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October 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

FILED/ACCEPTED

OCT - 9 2012

Federal Communications Commission
Office of the Secretary

Re: **Lima Baptist Temple Petition for Exemption from the Commission's Closed Captioning Rules**
Case No. CGB-CC-0218
CG Docket No. 06-181

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), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this opposition to the petition of Lima Baptist Temple ("Lima") to exempt its program from the Commission's closed captioning rules, 47 C.F.R. § 79.1.[1] Consumer Groups oppose the petition because

[1] *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181 (September 6, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0906/DA-12-1447A1.pdf; *Lima Petition for Exemption*, Case No. CGB-CC-0218, CG Docket No. 06-181 (January 11, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021755404 ("*Lima Petition*"). The Consumer and Governmental Affairs Bureau initially determined that the *Lima Petition* was deficient because it did not verify Lima's financial inability to provide closed

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it does not demonstrate that Lima has sought out the most reasonable price for captioning services or that Lima cannot afford to caption its programming in any case.

Consumer Groups acknowledge Lima's efforts to "serve elderly and handicapped persons [an inappropriate and outdated colloquialism referring to people with disabilities] who [are] not physically able to attend church anywhere."[2] Lima's requested exemption, however, would deny equal access to its programming to members of its community who are deaf or hard of hearing. Maximizing accessibility through the comprehensive use of closed captions is critical to ensuring that all viewers can experience the important benefits of video programming on equal terms.

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 documentation 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")[3] and amended by section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 ("CVAA"),[4] "a provider of video programming or program owner may petition the

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captioning and did not verify the effect providing captioning would have on Lima's programming. *Letter from the Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-0218, CG Docket No. 06-181 (April 4, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021907497 ("*CGB Letter*"). Lima then filed two supplements. *Lima Supplement*, Case No. CGB-CC-0218 (April 25, 2012), http://apps.fcc.gov/ecfs/document/view?id=7021918849; http://apps.fcc.gov/ecfs/document/view?id=7021991122 (July 3, 2012) (*Lima Supplement II*).

[2] *Lima Supplement* at 2.

[3] Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 613(d)(3)).

[4] 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 July 20, 2012 Report and Order, the Commission formally adopted the analysis set forth in its October 20, 2011 Interim Standard Order and Notice of Proposed Rulemaking.[5] In doing so, the Commission interpreted the term "economically burdensome" as being synonymous with the term "undue burden" as defined in section 713(e) of the 1934 Act and ordered the Consumer and Governmental Affairs Bureau to continue to evaluate all exemption petitions using the "undue burden" standard pursuant to the Commission's amended rules in 47 C.F.R. § 79.1(f)(2)-(3).[6]

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.[7] 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.[8] Where a

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[5] The *Interim Standard Order* and the *NPRM* were part of a multi-part Commission decision. *See Anglers for Christ Ministries, Inc., New Beginning Ministries, Petitioners Identified in Appendix A, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission's Rules; Video Programming Accessibility,* Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, CG Docket Nos. 06-181 and 11-175, 26 FCC. Rcd. 14941 (Oct. 20, 2011) (*"Anglers 2011"*).

[6] *Report and Order, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission's Rules; Video Programming Accessibility,* CG Docket No. 11-175, ¶ 8 (July 20, 2012) (*"Economically Burdensome Standard Order"*). 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 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

[7] *See Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

[8] *See id.*

petition fails to make either of those showings, it fails to demonstrate that providing captions would be economically burdensome, and the Commission must dismiss the petition.[9]

I. Lima'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.[10] 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. The Cost of Captioning Lima's Programming

To successfully demonstrate that captioning would be economically burdensome, a petitioner must demonstrate a concerted effort to determine "the most reasonable price" for captioning its programming.[11] 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.[12]

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[9] *See id.*

[10] *See id.*

[11] *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.

[12] *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*

Lima claims captioning its programming will cost $675 per one-hour program.[13] That estimate, however, appears to be for expedited two-day turnaround, while the vendor who provided that estimate quotes $450 for a standard three-business-day turnaround.[14] Yet another vendor quotes $405 per episode when committing to a 52-week contract,[15] while another quotes a cost of $2.34 per minute, or approximately $140 for each hour-long episode.[16]

Because Lima does not explain why the less expensive quotes are not feasible, it is unclear why Lima must spend $675 to caption its programming. It is further unclear why Lima needs to hire a "local editing professional in order to meet the shipping receipt deadline requirement ... and return shipping deadline requirement to meet the WLIO on air deadlines."[17] Even if this is true, Lima must explain why incurring such an expense is necessary and quote the reasonable cost with supporting documentation.

Furthermore, Lima does not indicate that it attempted to negotiate with any of the caption providers to seek out a more affordable rate. Accordingly, it is impossible to conclude that Lima has made the necessary effort to determine the most reasonable price for captioning its programming before turning to the exemption petition as a last response.

B. Lima's Financial Status

A successful petition requires, at a bare minimum, detailed information regarding the petitioner's finances and assets, gross or net proceeds, and other documentation

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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).

[13] *Lima Petition* at 5.

[14] *Id.* at Ex. A.

[15] *Lima Supplement* at 5.

[16] *See Lima Petition* at 1; *Lima Supplement* at 4.

[17] *Lima Petition* at 3.

"from which its financial condition can be assessed" that demonstrates captioning would present an undue economic burden.[18]

Lima notes that it is a tax-exempt non-profit entity.[19] But as the Commission has plainly stated, granting petitioners "favorable exemption treatment because of their non-profit status [is] inconsistent with . . . Commission precedent."[20] The Commission has "specifically rejected requests by commenters to adopt a categorical exemption for all non-profit entities based solely on their non-profit status" and has "chose[n] instead to adopt revenue-based exemption standards that . . . focus on the economic strength of each [petitioner]."[21] An entity's non-profit status does not suggest, much less preclude, the possibility that it cannot afford to caption its programming.

While Lima insists that it "does not have the funding to cover" captioning, it brought in more than $1.1 million in gross revenue in 2011, and a net income after expenses of nearly $70,000.[22] At the lowest price quoted—$140 per show—it would cost Lima only $7,280 to caption its programming annually—only about a tenth of its annual profit. Even at the highest quoted price—$675 per show—Lima could still afford to spend the $35,100 to caption its programming without exceeding its annual net income. While Lima speculates that it will "end the year significantly short of meeting the projected budget," it is unclear which year Lima is referring to, and it provides no concrete evidence suggesting that it takes in anything less than the substantial net income indicated in its profit and loss sheets.[23]

Lima also points out that the cost of broadcasting its program is currently $25,740 per year and insists that closed captioning "could more than double [Lima's] expenses

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[18] *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.
[19] *Lima Petition* at 3.
[20] *Anglers* 2011, 26 FCC Rcd. at 14, 951, ¶ 18.
[21] *Id.* at 14,950-51, ¶ 18 (citations omitted).
[22] *Lima Supplement* at 3.
[23] *Lima Petition* at 3.

to provide [its television ministry]."[24] But the specific budget for Lima's programming 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."[25]

II. The Locally Produced and Distributed Non-News, Non-Repeating Exemption for Video Programming Distributors

Finally, Lima "believes that the local, non-news exemption to the closed captioning rules also applies to [its programming]."[26] But as the CGB notes, the narrow exemption in Section 79.1(d)(8) of the Commission's rules applies only to "[p]rogramming that is locally produced **by [a] 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."[27] As CGB has repeatedly determined, entities like Lima are plainly not video programming distributors under the meaning of the Commission's rules and cannot qualify for this exemption.[28]

III. Conclusion

Lima's petition does not demonstrate that Lima has sought out the most reasonable price for captioning services or that Lima cannot afford to caption its programming. Accordingly, we respectfully urge the Commission to dismiss the petition and require Lima's programming to come into compliance with the closed captioning rules.

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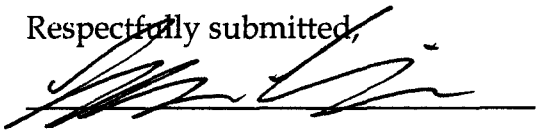
[24] *Id.* at 3; *Lima Supplement* at 3.
[25] *Anglers 2011*, 26 FCC Rcd. at 14,950, ¶ 17.
[26] *Lima Petition* at 3-4.
[27] *See CGB Letter* at 1.
[28] *See, e.g., id.; see also* 47 C.F.R. § 79.1(a)(2) (defining "video programming distributor").

Respectfully submitted,



Blake E. Reid†
October 9, 2012

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† Counsel thanks Georgetown Law student Jessica Lee for her assistance in preparing these comments.

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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 on in the foregoing document, these facts and considerations are true and correct to the best of my knowledge.

Claude L. Stout

Claude Stout
October 9, 2012

CERTIFICATE OF SERVICE

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

Lima Baptist Temple
c/o Huffman, Kelley, Brock & Gottschalk, LLC
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Niko Perazich
October 9, 2012