide" used in different places in the Communications Act can be subject to different meanings, depending on context). For the reasons discussed above, we believe that Congress's intent can best be effectuated by interpreting "economically burdensome" to have different, albeit closely related, meanings in sections 703(d)(1) and (d)(3).

[124] *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-43, Report and Order, FCC 11-126, ¶ 44 (2011) ("[W]e intend to 'use the same factors as applied to the undue burden standard' . . to determine whether the rules are economically burdensome (*i.e.*, whether

(continued....)

37. The CVAA also amended section 713(d)(3) to require the Commission to grant or deny a petition seeking an economically burdensome exemption within six months after it receives a petition, unless the Commission finds that an extension of the six-month period is necessary to determine whether such requirements are economically burdensome. Because time is of the essence in responding to petitions that continue to be submitted to the Commission, on an interim basis we direct CGB, with respect to all petitions filed or re-filed subsequent to October 8, 2010, the date on which the CVAA became law, to use the original factors set forth in section 713(e) of the Act, as codified in sections 79.1(f)(2) and (3) of the Commission's rules, in accordance with the guidance provided in the instant order, when making determinations as to whether an individual petitioner has made a documented showing that requiring closed captioning would be "economically burdensome."[125]

V. NOTICE OF PROPOSED RULEMAKING

38. In this *Notice of Proposed Rulemaking*, we propose to continue utilizing the factors used for the "undue burden" exemption standard contained in section 713(e) of the Act and codified in section 79.1(f)(2) of our rules, when evaluating future petitions seeking individual exemptions under the new economically burdensome standard contained in the CVAA. For the reasons explained in the *Interim Standard Order*, which is incorporated by reference herein, we tentatively conclude that Congress intended no substantive change in these factors and that, notwithstanding the change from an "undue burden" to an "economically burdensome" standard, Congress intended for the Commission to continue using the undue burden factors.[126] We seek comment on these tentative conclusions. We also seek comment on any other interpretations of the term "economically burdensome" that the Commission should consider in evaluating requests for individual exemptions from the closed captioning requirements.

39. At present, the Commission's rules, at section 79.1(f), contain various references to the prior undue burden standard. For example, section 79.1(f)(1) provides that "[e]xemptions may be granted, in whole or in part, for a channel of video programming, a category or type of video programming or a video programming provider upon a finding that the closed captioning requirements will result in an undue burden."[127] Similarly, section 79.1(f)(2) states "[a] petition for an exemption must be supported by sufficient evidence to demonstrate that compliance with the requirements to closed caption video programming would cause an undue burden,"[128] and goes on to list the "[f]actors to be

(Continued from previous page)
they impose significant difficulty or expense.") (citation omitted). In addition, the Commission recently proposed to apply this interpretation of the "economically burdensome" standard in its proposed rules implementing the CVAA's requirements for closed captioning on certain video programming delivered using Internet protocol. *See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Notice of Proposed Rulemaking, FCC 11-138 ¶ 30 (2011).

[125] 47 U.S.C. § 613(e), codified at 47 C.F.R. § 79.1(f)(2) and (3).

[126] *See* ¶¶ 30-37, *supra*. As noted above, in past rulings and in accordance with Congressional directives, the Commission has never applied certain factors considered under section 713(d)(1) for categorical exemptions – *i.e.*, the nonprofit status of the provider, the size of a program's market or audience share, whether a program is locally or regionally produced and distributed, and the existence of alternative means of providing access to programming to people with hearing loss – to its individual exemption determinations. Moreover, Congress did not change any of the factors in section 713(e) of the Act that currently apply to such petitions and the Senate Report to the CVAA encouraged the Commission to continue applying such factors to individual exemption determinations under section 713(d)(3).

[127] 47 C.F.R. § 79.1(f)(1).

[128] 47 C.F.R. § 79.1(f)(2).

considered when determining whether the requirements for closed captioning impose an undue burden . . ." Sections 79.1(f)(3), (4), (10), and (11) also reference the "undue burden" standard.[129] We propose to replace all current references to "undue burden" in section 79.1(f) of the rules with the term "economically burdensome" to correspond with the new language reflected in the CVAA and to make clear that petitioners seeking individual exemptions from the captioning rules must now show that providing captions on their programming would be "economically burdensome."[130] We seek comment on this proposed action.

VI. INITIAL REGULATORY FLEXIBILITY CERTIFICATION

40. In this *Notice of Proposed Rulemaking*, the Commission proposes to revise the references to "undue burden" contained in section 79.1(f) of the Commission's rules – "*Procedures for exemptions based on undue burden*" - to "economically burdensome" as required by the Twenty-First Century Communications and Video Accessibility Act of 2010. No substantive changes to the existing rule beyond this change in terminology are proposed. Since the change is only a change in terminology, there is no burden of compliance on regulated entities subject to these rules. No action is required that would impose any monetary costs or burdens of compliance on any regulated entity. We conclude there will be no economic impact by this rule change on small business entities or consumers. Therefore, since there will be no economic impact of any kind, we certify that the proposals in this *Notice of Proposed Rulemaking*, if adopted, will not have any significant economic impact on a substantial number of small entities. Therefore, the question about impact to small entities is moot.

41. The Commission will send a copy of the *Notice of Proposed Rulemaking*, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.[131] This initial certification will also be published in the Federal Register.[132]

VII. PROCEDURAL ISSUES

A. Materials in Accessible Formats

42. To request materials in accessible formats (such as Braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *MO&O* can also be downloaded in Word and Portable Document Formats (PDF) at http://www.fcc.gov/cgb/dro/caption.html.

B. Regulatory Flexibility

43. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Certification ("IRFC") of the possible significant economic impact on small entities of the policies and rules addressed in this NPRM. The IRFC is set forth in Appendix C. Written public comments are requested on the IRFC. These comments must be filed in accordance with the same filing deadlines as comments filed in response to the Notice and must have a separate and distinct heading designating them as responses to the IRFC.

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[129] 47 C.F.R. §§ 79.1(f)(3), (4), (10), and (11).

[130] *See* proposed rule changes in Appendix B.

[131] 5 U.S.C. § 605(b).

[132] 5 U.S.C. § 605(b).

C. Paperwork Reduction Act

44. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

D. Ex Parte Presentations

45. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[133] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

E. Comment Filing Procedures

46. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[134] interested parties may file comments and reply comments regarding the NPRM on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).[135]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS): http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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[133] 47 C.F.R. §§ 1.1200 *et seq.*

[134] 47 C.F.R. §§ 1.415, 1.419.

[135] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

47. Documents in CG Docket No. 11-**XXX** will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

48. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

F. Congressional Review Act

49. The Commission will send a copy of this *MO&O* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[136]

VIII. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4, 5, 303, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 155, 303, and 613, and sections 1.115 and 1.411 of the Commission's Rules, 47 C.F.R. §§ 1.115, 1.411, this *MO&O, Order, and Notice of Proposed Rulemaking* IS ADOPTED.

51. IT IS FURTHER ORDERED that, pursuant to section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Consumer Organizations' Application for Review of the *Anglers Order* and the Bureau Letter Orders listed in Appendix A, IS GRANTED to the extent indicated above.

52. IT IS FURTHER ORDERED THAT The Petition for Emergency Stay, filed by the Consumer Organizations is dismissed as moot.

53. IT IS FURTHER ORDERED that the *MO&O, Order, and Notice of Proposed Rulemaking* SHALL BE EFFECTIVE upon publication in the *Federal Register*.

54. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND copies of this *MO&O, Order, and Notice of Proposed Rulemaking* via certified mail, return receipt requested to counsel for or the last known

[136] *See* 5 U.S.C. § 801(a)(1)(A).

address for each of the petitioners named in this matter within 10 business days of release of this *MO&O, Order, and Notice of Proposed Rulemaking*.

55. IT IS FURTHER ORDERED that each of the petitions noted in Appendix A hereto that were the subject of the Application for Review shall be dismissed 90 days from the release date of this *MO&O*. Affected petitioners may file new petitions in accordance with the statute and Commission rules within 90 days after the release of this *MO&O*. Any such petitioner who does not file a new petition in accordance with the statute and Commission rules within this 90 day period must begin providing closed captioning of its programming beginning on the 91st day after release of this *MO&O*.

56. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

List of Petitioners

Case Identifier CGB-CC-	Petitioner	Program Name	Mailing Address
0001	Curtis Baptist Church		Curtis Baptist Church 1326 Broad St. Augusta, GA 30901
0004	Main Street Living		Main Street Living 1400 So. Duluth Ave. Sioux Falls, SD 57105
0005	Anglers for Christ Ministries, Inc.	"The Christian Angler Outdoors Television Show"	Anglers for Christ Ministries, Inc. 2224 Fish Hatchery Rd. Morristown, TN 37813
0006	New Life Worship Center	"Life in Christ	New Life Worship Center 915 Douglas Pike Smithfield, Rl 02917
0007	New Beginning Ministries	"In His Image"	New Beginning Ministries 4004 Bonita Rd. Holiday, FL 34691
0008	Thy Kingdom Come, Inc.	"Prophecy Watch"	Thy Kingdom Come, Inc. 7301 E. 14th Street Tulsa, OK 74112
0009	Niagara Ministries	"Digging In With Joanne Bunce"	Niagara Ministries 2074 Lockport Rd. Niagara Falls, NY 14304
0010	Living Faith Apostolic Church	"The Un-compromised Word"	Living Faith Apostolic Church 2177 Mock Road Columbus, OH 43219
0015	University Park Baptist Church	"Producing Kingdom Citizens"	University Park Baptist Church 6029 Beatties Ford Road Charlotte, NC 28216
0018	Power in the Word Outreach Ministries	"Power in the Word"	Power in the Word Outreach Ministries 351 S. Craft Highway Chickasaw, AL 36611
0020	Catholic Diocese of Reno		Catholic Diocese of Reno 290 S. Arlington Avenue, Suite 200 Reno, NV 89501-1713
0023	Christ Chapel, Inc.		Christ Chapel, Inc. 3051 Cloverdale Road