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November 26, 2012

via hand delivery

FILED/ACCEPTED

NOV 26 2012

Federal Communications Commission
Office of the Secretary

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: **Los Angeles Unified School District Petition for Exemption from the Commission's Closed Captioning Rules**
Case No. CGB-CC-0269
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 Los Angeles Unified School District ("LAUSD") to exempt its programming from the Commission's closed captioning rules, 47 C.F.R. § 79.1.[1] Consumer Groups oppose the petition because it appears to be moot and fails to establish that LAUSD

[1] *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181 (October 26, 2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1729A1.pdf; *LAUSD Petition for Exemption*, Case No. CGB-CC-0269, CG Docket No. 06-181 (July 5, 2012), http://apps.fcc.gov/ecfs/comment/view?id=6017097028 ("*LAUSD Petition*"); *LAUSD Supplement*, Case No. CGB-CC-0269 (July 24, 2012), http://apps.fcc.gov/ecfs/document/view?id=7022007723.

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diligently sought the lowest price to caption its programming or that LAUSD cannot afford captioning.

Consumer Groups acknowledge LAUSD's efforts to "provide pertinent educational and informational programming to students in classrooms and at home, programming of interest to the general public which will enable viewers to understand the mission of the LAUSD, its plans, and its programs, and other educational and public interest programming."[2] Consumer Groups are also sympathetic to the difficult economic and policy decisions that LAUSD faces in operating the second-largest school system in the United States during California's ongoing budget shortfall.[3]

LAUSD's requested exemption, however, would deny equal access to its programming to students and community members who are deaf or hard of hearing. That LAUSD is responsible for the educational needs of 664,233 students and their families does not excuse LAUSD of its important obligations to caption the programming it distributes.[4] To the contrary, many students, parents, teachers, and other members of the public who access or benefit from LAUSD's services are among the more than 800,000 Californians who are deaf or hard or hearing residing in greater Los Angeles and its surrounding counties.[5]

I. Mootness

To obtain an exemption from the Commission's closed captioning rules, a petitioner must establish that the Commission's closed captioning rules in fact impose any burden to demonstrate that an individualized exemption from the rules is warranted.[6] LAUSD fails to make this threshold showing in two respects.

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[2] *LAUSD Petition* at 6.
[3] *Id.* at 3, 5.
[4] *See id.* at 5.
[5] *See* Greater Los Angeles Agency on Deafness, Inc., *Resources*, http://www.gladinc.org/information-center/resources (last visited Nov. 18, 2012).
[6] *See* 47 U.S.C. § 613(d)(3); 47 C.F.R. § 79.1(f)(1)-(2).

First, LAUSD's petition fails to address its existing obligations to caption its programming under federal and state accessibility laws outside of the Commission's jurisdiction, including Title II of the American with Disabilities Act of 1990 ("ADA"), Section 504 of the Rehabilitation Act of 1973, and California's Unruh Civil Rights Act.[7] The Commission has no authority to grant exemptions from those laws in the context of this proceeding, and LAUSD's obligations under those laws cannot form the basis for its contention that complying with the Commission's rules would be burdensome. LAUSD must identify captioning obligations that the Commission's rules specifically impose above and beyond LAUSD's obligations under other accessibility laws and establish that its obligations under the Commission's rules alone constitute an undue economic burden. Because LAUSD's petition fails to differentiate between obligations under the Commission's rules and those already imposed by other accessibility laws over which

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[7] Under the ADA, public entities are barred from discriminating against people with disabilities through exclusion from benefits, services, or programs of the entity. 42 U.S.C. § 12132. School districts like LAUSD are public entities for the purposes of the ADA, as defined under 42 U.S.C. § 12131(1). *See, e.g., Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 639 (E.D.N.Y. 2007).

Section 504 also bars entities from discriminating against people with disabilities through the exclusion from participation in, denial of benefits of, or discrimination under programs activities receiving federal financial assistance. 29 U.S.C. § 794(a). Section 504 applies in parallel with the ADA to school districts, such as LAUSD, that receive federal funding. *See Cave*, 480 F. Supp. 2d at 640 (citations omitted); LAUSD Budget Realities, *FAQs: Where does LAUSD's revenue for the General Fund come from?*, http://budgetrealities.lausd.net/faq#t13n68 (last visited Nov. 18, 2012) (noting that LAUSD received $934 million in federal funding in 2012). Public broadcasters that, like LAUSD, receive federal funding, also have "a duty to comply with" Section 504. *See Cmty. Television v. Gottfried*, 459 U.S. 498, 511 (1983); *LAUSD Petition* at 10 (noting that LASD receives a significant portion of its budget from federal funds distributed by the Corporation for Public Broadcasting).

To comply with ADA regulations promulgated by the United States Department of Justice, public entities subject to Title II of the ADA must make their television programming accessible to people with disabilities, ideally through the provision of closed captioning. *See* 28 C.F.R. § 35.160; 28 C.F.R. Pt. 35, App. B. Violations of the ADA also constitute separate violations of California's Unruh Civil Rights Act. Cal. Civ. Code § 51(b), (f).

the Commission has no jurisdiction, it is impossible for the Commission or the public to evaluate what burden, if any, the Commission's rules actually impose on LAUSD, and the petition therefore should be dismissed.

Second, LAUSD also claims that its programming may already be exempt under one or more of the Commission's thirteen categorical exemptions under 47 C.F.R. § 79.1(d).[8] As the Consumer and Governmental Affairs Bureau has repeatedly noted, those exemptions are "self-implementing," and a party claiming eligibility for one of the exemptions "need not petition the Commission or otherwise obtain the Commission's permission to not caption its programming."[9] It is indisputable that the Commission's captioning rules cannot impose any burden, undue or otherwise, on exempt programming. Accordingly, petitioners must identify specific programming that is non-exempt and thereby raises the possibility that complying with the Commission's rules could actually impose an economic burden on the petitioner. LAUSD's petition fails to identify any specific programming it believes to be non-exempt, and therefore should be dismissed.[10]

II. The Economically Burdensome Standard

While LAUSD's petition fails to establish what, if any, cognizable burden the FCC's captioning rules impose on LAUSD, Consumer Groups nevertheless offer our comments on the remainder of the petition, assuming for the sake of argument that some or all of LAUSD's programming is neither subject to any captioning requirement outside of the Commission's rules nor exempt from the Commission's rules.

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[8] *LAUSD Petition* at 8.

[9] *E.g., Letter from Roger Holberg, Consumer and Governmental Affairs Bureau, to Faith Christian Center Church,* Case No. CGB-CC-0462 (August 15, 2012), http://apps.fcc.gov/ecfs/document/view?id=7022007470.

[10] While LAUSD notes that one program might not be eligible for the exemption in 47 C.F.R § 79.1(d)(8), it "expressly reserves the right to contend, at some future time, that any or all of the programs and specials reflected [in its petition] falls within one of the regulatory exemptions [in 47 C.F.R. § 79.1(d)]." *LAUSD Petition* at 8 & n.7.

Maximizing the accessibility of such programming 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")[11] and amended by section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 ("CVAA"),[12] "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 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.[13] 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

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[11] Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 613(d)(3)).
[12] Pub. L. 111-260, 124 Stat. 2751 (codified at 47 U.S.C. § 613(d)(3)).
[13] 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"*).

petitions using the "undue burden" standard pursuant to the Commission's amended rules in 47 C.F.R. § 79.1(f)(2)-(3).[14]

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.[15] 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.[16] Where a 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.[17]

III. LAUSD'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.[18] 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

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[14] *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.

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

[16] *See id.*

[17] *See id.*

[18] *See id.*

petitioner reallocated its resources or obtained more reasonable price quotes for captioning its programming.

A. The Cost of Captioning LAUSD'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.[19] 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.[20]

LAUSD's petition fails to concisely or consistently articulate the most affordable rate for captioning LAUSD's programming. LAUSD first notes that it could bring captioning operations in-house by hiring two full-time staff members at an annual cost of $75,000 each, or $150,000 total.[21] But LAUSD offers no explanation of its basis for this estimate, including why two staffers are necessary or why $75,000 represents the most reasonable annual cost for captioning staffers. Without more, it is impossible to conclude that $150,000 per year represents the most reasonable cost for LAUSD to conduct captioning in-house.

Turning to the possibility of contracted captioning from vendors, LAUSD provides widely varying and apparently inaccurate estimates. First, LAUSD provides at

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[19] *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.
[20] *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).
[21] *LAUSD Petition* at 9.

least three overall estimates for captioning its programming: approximately $54,000 annually,[22] approximately $52,000 annually,[23] and approximately $50,000 annually.[24]

Moreover, LAUSD admits in its supplement that at least two of the programs listed in its petition, *Shakespeare Shorts* and *Destinos*, are already captioned by outside sources.[25] LAUSD's petition incorrectly indicates that these programs would require a total of 29 hours of offline captioning at a cost of $120 per hour, inflating its overall cost estimate by nearly $3500.[26]

LAUSD also appears to significantly overestimate the cost of captioning its broadcasts of board and committee meetings. LAUSD's petition notes that these three-and-a-half hour broadcasts air live twice weekly.[27] If meetings actually occur every Tuesday and Thursday for the entire calendar year, LAUSD must only captioning seven hours per week at 52 weeks per year, a total of 364 hours. LAUSD's petition, however, lists a total length of 420 hours.[28] LAUSD's petition incorrectly suggests, then, that this non-existent 56 hours of programming must be captioned in real-time at a cost of $55 per hour, inflating LAUSD's overall cost estimate by more than $3000.

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[22] *Id.* at 3, 9, 24 (apparently based on 234.5 hours of offline captioning services at $120 per hour totaling $28,140 and 469.5 hours of realtime captioning at $55 per totaling $25,822.50).
[23] *Id.* at 13.
[24] *Id.* at 25. (based on 203 hours of offline captioning services at $120 per hour, totaling $24,360, and 469.5 hours of real-time captioning at $55 per hour, totaling $25,822.50.)
[25] *LAUSD Supplement* at 1-2. LAUSD notes that a "small number" of *Destinos* episodes are delivered on DVD and that captions are lost during the conversion process and asserts that "additional LAUSD personnel and new equipment" would be required to remedy the problem, but fails to specify the cost of additional personnel and equipment or identify how many episodes of the program are actually delivered on DVD, thereby making it impossible to determine the cost of re-captioning by an outside vendor. *See id.* at 2.
[26] *See LAUSD Petition* at 22-23.
[27] *Id.* at 7, 8, 22.
[28] *Id.*

While we lack sufficient information or resources to more thoroughly audit LAUSD's estimates, even our brief examination shows that LAUSD's estimates, which themselves vary by approximately $4000, are inflated by at least $6500. That LAUSD's estimates potentially vary by $10,500 or more, or nearly 20%, from LAUSD's initial $54,000 estimate, suggest that LAUSD's estimates are insufficiently rigorous to establish that LAUSD has engaged in the necessary effort to ascertain the most reasonable price for captioning its content through an outside provider. Because LAUSD has not provided sufficient estimates for either in-house or outside captioning, neither the Commission nor the public can even begin to evaluate whether having to provide captioning would impose an undue economic burden in light of LAUSD's overall financial status.

B. LAUSD'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 "from which its financial condition can be assessed" that demonstrates captioning would present an undue economic burden.[29]

At the outset, LAUSD argues that the "Commission policy applied in" the Consumer and Governmental Affairs Bureau's Memorandum Opinion and Order in *Anglers for Christ Ministries, Inc.* ("*Anglers Order*"), "should be equally applicable to LAUSD."[30] LAUSD's counsel fails to disclose, however, that Commission reversed the *Anglers Order* in 2011, including the two exemptions granted in the *Order*, and reversed 296 other exemptions that relied on the rationale set forth in the *Order*.[31] Moreover, the Commission not only reversed the *Anglers Order*, but specifically repudiated the

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[29] *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.
[30] *LAUSD Supplement* at 2-3 (citing 21 FCC Rcd. 10,094, 10,097, ¶ 11 (2006)).
[31] *Anglers 2011*, 26 FCC Rcd. at 14,942, ¶ 1 & n.3.

paragraph cited by LAUSD's counsel in nearly every respect, including the paragraph's "reliance on the non-commercial nature and lack of remunerative value of the programming at issue," its "substantial reliance on [petitioners'] non-profit status," and its "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,'" an approach which the Commission specifically concluded was "impermissibly vague," "inappropriate," and inconsistent with Commission precedent, Congressional intent, and sound public policy.[32] If, as LAUSD's counsel indicates, LAUSD's petition is primarily based on the rationale of the *Anglers Order*, then the petition should be dismissed accordingly.

Nevertheless, LAUSD claims that it cannot afford to caption its programming out of its projected 2012-2013 budget of approximately $3.4 million.[33] But the specific budget that LAUSD's chooses to devote to KLCS is irrelevant to the Commission's evaluation of its petition. 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 those resources that are allocated for specific programs."[34]

The relevant basis of the Commission's inquiry, instead, is LAUSD's overall budget, which LAUSD admits was more than $6.5 billion in 2011-2012.[35] Even using the dubious measure of LAUSD's highest estimate to caption its programming, $54,000, captioning would amount to less than one one-thousandth of one percent of LAUSD's overall budget. LAUSD cannot credibly insist that it cannot afford to allocate such a miniscule fraction of its budget toward captioning.

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[32] *Id.* at 14,950-52, ¶¶ 17-21 (internal citations omitted).
[33] *LAUSD Petition* at 10.
[34] *Anglers 2011*, 26 FCC Rcd. at 14,950, ¶ 17.
[35] *LAUSD Petition* at 3.

Even assuming for the sake of argument that LAUSD's specific broadcast budget of $3.4 million represents the basis against which the Commission should evaluate LAUSD's claims, captioning at the cost of $54,000 would amount to less than 1.6% of LAUSD's broadcast budget. More than 15 years ago, the Commission recognized, even at the now-exorbitant cost of $500 per hour for captioning—more than four times the $120 per hour rate quoted by LAUSD for offline captioning and nearly ten times the $55 per hour rate quoted for real-time captioning—that most providers could easily expend up to 2% of their annual revenues on captioning without breaching the "economically burdensome" criteria set forth by Congress in the Telecommunications Act of 1996 and still provide more than a minimal amount of captioned programming.[36] That approach was specifically intended to "help avoid [the] 'all or nothing' approach" that LAUSD now invites the Commission to adopt in issuing a blanket exemption for all of LAUSD's programming.[37] That LAUSD can caption all of its programming by spending substantially less than 2% of the specific budget it chooses to devote to broadcasting suggests that captioning would not constitute an undue economic burden.

Despite the overwhelming evidence that captioning its programming would not impose an economic burden, LAUSD variously complains that most of its broadcast budget is encumbered in "payroll, program acquisition, and other critical items," and that it is burdened by funding cuts, the DTV transition to digital conversion, collective bargaining agreements, and other problems.[38] While Consumer Groups acknowledge the budgetary difficulties that undoubtedly face an entity of LAUSD's size, LAUSD has

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[36] *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd. 3272, 3350-51, ¶¶ 164-168 (1997).
[37] *See id.* at 3399, ¶ 295.
[38] *LAUSD Petition* at 10-11

had nearly *seven years* to prepare for closed captioning since it filed its first exemption petition and its programming became temporarily exempt.[39]

While LAUSD asks the Commission not "to substitute the Commission's judgment for the judgment of LAUSD as regards [sic] closed captioning" and urges the Commission to "as a matter of policy, give substantial deference to LAUSD's professional and experienced judgment," deference to LAUSD's judgment for the past seven years has resulted in LAUSD's complete failure to conceive and execute a plan to allocate a barely measurable fraction of its multibillion dollar budget toward the funding of closed captions that are so vitally important to the hundreds of thousands of Los Angeles residents who are deaf or hard of hearing, likely including many of LAUSD's own students and staff.[40] As LAUSD notes, it is the steward of "a quintessential local public service" that is "specifically devoted to the education of young students" and "inform[ing] the public of the policy issues and decisions of local public officials" – a role that LAUSD cannot selectively abdicate with respect to students and members of the public who are deaf or hard of hearing simply out of a lack of foresight.

IV. Conclusion

LAUSD's petition appears to be moot and fails to establish that LAUSD diligently sought the lowest price to caption its programming or that LAUSD cannot afford captioning. Accordingly, we respectfully urge the Commission to dismiss the petition and require LAUSD to bring its programming into compliance with the closed captioning rules.

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[39] *LAUSD Petition for Exemption*, Case No. CGB-CC-0269, CG Docket No. 06-181 (Dec. 23, 2005), http://apps.fcc.gov/ecfs/comment/view?id=5513674855. "During the pendency of an undue burden determination, the video programming subject to the request for exemption shall be considered exempt from the closed captioning requirements." 47 C.F.R. § 79.1(f)(11).

[40] *See LAUSD Petition* at 12-13.

Respectfully submitted,

Blake E. Reid†
November 26, 2012

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† Counsel thanks Georgetown Law student Hillary Hodsdon for her assistance in preparing these comments.

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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
November 26, 2012

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on November 26, 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:

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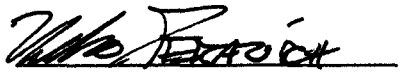

Niko Perazich
November 26, 2012