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January 14, 2013

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

**Re: Leon Charney Media Foundation, Inc. / *The Leon Charney Report*
Petition for Exemption from the Commission's Closed Captioning Rules
Case No. CGB-CC-1243
CG Docket No. 06-181**

FILED/ACCEPTED

JAN 14 2013

Federal Communications Commission
Office of the Secretary

Dear Ms. Dortch:

Pursuant to the Commission's Request for Comment and 47 C.F.R. § 79.1(f)(6), 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), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this opposition to the petition of Leon Charney Media Foundation, Inc. ("LCMF") to exempt *The Leon Charney Report* from the Commission's closed captioning rules.¹ We oppose the petition because it does not appear to disclose

¹ *Public Notice, Request for Comment: Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181 (Nov. 30, 2012), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1923A1.pdf; *LCMF Petition for Exemption* (June 6, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021923602> ("*LCMF Petition*"). The Consumer and Governmental Affairs Bureau initially determined that the *LCMF Petition* was deficient. *Letter from the Consumer and Governmental Affairs Bureau* (July 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022004686> ("*CGB Letter*"). Charney then filed two supplements. *LCMF Supplement I* (August 22, 2012),

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necessary financial information about the *Report*. Instead, the petition notes that LCMF spent more than more than \$200,000 to distribute the *Report* over six months without any source of income or assets, suggesting that LCMF is merely a shell corporation. This leads us to the assumption that LCMF is funded at least in part by Leon Charney, the billionaire host and namesake of the *Report*, whose relationship with LCMF and financial information is not fully explained in the petition. Because the petition is incomplete and fails to establish that captioning the *Report* would impose an undue economic burden, we urge the Commission to deny it.

The Leon Charney Report stars billionaire real estate tycoon Leon Charney, who “engages some of the best and brightest from around the world in unrehearsed, highly intelligent one-on-one discussion.”² Mr. Charney was ranked by Forbes in 2012 as the 360th richest person in America, with an estimated net worth of more than \$1.2 billion.³ The *Report*’s website notes that Mr. Charney is “[a] noted philanthropist” and “not your ordinary billionaire.”⁴

While Mr. Charney’s “rise to international prominence” is no doubt “a tale of a man living out the ‘American Dream,’” LCMF’s petition to avoid the modest cost of closed captioning the *Report* would deny equal access to Americans who are deaf or hard of hearing, whose own pursuit of the American Dream depends in part on equal access to the economic, participatory, and cultural opportunities afforded by the video

<http://apps.fcc.gov/ecfs/document/view?id=7022010758>; *LCMF Supplement II* (September 19, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7022032303>.

² See *The Leon Charney Report, About* (last visited Jan. 12, 2013), <http://charneyreport.com/about/>; Forbes, #296 *Leon Charney – The Forbes 400 Richest Americans 2009* (Sept. 30, 2009), http://www.forbes.com/lists/2009/54/rich-list-09_Leon-Charney_S833.html (“Hosts *The Leon Charney Report*, weekly political talk show aired on NYC TV.”).

³ Forbes, *Leon Charney* (last updated September 2012, last visited January 12, 2013), <http://www.forbes.com/profile/leon-charney/>.

⁴ See *The Leon Charney Report, Biography* (last visited Jan. 12, 2013), <http://charneyreport.com/about/biography/>.

programming ecosystem.⁵ 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. In doing so, a petitioner must make clear that it has engaged in a diligent, good faith effort to caption its programming and is turning to the exemption process only as a last resort.

I. Legal Standard

Under Section 713(d)(3) of the Communications Act of 1934 (“1934 Act”), as added by the Telecommunications Act of 1996 Act (“1996 Act”) and amended by Section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 (“CVAA”), “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.”⁶ In its *Economically Burdensome Standard Order*, 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

⁵ See *id.*

⁶ 47 U.S.C. § 613(d)(3); Pub. L. 111-260, 124 Stat. 2751 § 202(c); Pub. L. 104-104, 110 Stat. 56 § 305.

the Consumer and Governmental Affairs Bureau to continue to evaluate all exemption petitions using the “undue burden” standard pursuant to Rule 79.1(f)(2)-(3).⁷

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.⁸ 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).⁹

Under Section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.¹⁰ 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.¹¹ 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.¹²

⁷ *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, 27 FCC Rcd. 8831, 8834-35, ¶ 8 (2012) (“*Economically Burdensome Standard Order*”). The *Economically Burdensome Standard Order* formally adopted the analysis and interim standard proposed in a multi-part 2011 decision, *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*”). See generally *id.*

⁸ E.g., *Home Shopping Club L.P.*, Case No. CSR 5459, 15 FCC Rcd. 10,790, 10,792-94 ¶¶ 6-9 (CSB 2000).

⁹ See generally *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

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.¹³ 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.

II. Cost of Captioning

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.¹⁴ 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 its cost estimates for captioning, such as competitive hourly rate quotes and associated correspondence from several established captioning providers.¹⁵

LCMF's petition fails to establish the most reasonable price for captioning the *Report* in several respects. First, LCMF documents only a single direct estimate of the cost to caption the *Report*.¹⁶ Moreover, LCMF provides no evidence that it attempted to

¹³ *See id.*

¹⁴ *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.

¹⁵ 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).

¹⁶ *LCMF Petition* at 3.

negotiate with the caption provider for a more reasonable rate, despite the offer of the provider to “significantly discount [its] rates on faster expedited turnarounds and other services” if LCMF became a regular client.¹⁷ LCMF also provides an indirect estimate apparently provided to one of the *Report*’s video programming distributors, WMBC-TV, but offers no evidence of the details of the estimate or any attempts to negotiate with the provider who offered it.¹⁸

Second, LCMF notes that the *Report* has not been produced since July 2010 and that only repeats are currently being aired.¹⁹ While the provided estimate suggests that the *Report* is aired “weekly,” LCMF provides no concise explanation of how many unique shows are aired over the course of a year, making it impossible to determine how much captioning the *Report* would cost in the aggregate at any rate.

Finally, the *Report* apparently began broadcasting in 1988 and presumably has been subject to the Commission’s closed captioning rules for a significant portion of that time.²⁰ Unless the *Report* has been eligible for an unidentified exemption or has been aired without captions in violation of the rules, at least some of those repeats must have been aired with captions that can presumably be repurposed, thereby negating at least some of the cost of captioning.

It is critical that petitioners seek out and document several personalized, negotiated estimates to establish what it would actually cost to caption their programming. Just as with any other service, no sensible business owner would simply engage the first captioning provider he or she was able to locate regardless of cost. A prudent owner would diligently seek out the most affordable and highest quality

¹⁷ *See id.*

¹⁸ *See LCMF Supplement II* at 2.

¹⁹ *LCMF Petition* at 1.

²⁰ *See The Leon Charney Report, About* (last visited Jan. 12, 2013), <http://charneyreport.com/about/>; *see also LCMF Petition* at 1 (acknowledging that the *Report* has been subject to the FCC’s closed captioning rules since at least January 1, 2006).

provider to suit his or her specific needs. Without documentation that a petitioner has undertaken such a search, it is simply impossible to conclude that the petitioner has established the most reasonable price for captioning its programming and turned to the exemption process only as a last resort because it cannot afford that price. As such, it is impossible to conclude that LCMF has documented the most reasonable price for captioning the *Report*.

III. Financial Status

Even where a petition successfully establishes the most reasonable price for captioning the petitioner's programming, it must also include detailed information regarding the petitioner's finances and assets, revenues, expenses, and other documentation "from which its financial condition can be assessed" that demonstrates that captioning would impose an undue economic burden.²¹ When the Commission evaluates the financial status of a petitioner, it "take[s] into account the overall financial resources of the provider or program owner," not "only the resources available for a specific program."²²

LCMF's initial petition, filed on June 6, 2012, states that "[f]or the past few years, we haven't generated any revenues from the Leon Charney Report show and there are no advertisers affiliated with this programming," and includes a profit and loss statement for the period beginning in January 2012 stating that the *Report* brought in no income and incurred \$171,942.69 in losses.²³ The Consumer and Governmental Affairs Bureau concluded that the petition failed to "[d]ocumen[t] [LCMF's] financial status sufficient to demonstrate [its] inability to afford closed captioning," in part because it only "include[d] the resources devoted to or the costs associated with the [*Report*]."²⁴

²¹ See, 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.

²² *Anglers 2011*, 26 FCC Rcd. at 14,950, ¶ 17.

²³ *LCMF Petition* at 1-2.

²⁴ *CGB Letter* at 1.

However, LCMF never addressed its initial failure to document its financial status. Instead, it filed another profit and loss statement that revealed no income or assets but detailed \$203,288.07 in losses between January 1, 2012 and June 30, 2012.²⁵

It is simply impossible that LCMF was able to spend more than \$200,000 distributing the *Report* without any source of income or assets. Moreover, LCMF appears to have been incorporated on December 27, 2011, less than six months before it filed the petition.²⁶ The petition offers no explanation of how the creation and distribution of the *Report* was funded for more than two decades prior to LCMF's existence. Because the petition is plainly incomplete in this respect, it must be dismissed.

LCMF's petition also notes, however, that "[f]or the past few years, *we* haven't generated any revenues."²⁷ LCMF does not specify to whom "we" refers, but it cannot refer exclusively to LCMF, which apparently did not exist for the vast majority of the *Report's* duration. In this light, it appears that LCMF is little more than a shell corporation recently incorporated to reflect only the *Report's* recent expenses, but none of the income or assets used to fund the *Report's* creation and distribution.

LCMF's lack of stated income or assets, recent incorporation, and apparent shell status leads us to assume that Mr. Charney, who hosts the *Report* and whose name appears in the title, is at least partially responsible for funding the *Report*. The petition must also fail, then, because it appears to contain no financial information about Mr. Charney, much less information sufficient to conclude that someone with a \$1.2 billion net worth cannot afford the modest cost of providing closed captions for his personal television program.

²⁵ *LCMF Supplement* at 1-4.

²⁶ State of Delaware, Division of Corporations, *General Information Name Search, Leon H Charney Media Foundation, File Number 5086800* (last visited Jan. 12, 2012), available at <https://delecorp.delaware.gov/tin/GINameSearch.jsp>.

²⁷ *LCMF Petition* at 1 (emphasis added).

Moreover, it would require no stretch of the imagination for the Commission to conclude that Mr. Charney can afford to caption his programming simply based on his net worth. Although the petition fails to establish precisely how much it would cost to caption the episodes of the *Report* that currently air on television, the petition includes an offer from WMBC-TV to evenly split the \$400 cost of contracting captioning services from an unknown provider, meaning that it would cost Mr. Charney no more than \$200 to caption each episode of the *Report*.²⁸ The *Report*'s website also suggests that there are somewhere in the ballpark of 400 episodes in existence.²⁹ Even conservatively assuming that 500 episodes would have to be captioned at \$200 apiece would mean that captioning the entire 25-year catalog of the *Report* would cost \$100,000 – less than one one-hundredth of one percent of \$1.2 billion.

Whatever Congress had in mind in affording the Commission the authority to grant temporary exemptions from the closed captioning rules on the basis of undue economic burden, it surely cannot have intended that the Commission exempt programs on the basis of petitions filed by shell corporations that do not include the relevant financial information of people and entities directly involved in the programs' creation and distribution. If the Commission were to permit video programmers to seek an exemption from the closed captioning rules simply by establishing a shell company dedicated to a particular program and not providing the company with sufficient funding for closed captions, it would effectively allow any programmer to "opt out" of the closed captioning rules regardless of whether providing captions would in fact impose an undue economic burden. Such a result would plainly contravene the letter and the spirit of the 1996 Act and the CVAA and disserve the public interest by denying

²⁸ See *LCMF Supplement* at 2.

²⁹ See *The Leon Charney Report, About* (last visited Jan. 12, 2013), <http://charneyreport.com/about/> ("With more than 400 interviews since [the *Report*] first broadcast in 1988. . .").

equal access to video programming for millions of Americans who are deaf or hard of hearing. Thus, we urge the Commission to clarify in dismissing LCMF's petition that video programmers cannot avoid the Commission's closed captioning rules simply by transferring their programming to unprofitable shell corporations.

IV. Conclusion

Though it should go without saying, the Commission cannot reasonably justify exempting a billionaire's personal television program from the scope of the closed captioning rules on the basis of undue economic burden simply because an unprofitable shell corporation is responsible for the show's distribution. LCMF's petition fails to establish that LCMF sought out the most reasonable price for captioning *The Leon Charney Report*, nor that LCMF and Mr. Charney cannot afford to caption the *Report*. Accordingly, we respectfully urge the Commission to dismiss the petition and require LCMF and Mr. Charney to bring the *Report* into compliance with the closed captioning rules.

Respectfully submitted,



Blake E. Reid[†]
January 14, 2013

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[†] Counsel thanks Georgetown Law students Hillary Hodsdon for her assistance in preparing this document.

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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 Stout
January 14, 2013

CERTIFICATE OF SERVICE

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on November 5, 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
January 14, 2013