

Institute for Public Representation
600 New Jersey Ave. NW
Washington, DC 20001
(p): 202.662.9535
(f): 202.662.9634

March 9, 2012

via hand delivery

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

Attn: CGB Room 3-B431

**Re: Niagara Ministries Request for Exemption from the
Commission's Closed Captioning Rules
Case No. CGB-CC-0009
CG Docket No. 06-181**

FILED/ACCEPTED

MAR - 9 2012

Federal Communications Commission
Office of the Secretary

Dear Ms. Dortch:

Pursuant to the Commission's Request for Comment, Telecommunications of the Deaf and Hard of Hearing Inc. (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this Opposition to the petition of Niagara Ministries ("Niagara") to exempt its programming from the Commission's closed captioning rules, 47 C.F.R. § 79.1 (2010).¹ Niagara has provided insufficient information to demonstrate that it cannot afford to caption its programming.

¹ *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules, Niagara Ministries*, Case No. CGB-CC-0009, CG Docket No. 06-181 (Feb. 8, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0208/DA-12-162A1.pdf; *Petition for Exemption from Closed Captioning Requirement for Niagara Ministries*, Case No. CGB-CC-0009, CG Docket No. 06-181 (Jan. 9, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021756104> [hereinafter *Niagara Petition*].

Niagara's requested exemption would deny equal access to its program *Digging In with Joanne Bunce* for the members of its community who are deaf or hard of hearing. Maximizing accessibility through the comprehensive use of closed captions is a critical step in ensuring that all viewers who are deaf or hard of hearing can experience the important benefits offered by video programming on equal terms to their hearing peers.

Because the stakes are so high for the millions of Americans who are deaf or hard of hearing, it is essential that the Commission grant petitions for exemptions from captioning rules only in the rare case that a petitioner conclusively demonstrates that captioning its programming would impose a truly untenable economic burden. To make such a demonstration, a petitioner must present detailed, verifiable, and specific evidence that it cannot afford to caption its programming, either with its own revenue or with alternative sources.

Niagara has provided insufficient information to demonstrate, or for the Commission to determine, that Niagara cannot afford to caption its programming. Niagara does not present its most recent financial information, but its previous financial statements indicate that it can in fact afford captioning. Consumer Groups recommend that Niagara be given 45 days either to comply with the closed captioning rules or to re-apply with sufficient information to allow the Commission and the public to accurately determine whether Niagara's request meets the legal standard for granting an exemption.

Under section 713(d)(3) of the Communications Act of 1934 ("1934 Act"),² as added by the 1996 Act and amended by section 202(c) of the CVAA, "a provider of video programming or program owner may petition the Commission for an exemption from the [closed captioning] requirements of [the 1934 Act], and the Commission may grant such petition upon a showing that the requirements . . . would be economically

² Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 27 U.S.C. 613(d)(3)).

burdensome.” In its October 20, 2011 Interim Standard Order, the Commission directed the Consumer and Governmental Affairs Bureau to evaluate all exemption petitions filed subsequent to October 8, 2010 using the “undue burden” standard in section 713(e) of the 1934 Act, pursuant to the Commission’s existing rules in 47 C.F.R. § 79.1(f)(2)-(3).³

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.⁴ More specifically, a petitioner must first demonstrate its inability to afford providing closed captions for its programming.⁵ If a petitioner sufficiently demonstrates such an inability, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning its programming.⁶ Where a petition fails to make either of the foregoing showings, it fails to demonstrate that providing captions would pose an undue burden, and the Commission must dismiss the petition.⁷

³ *Order, Interpretation of Economically Burdensome Standard*, CG Docket No. 06-181, 26 FCC Rcd. 14,941, 14,961, ¶ 37 (Oct. 20, 2011), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1123/FCC-11-159A1.pdf. The Commission proposed to finalize this interim directive in a Notice of Proposed Rulemaking released with the 2011 ISO. *Interpretation of Economically Burdensome Standard*, CG Docket No. 11-175, 26 FCC Rcd. 14,941, 14,961-62, ¶¶ 38-39 (proposed Oct. 20, 2011), 76 Fed. Reg. 67,397 (Nov. 1, 2011), http://transition.fcc.gov/Daily_Releases/Daily_Business/011/db1123/FCC-11159A1.pdf. See also 2011 ISO at 14,960, ¶ 36. In some early adjudications, the Commission specifically analyzed exemption petitions under the four-factor rubric in section 713(e), analyzing whether each of the four factors weighed for or against granting a particular petition. E.g., *Home Shopping Club L.P.*, Case No. CSR 5459, 15 FCC Rcd. 10,790, 10,792-94 ¶¶ 6-9 (CSB 2000). Over the past decade, however, this factor-based analysis has evolved into several specific evidentiary requirements that must be satisfied to support a conclusion that a petitioner has demonstrated an undue economic burden sufficient to satisfy the requirements of section 713(e). See *Anglers for Christ Ministries*, Case Nos. CGB-CC-0005 and CGB-CC-0007, CG Docket No. 06-181, 26 FCC Rcd. 14,941, 14,955-56, ¶ 28 (Oct. 20, 2011) [hereinafter *Anglers 2011*].

⁴ See *Anglers 2011*, *supra* note 3, 26 FCC Rcd. at 14,955-56, ¶ 28.

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

I. Niagara's Ability to Afford Captioning

To sufficiently demonstrate that a petitioner cannot afford to caption its programming, a petition must provide both detailed information regarding the petitioner's financial status and verification that the petitioner has diligently sought out and received accurate, reasonable information regarding the costs of captioning its programming, such as competitive rate quotes from established providers.⁸ Both showings are essential to enable the Commission and the public to verify that the petitioner in fact cannot afford to caption its programming and eliminate the possibilities that captioning would be possible if the petitioner reallocated its resources or obtained more reasonable price quotes for captioning services.

A successful petition requires, at a bare minimum, detailed information regarding the petitioner's finances and assets, gross or net proceeds, and other documentation "from which its financial condition can be assessed."⁹ Niagara, however, only includes a financial statement for 2010 and not for 2011.¹⁰ Accordingly, it is impossible to determine whether Niagara can afford to caption its programming.

Moreover, even if Niagara's 2010 financial statement in fact provided a current picture of Niagara's finances, it is wholly unclear how providing closed captioning would impose an undue economic burden. In 2010, Niagara had net revenues of more than \$80,000, far in excess of the \$29,250 it asserts closed captioning its programming would cost.¹¹

⁸ See *id.*

⁹ E.g., *Survivors of Assault Recovery*, Case No. CSR 6358, 20 FCC Rcd. 10,031, 10,032, ¶ 3 (MB 2005) (hereinafter *Survivors*), cited with approval in *Anglers 2011*, *supra* note 3, 26 FCC Rcd. at 14,956, ¶ 28 n.100.

¹⁰ *Niagara Petition*, *supra* note 1, at 5; Exhibit 1, at 2-3.

¹¹ *Id.* at 2; Exhibit 1.

II. Alternative Avenues for Captioning Assistance

Even where a petition succeeds at demonstrating that a petitioner cannot afford to caption its programming, the petitioner must also demonstrate that it has exhausted all alternative avenues for attaining assistance with captioning its programming.¹² In particular, a petitioner also show that it has sought out sponsorships or other sources of revenue to cover the cost of captioning its program and is unable to obtain alternative means of funding captions for its programming.¹³ Niagara, however, summarily argues that it should not have to solicit sponsorships because its “market does not use the model of sponsorship that the commercial sector uses” and that “[t]here is no sponsorship available for [its] programming.”¹⁴ Given that many similarly-situated entities seek out and obtain captioning sponsorship for their programming, we are unaware of any reason that Niagara’s refusal to seek sponsorship support for captioning should excuse it from complying with the Commission’s rules.

III. Conclusion

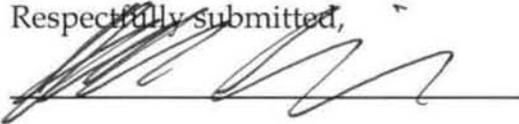
Niagara’s petition does not include sufficient information to conclude that Niagara cannot afford to caption its programming at this time or that it has exhausted all available alternative options for providing captioning. Because the petition fails to conclusively demonstrate that it would be unduly burdensome for Niagara to caption its programming under the high standard demanded under the 1996 Act and the CVAA, we respectfully urge the Commission give Niagara 45 days either to comply with the closed captioning rules or to re-apply with sufficient information, including its most recent financial statements, to allow the Commission and the public to determine whether Niagara’s petition meets the legal standard for granting an exemption.

¹² See *Anglers 2011*, *supra* note 3, 26 FCC Rcd. at 14,955-56, ¶ 28 (internal citations omitted).

¹³ See *Outland Sports*, 16 FCC Rcd. at 13607-08, ¶ 7 (2001), *cited with approval in Anglers 2011*, *supra* note 3, 26 FCC Rcd. at 14,956, ¶ 28 n. 103.

¹⁴ *Niagara Petition*, *supra* note 1, at 3.

Respectfully submitted,


Blake E. Reid, Esq.†

March 9, 2012

*Counsel for Telecommunications for the
Deaf and Hard of Hearing, Inc.*

Institute for Public Representation
Georgetown Law
600 New Jersey Ave. NW
Washington, DC 20001
202.662.9545
ber29@law.georgetown.edu

cc: Roger Holberg, Consumer &
Governmental Affairs Bureau
Traci Randolph, Consumer &
Governmental Affairs Bureau

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

_____/s/_____

Claude Stout, Executive Director • cstout@TDIforAccess.org
Contact: Jim House, CEPIN Outreach/Public Relations • jhouse@TDIforAccess.org
8630 Fenton Street, Suite 604, Silver Spring, MD 20910
301.589.3786
www.TDIforAccess.org

National Association of the Deaf (NAD)

_____/s/_____

Howard Rosenblum, Chief Executive Officer • howard.rosenblum@nad.org
Contact: Shane Feldman, Chief Operating Officer • shane.feldman@nad.org
8630 Fenton Street, Suite 820, Silver Spring, MD 20910
301.587.1788
www.nad.org

Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)

_____/s/_____

Cheryl Heppner, Vice Chair • CHeppner@nvrc.org
3951 Pender Drive, Suite 130, Fairfax, VA 22030

† Counsel thanks Georgetown Law student clinicians Allyn Ginns and Cathie Tong for their assistance in preparing these comments.

Association of Late-Deafened Adults (ALDA)

_____/s/_____

Contact: Brenda Estes, President • bestes@endependence.org
8038 Macintosh Lane, Rockford, IL 61107

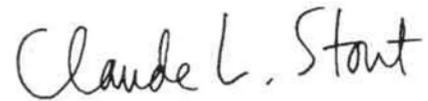
Cerebral Palsy and Deaf Organization (CPADO)

_____/s/_____

Contact: Mark Hill, President • deafhill@gmail.com
1219 NE 6th Street #219, Gresham, OR 97030
503.468.1219

CERTIFICATION

Pursuant to 47 C.F.R. § 1.16 and 79.1(f)(9), I, Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), hereby certify under penalty of perjury that to the extent there are any facts or considerations not already in the public domain which have been relied in the foregoing Opposition, these facts and considerations are true and correct to the best of my knowledge.



Claude Stout
March 9, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on March 9, 2012, pursuant to the Commission's aforementioned Public Request for Comment, a copy of the foregoing Opposition was served by first class U.S. mail, postage prepaid, upon the petitioner:

Niagara Ministries
2074 Lockport Rd.
Niagara Falls, NY 14304



Niko Perazich
March 9, 2012