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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: Frank Leto Petition for Exemption from the  
Commission's Closed Captioning Rules  
Case No. CGB-CC-0011  
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 Frank Leto to exempt his program *Zomboo's House of Horror Movies* from the Commission's closed captioning rules, 47 C.F.R. § 79.1.<sup>1</sup> Consumer Groups oppose the

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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); *Leto Petition for Exemption*, Case No. CGB-CC-0011, CG Docket No. 06-181 (November 23, 2005), <http://apps.fcc.gov/ecfs/document/view?id=6518524565> ("*Leto Petition*"). The Consumer and Governmental Affairs Bureau requested further information. *Letter from the Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-0011, CG Docket No. 06-181 (April 5,

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petition because it does not sufficiently demonstrate that Mr. Leto has diligently sought out the most reasonable price for captioning his programming, that he cannot afford to caption his programming, or that he has exhausted all alternative avenues for captioning.

Consumer Groups acknowledge Mr. Leto's efforts to showcase "campy, public-domain horror or science movie[s] spliced with comic interludes" and his laudable efforts to engage in community outreach, appearing as Zomboo at no cost.<sup>2</sup> Mr. Leto's requested exemption, however, would deny equal access to his 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

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2012), <http://apps.fcc.gov/ecfs/document/view?id=7021908025> ("CGB Letter"). Leto then filed two supplements. *Leto Supplement*, Case No. CGB-CC-0011 (June 28, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021991805>; *Leto Supplement II*, Case No. CGB-CC-0011 (September 20, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022032941>.

<sup>2</sup> *Leto Supplement* at 3.

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

“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 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

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

<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.

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

### **I. Mr. Leto'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 Leto'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>8</sup> See *id.*

<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

Mr. Leto claims it would cost \$350 per show, or a total of \$18,200 per year to caption his weekly two-hour program.<sup>13</sup> This estimate, however, is based solely on a single price quote.<sup>14</sup> Mr. Leto does not provide any evidence that he sought multiple quotes from competing captioning providers or attempted to negotiate for a lower price with any of them in a diligent effort to seek an affordable rate. Accordingly, it is impossible for the Commission to conclude that Leto has diligently sought out the lowest price for captioning his programming before turning to the exemption petition process as a last resort.

**B. Mr. Leto'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>

Mr. Leto asserts that he cannot afford captioning because the company that produces *Zomboo's House of Horror Movies*, Zomboo, Inc., operates at a net loss.<sup>16</sup> Mr. Leto provides tax forms indicating that Zomboo operated at a \$1,748 loss in 2010 and a \$6,528 loss in 2011.<sup>17</sup>

These documents, however, do not explain why Mr. Leto can afford to continue operating his program at a significant loss, but cannot incur the modest additional cost of captioning.<sup>18</sup> While Mr. Leto contends that the cost of captioning would "force

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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).

<sup>13</sup> *Leto Supplement* at 2.

<sup>14</sup> *Id.* at PDF p. 10 (Exhibit C).

<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> *Leto Supplement* at 1.

<sup>17</sup> *Id.* at PDF p.6 (Exhibit A); *Leto Supplement II* at PDF p.2.

<sup>18</sup> *Leto Supplement II* at PDF p.2.

Zomboo's House off the air,"<sup>19</sup> Mr. Leto does not distinguish between the apparently tenable losses he incurs from airing his program in general from the further losses he would incur from making his program accessible, nor does Mr. Leto describe the assets or other sources of income that allow him to continue broadcasting. Without further explanation, it is impossible for the Commission to conclude that providing captioning would present an undue economic burden on Mr. Leto.

## 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>20</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>21</sup> sought sponsorships or other sources of revenue to cover captions, and is unable to obtain alternative means of funding captions.<sup>22</sup>

Mr. Leto verifies that he has "sought and ha[s] not been able to secure sponsorship sources," but does not offer any specifics of these efforts.<sup>23</sup> While Consumer Groups are sympathetic to the possibility that advertisers have "cut back" in response to the housing crisis and business closures in Reno, Mr. Leto notes that his character, Zomboo, "has been a local icon for more than twelve years" and has a "cult following."<sup>24</sup> The local importance of Mr. Leto's programming makes all the more critical that he demonstrate that he has truly exhausted all alternative avenues for funding captions to

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<sup>19</sup> *Leto Supplement* at 2.

<sup>20</sup> *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28 (internal citations omitted).

<sup>21</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>22</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.

<sup>23</sup> *Leto Supplement* at 3.

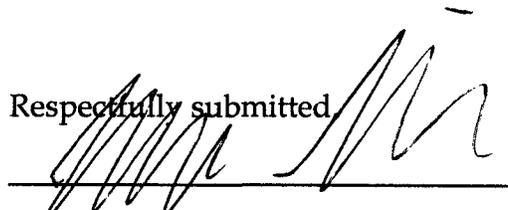
<sup>24</sup> *Id.* at 2-3.

ensure that the deaf and hard of hearing members of the Reno community are not unduly denied access to Mr. Leto's programming.

### III. Conclusion

Mr. Leto's petition does not sufficiently demonstrate that he sought out the lowest price for captioning services, that he cannot afford captioning, or that he has exhausted all alternative avenues of funding. Accordingly, we respectfully urge the Commission to dismiss the petition and require Mr. Leto to bring his programming into compliance with the closed captioning rules.

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.

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

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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:

Frank Leto  
Wiley Rein LLP  
Attn: Joan Stewart  
1776 K Street, N.W.  
Washington, DC 20006



Niko Perazich  
November 26, 2012