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November 26, 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: Digital Exposure Petition for Exemption from the  
Commission's Closed Captioning Rules  
Case No. CGB-CC-1197  
CG Docket No. 06-181**

**FILED/ACCEPTED**

**NOV 26 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), 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 Digital Exposure ("Digital") to exempt *The Austin Real Estate Experts* from the Commission's closed captioning rules, 47 C.F.R. § 79.1.<sup>1</sup> Consumer Groups oppose

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<sup>1</sup> *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](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1729A1.pdf); *Digital Petition for Exemption*, Case No. CGB-CC-1197, CG Docket No. 06-181 (January 7, 2012), <http://apps.fcc.gov/ecfs/comment/view?id=6016983460> ("*Digital Petition*"). The Consumer and Governmental Affairs Bureau initially determined that the *Digital Petition* was deficient. *Letter from the Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-1197, CG Docket No. 06-

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the petition because it does not sufficiently demonstrate that Digital has sought out the most reasonable price for captioning services or that the real estate entity responsible for funding the program cannot afford captioning.

Consumer Groups acknowledge Digital's efforts to "educate the public and advise about responsible decisions when looking for real estate."<sup>2</sup> Digital's requested exemption, however, would deny equal access to its programming to community members 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")<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 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

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181 (August 15, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022007471> ("CGB Letter"). Digital then filed a supplement. *Digital Supplement*, Case No. CGB-CC-1197 (September 10, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022032948>.

<sup>2</sup> *Digital Petition* at Part 1, p. 1.

<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)).

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.<sup>5</sup> 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).<sup>6</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>7</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>8</sup> Where a petition fails to make either of those showings, it fails to demonstrate that providing

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<sup>5</sup> 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*”).

<sup>6</sup> *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.

<sup>7</sup> See *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

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

captions would be economically burdensome, and the Commission must dismiss the petition.<sup>9</sup>

### **I. Digital'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>10</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. The Cost of Captioning Digital'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.<sup>11</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>12</sup>

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

<sup>10</sup> See *id.*

<sup>11</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>12</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).

Digital claims that captioning its programming will cost over \$1000 per month.<sup>13</sup> Digital does not explain the basis for this estimate. Moreover, Digital provides a quote from its video programming distributor offering to caption the program for \$60 per week, or \$3,120 per year.<sup>14</sup>

#### **B. Digital '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.<sup>15</sup>

Digital does not submit a concise statement of assets or annual revenues or expenses. Nevertheless, Digital's financial statement shows that it took in revenue of nearly \$120,000 in the first eleven months of 2011 against approximately \$70,000 in expenses, leaving approximately \$50,000 in profit, currently paid out to the partners of the business.<sup>16</sup> Digital offers no explanation of why it cannot use a tiny fraction of that profit to caption its programming at the cost quoted by its distributor.

Moreover, Digital's financial information does not appear to present a complete picture of the financial underpinnings of *The Austin Real Estates Experts* because the program appears to be underwritten and controlled by another entity, "The Austin Real Estate Experts," a group of Keller Williams real estate agents.<sup>17</sup> "Digital merely produces the program, while The Austin Real Estate Experts appears to bear financial

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<sup>13</sup> *Digital Petition* at Part 1, p. 2.

<sup>14</sup> *Digital Supplement* at 2.

<sup>15</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>16</sup> *Digital Petition*, at Part 1, pp. 3-9.

<sup>17</sup> The Austin Real Estate Experts, *The Show*, <http://www.theaustinrealestateexperts.com/the-experts.html> (last visited Nov. 16, 2012) (linking to The Austin Real Estate Experts, Keller Williams Realty, <http://www.theaustinree.com> (last visited Nov. 16, 2012)).

responsibility for funding the program. Without the other entity's financial information, it is impossible for the Commission or the public to conclude that captioning *The Austin Real Estate Experts* would impose an undue economic burden.

## II. Conclusion

Digital has not sufficiently demonstrated that it sought out the most reasonable price for captioning services or that the real estate entity responsible for funding the program cannot afford captioning. Accordingly, we respectfully urge the Commission to dismiss the petition and require Digital to bring its programming into compliance with the Commission's rules.

Respectfully submitted,



Blake E. Reid†  
November 26, 2012

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

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

\_\_\_\_\_/s/\_\_\_\_\_  
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**National Association of the Deaf (NAD)**

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**Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)**

\_\_\_\_\_/s/\_\_\_\_\_  
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**Association of Late-Deafened Adults (ALDA)**

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**California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH)**

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**Cerebral Palsy and Deaf Organization (CPADO)**

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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*

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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:

Digital Exposure  
11421 Viridian Way  
Austin, TX 78739



Niko Perazich  
November 26, 2012