2. In the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), Congress amended section 713(d)(3) of the Act by replacing the term “undue burden” with the term “economically burdensome.” Specifically, amended section 713(d)(3) of the Act states: “A provider of video programming or program owner may petition the Commission for an exemption from the requirements of this section, and the Commission may grant such petition upon a showing that the requirements contained in this section would be economically burdensome.”

3. In document FCC 11–159, the Commission provides guidance on how it will construe, on an interim basis, the term “economically burdensome” for purposes of evaluating requests for individual exemptions under section 713(d)(3) of the Act, as amended by the CVAA. The Commission concludes that Congress, when it enacted the CVAA, intended for the Commission to continue using the undue burden factors contained in 713(e) of the Act, as interpreted by the Commission and reflected in Commission rules and precedent, for individual exemption petitions, rather than to make a substantive change to this standard.

4. The Commission also directs CGB, with respect to all petitions filed or refiled subsequent to October 8, 2010, the date on which the CVAA became law, to use the original factors set forth in section 713(e) of the Act, as codified in §§ 79.1(f)(2) and (3) of the Commission’s rules, in accordance with the guidance provided in the instant order, when making determinations as to whether an individual petitioner has made a documented showing that requiring closed captioning would be “economically burdensome.”

Congressional Review Act

The Commission will send a copy of document FCC 11–159 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

Ordering Clauses

defines “undue burden” to mean “significant difficulty or expense,” and directs the Commission to consider the following factors in making an undue burden determination: (1) The nature and cost of the closed captions for the programming; (2) the impact on the operation of the provider or program owner; (3) the financial resources of the provider or program owner; and (4) the type of operations of the provider or program owner. The petitioner also may present for the Commission’s consideration “any other factors the petitioner deems relevant to the Commission’s final determination,” including alternatives that might constitute a reasonable substitute for closed captioning.

2. Commission rules require the Commission to place any petition seeking an individual exemption from the closed captioning requirements under section 713(d)(3) of the Act on public notice, after which parties are given an opportunity to provide comments and petitioners are given an opportunity to reply to those comments. During the pendency of the petition, the programming that is the subject of the petition is exempt from the closed captioning rules.

3. On September 11, 2006, the Consumer and Governmental Affairs Bureau (CGB) released an Order (Anglers Order), 21 FCC Rcd 10094, granting exemptions to two petitioners—Anglers for Christ Ministries, Inc., and New Beginning Ministries—in a manner that deviated from the Act and the Commission’s rules. The CGB then granted 301 individual petitions for exemption relying on the new standard established in the Anglers Order, also in a manner that deviated from the Act and the Commission’s rules.

4. On October 12, 2006, a group of consumer organizations filed an Application for Review and a Petition for Emergency Stay requesting the Commission to rescind the Anglers Order and the hundreds of exemptions that were based on the Anglers Order.

5. In FCC 11–159, the Commission grants the relief sought in the Application for Review, and reverses exemptions granted to Anglers and New Beginning in the Anglers Order. The Commission concludes that the reasoning used in the Anglers Order for evaluating requests for exemption from the closed captioning rules on the basis of undue burden under section 713(d)(3) is not supported by the Act, its legislative history, or the Commission’s implementing regulations and Orders. Specifically, the Commission reverses these exemptions because it finds that: (1) It was not appropriate to grant exemptions based on the non-commercial nature and lack of remunerative value of Angler’s and New Beginning’s programming; (2) the Anglers Order should not have placed substantial reliance on Anglers’ and New Beginning’s non-profit status; (3) the presumption created in the Anglers Order, 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,” is an unworkable standard and not an appropriate factor for undue burden determinations; (4) neither Anglers nor New Beginning should have received permanent exemptions; and (5) the Anglers Order failed to consider whether petitioners solicited captioning assistance from their video programming distributors, as required by Commission precedent. Accordingly, the Commission rejects the undue burden criteria used in Anglers, and affirms instead the undue burden criteria used in Anglers Order.

6. In addition, the Commission reverses the hundreds of exemptions that were based on the rationale in the Anglers Order. As a substantive matter, the Commission finds that each of these exemptions cannot stand because each relied on the Anglers Order’s rationale. Additionally, the Commission reverses the exemptions because none of the orders analyzed the individual circumstances of the petitioners under the “undue burden” criteria, as required under the Act and the Commission’s rules. Finally, the orders were procedurally flawed because they waived, without justification, the Commission’s public notice requirements for undue burden exemption petitions.

7. Each of the petitioners affected by document FCC 11–159 shall be provided with a copy of document FCC 11–159 and notified, by letter sent by first class mail, that it may file a new petition for a closed captioning exemption, consistent with the requirements of the Commission’s rules and document FCC 11–159.

Congressional Review Act

The Commission will send a copy of document FCC 11–159 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

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The Petition for Emergency Stay, filed by the Consumer Organizations is dismissed as moot.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.