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June 15, 2012

*via hand delivery*

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

**Attn: CGB Room 3-B431**

**Re: Van Buren First Assembly of God's Petition for Exemption from the  
Commission's Closed Captioning Rules  
Case No. CGB-CC-0045  
CG Docket No. 06-181**

**FILED/ACCEPTED**

**JUN 15 2012**

Federal Communications Commission  
Office of the Secretary

Dear Ms. Dortch:

Pursuant to the Commission's Request for Comment, Telecommunications for 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), Communication Service for the Deaf, Inc. (CSD), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this opposition to the petition of Van Buren First Assembly of God ("Van Buren") to exempt its program *Reach Out* from the Commission's closed captioning rules, 47 C.F.R. § 79.1.<sup>1</sup> Consumer Groups oppose the petition because it

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<sup>1</sup> *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules, Van Buren First Assembly of God, Case No. CGB-CC-0045, CG Docket No. 06-181 (May 17, 2012), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0518/DA-12-781A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0518/DA-12-781A1.pdf); Petition for Waiver of Closed Captioning Rules, Case No. CGB-CC-0045, CG Docket No. 06-181 (Jan. 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021755293> ("Van Buren Petition").* The Consumer and Governmental Affairs Bureau initially determined that the *Van Buren Petition* was

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does not include sufficient information to demonstrate that Van Buren cannot afford to caption its programming.

Consumer Groups acknowledge Van Buren's efforts to serve its community by helping "reach others outside of the church by television to bring them the gospel message."<sup>2</sup> Van Buren's requested exemption, however, would deny equal access to Van Buren's programming to community members who are deaf or hard of hearing. Maximizing accessibility through the comprehensive use of closed captions is critical to ensure that all viewers who are deaf or hard of hearing can experience the important benefits offered by video programming on equal terms with 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.

Under section 713(d)(3) of the Communications Act of 1934 ("1934 Act"), as added by the Telecommunications Act of 1996 Act ("1996 Act")<sup>3</sup> and amended by section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 ("CVAA"),<sup>4</sup> "a provider of video programming or program owner may petition the

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deficient because it did not include a valid affidavit. *Letter from Roger Holberg, Consumer and Governmental Affairs Bureau, Case No. CGB-CC-0045, CG Docket No. 06-181 (April 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021913427> ("CGB Letter").* CGB later determined that the unsworn declaration in the *Van Buren Petition* was sufficient to satisfy the affidavit requirement pursuant to 47 C.F.R. § 1.16. *E-mail from Traci Randolph, CGB, to Blake Reid (May 29, 2012) (on file with author).*

<sup>2</sup> *Van Buren Petition* at 2.

<sup>3</sup> Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 613(d)(3)).

<sup>4</sup> Pub. L. 111-260, 124 Stat. 2751 (codified at 47 U.S.C. § 613(d)(3)).

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 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).<sup>5</sup>

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.<sup>6</sup> If a petitioner sufficiently demonstrates an inability to afford captioning, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning.<sup>7</sup> Where a petition fails to make either of the foregoing showings, it fails to demonstrate that

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<sup>5</sup> *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](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1123/FCC-11-159A1.pdf) (“2011 ISO”). 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](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) (“*Anglers 2011*”).

<sup>6</sup> See *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

<sup>7</sup> See *id.*

providing captions would pose an undue burden, and the Commission must dismiss the petition.<sup>8</sup>

### **I. Van Buren's Ability to Afford Captioning**

To sufficiently demonstrate that a petitioner cannot afford to caption its programming, a petition must provide both 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, and detailed information regarding the petitioner's financial status.<sup>9</sup> Both showings must demonstrate that the petitioner in fact cannot afford to caption its programming and eliminate the possibility that captioning would be possible if the petitioner reallocated its resources or obtained more reasonable price quotes for captioning its programming.

#### **A. Cost of Captioning**

To successfully demonstrate that captioning would pose an undue burden in light of its financial status, a petitioner must also demonstrate a concerted effort to determine "the most reasonable price" for captioning its programming.<sup>10</sup> To allow the Commission and the public to evaluate whether a petitioner's cost estimates are reasonable, it is essential that a petition provide, at a bare minimum, detailed information about the basis and validity of cost estimates for captioning, such as competitive hourly rate quotes and associated correspondence from several established captioning providers.<sup>11</sup>

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<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *The Wild Outdoors*, Case No. CSR 5444, 16 FCC Rcd. 13,611, 13,613-14 ¶ 7 (CSB 2001), cited with approval in *Anglers 2011*, 26 FCC Rcd. at 14,956, ¶ 28 n.101.

<sup>11</sup> Compare, e.g., *Outland Sports, Inc.*, Case No. CSR 5443, 16 FCC Rcd. 13,605, 13,607, ¶ 7 (CSB 2001) (approving of a petitioner's inclusion of rate quotes and associated correspondence from at least three captioning providers in its petition) with *The Wild Outdoors*, 16 FCC Rcd. at 13,613-14, ¶ 7 (disapproving of a petitioner's bald assertion of the cost to caption a program without supporting evidence).

Van Buren asserts that it received one bid of \$8,684 per year to caption its programming, and another bid for \$9,000 plus additional expenses of \$292-\$375 for additional filming and editing expenses – which Van Buren apparently contends bear some relationship to captioning. Van Buren, however, provides no documentation of these bids, and does not even include basic information such as how many shows are aired per year that would permit the quoted hourly rate to be inferred. Accordingly, it is impossible to determine whether Van Buren has made a concerted effort to determine the most reasonable price of captioning its programming.

**B. Van Buren’s Financial Status**

Even assuming that \$8,684 represents a reasonable assessment of the cost of captioning Van Buren’s programming, Van Buren has not presented sufficient information about its financial status to demonstrate that it cannot afford captioning. 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” that demonstrates captioning would present an undue economic burden.<sup>12</sup>

Van Buren first provides yearly income and expense statements for its television program, showing net losses each year.<sup>13</sup> Van Buren also argues that “the addition of captioning expenses would add at least 18 percent to the cost of its program.”<sup>14</sup> The specific budget for Van Buren’s programming, however, is irrelevant to the Commission’s determination. When evaluating the financial status of a petitioner, the Commission “take[s] into account the overall financial resources of the provider or program owner,” not “only the resources available for a specific program.”<sup>15</sup>

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<sup>12</sup> *E.g., Survivors of Assault Recovery*, Case No. CSR 6358, 20 FCC Rcd. 10,031, 10,032, ¶ 3 (MB 2005), cited with approval in *Anglers 2011*, 26 FCC Rcd. at 14,956, ¶ 28 n.100.

<sup>13</sup> *Van Buren Petition* at Exhibit 1.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Anglers 2011*, *supra* note 5, 26 FCC Rcd. at 14,950, ¶ 17.

Van Buren also provides overall income, expense, and asset statements for 2009, 2010, and the first 8 months of 2011.<sup>16</sup> These statements show that Van Buren had more than \$2.3 million in net assets as of August 31, 2011, including more than \$300,000 in various savings accounts.<sup>17</sup> Van Buren inexplicably insists that these assets are insufficiently liquid to pay for the modest cost of closed captioning.<sup>18</sup> Van Buren also points to its net overall losses in 2009 and 2010.<sup>19</sup> But in just 8 months of 2011, Van Buren took in \$26,262.62 in net income<sup>20</sup>— enough to pay for three years of closed captioning at its quoted rate of \$8,684. Van Buren provides no explanation as to why it cannot dedicate its excess income or substantial assets toward paying for closed captions rather than seeking an unprecedented 3-year exemption from the closed captioning rules. There is simply no indication that Van Buren cannot afford to caption its programming.

## 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.<sup>21</sup> A petitioner must provide documentation showing that it has sought assistance from other parties involved with the creation and distribution of its programming,<sup>22</sup> sought sponsorships or other sources of revenue to cover captions, and is unable to obtain alternative means of funding captions.<sup>23</sup>

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<sup>16</sup> *Van Burden Petition* at Exhibit 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at Exhibit 2.

<sup>21</sup> *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28 (internal citations omitted).

<sup>22</sup> See, e.g., *Engel's Outdoor Experience*, Case No. CSR 5882, 19 FCC Rcd. 6867, 6868, ¶ 3 (MB 2004), cited with approval in *Anglers 2011*, 26 FCC Rcd. at 14,956, ¶ 28 n. 102.

<sup>23</sup> See *Outland Sports*, 16 FCC Rcd. at 13607-08, ¶ 7, cited with approval in *Anglers 2011*, 26 FCC Rcd. at 14,956, ¶ 28 n. 103.

Van Buren asserts that it has “sought sponsors for the captioning in the community, but it has been unable to obtain any.”<sup>24</sup> Van Buren provides no verifiable documentation of its efforts. Even if Van Buren successfully demonstrated that it could not afford to caption its programming, it could not evade the captioning rules simply by insisting without any supporting evidence that it could not find any sponsors for its captioning.

### **III. Categorical Exemptions**

Finally, Van Buren asserts that it should be eligible for the Commission’s self-executing categorical exemptions for channels producing revenues of less than \$3,000,000 under 47 C.F.R. § 79.1(d)(12) and for video programming distributors locally producing non-news programming with no repeat value under 47 C.F.R. § 79.1(d)(8). As the Consumer and Governmental Affairs Bureau correctly noted in its April 18, 2012 letter to Van Buren, only channels of video programming are eligible for the \$3,000,000 exemption, which therefore does not apply to Van Buren.<sup>25</sup> The Bureau also correctly noted that the local exemption is only available to video programming distributors and therefore does not apply to Van Buren.<sup>26</sup>

Van Buren also implies that it should be eligible for an exemption because it is a non-profit entity. Again, as the Bureau’s letter notes, the Commission’s rules do not provide a categorical exemption for non-profit entities.<sup>27</sup>

### **IV. Conclusion**

Van Buren’s petition does not include sufficient information to demonstrate that Van Buren cannot afford to caption its programming. Accordingly, we respectfully urge the Commission to dismiss the petition and require Van Buren to comply with the

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<sup>24</sup> *Van Buren Petition* at 3.

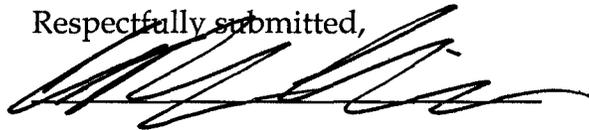
<sup>25</sup> *CGB Letter* at 1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2.

closed captioning rules. Should the Commission nevertheless determine that an exemption is appropriate, it should decline Van Buren's unprecedented request for a three-year exemption. It is impossible to conclude that Van Buren will be unable to afford captioning for the next three years, and the Commission should not afford programmers exemptions from the captioning rules without continuing demonstrations of economic burden and efforts to seek alternative methods of funding closed captioning or otherwise make their programs accessible.

Respectfully submitted,



Blake E. Reid, Esq.

June 15, 2012

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          /s/          

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## 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 L. Stout*

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Claude Stout  
June 15, 2012

## CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on June 15, 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:

Van Buren First Assembly of God  
c/o Anne Goodwin Crump  
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Niko Perazich  
June 15, 2012