WILKINSON BARKER KNAUER LLP

1800 M STREET, NW
SUITE 800N
WASHINGTON, DC 20036
TEL 202.783.4141
FAX 202.783.5851
WWW.WBKLAW.COM
DAVID A. O'CONNOR
202.383.3429
DOCONNOR@WBKLAW.COM

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VIA ELECTRONIC FILING (ECFS)

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: **EX PARTE PRESENTATION**
Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities
CG Docket Nos. 13-24, 03-123

Dear Ms. Dortch:

Dixie Ziegler, Vice President of Hamilton Relay, Inc. ("Hamilton"), and the undersigned counsel on behalf of Hamilton, met on May 25 with Jamie Susskind of Commissioner Carr's office, on May 29 with Travis Litman of Commissioner Rosenworcel's office, and on May 30 with Nirali Patel and Justin McCuen of Chairman Pai's office, regarding the draft item on Internet Protocol Captioned Telephone Service ("IP CTS").[1] Ms. Ziegler participated by telephone.

During the meeting, Hamilton discussed the points made in its May 24, 2018 written ex parte filing, in particular that: 1) all issues related to automated speech recognition ("ASR") should be moved to the *Further Notice*; 2) all issues in the draft *Notice of Inquiry* should be moved to the *Further Notice*; and 3) if the Commission decides to abandon MARS (despite Hamilton's arguments for retaining that rate methodology), the Commission should freeze the IP CTS rate at $1.75 for two years or until a permanent rate methodology has been implemented for

[1] FCC-CIRC1806-10 (May 17, 2018) ("Draft Item").

IP CTS.[2] Hamilton also expressed concern about the draft *Declaratory Ruling* and its failure to address emergency call handling in an ASR environment.[3]

In addition, Hamilton takes this opportunity to underscore the legal problems raised by the determination in the draft *Declaratory Ruling* that ASR is a reimbursable form of IP CTS. As discussed below, this action—which has never been subject to public notice or comment prior to release of the draft item—violates the Administrative Procedure Act ("APA"), raises serious and unresolved legal questions, and marks an abrupt and unexplained departure from the Commission's longstanding practice with respect to recognizing new forms of TRS.

First, the Commission's decision to bypass rulemaking procedures in recognizing ASR as compensable IP CTS violates the APA's notice-and-comment requirements.[4] The draft *Declaratory Ruling* constitutes a substantive rule because it does more than "merely track preexisting requirements and explain something the statute or regulation already required," and instead "effects a substantive regulatory change to the statutory or regulatory regime."[5] Any action by the Commission in recognizing a new technology to be a compensable form of TRS amounts to a substantive change to its regulations. Moreover, all forms of IP CTS to date have required human participation via a Communications Assistant ("CA"). As the Commission acknowledges in the draft *Declaratory Ruling*, the applicable regulation defines Internet-based TRS service as TRS in which the user "*connects to a TRS communications assistant*" using an Internet-enabled device.[6] The draft *Declaratory Ruling* attempts to reconcile ASR with its existing regulations by reasoning that "the operative part of this definition focuses on the need for a caller to use the Internet to connect to TRS, rather than a requirement for a CA to be on

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[2] *Ex Parte* Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, CG Docket Nos. 13-24, 03-123 (May 24, 2018) ("Hamilton *Ex Parte*").

[3] For more than 10 years, IP CTS providers have been operating under interim emergency call handling procedures, and Hamilton encourages the Commission to prioritize this issue by adopting permanent IP CTS emergency call handling procedures before rushing prematurely into declaring ASR as a compensable form of relay without any analysis of its impact on 911. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, Report and Order, 23 FCC Rcd 5255 (2008) (adopting interim emergency call handling procedures for VRS, IP Relay, and IP CTS providers); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591 (2008) (adopting permanent emergency call handling rules for VRS and IP Relay providers, but not for IP CTS providers).

[4] *See* 5 U.S.C. § 553. As Hamilton has noted, the draft *Declaratory Ruling* is not the logical outgrowth of the 2013 NPRM or the proceedings to date. Hamilton *Ex Parte*, at 2-3 & n.3.

[5] *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (alterations and internal quotation marks omitted).

[6] 47 C.F.R. § 64.601(a)(16) (emphasis added).

every call."[7] As a result of the draft *Declaratory Ruling*, however, a CA would no longer be required to be on *any* call using ASR. The draft item reads the CA's role out of the applicable regulations entirely; this new interpretation of IP CTS clearly amounts to a substantial change to the Commission's existing regulations.[8]

Second, the draft *Declaratory Ruling* gives rise to serious and unresolved legal questions that demonstrate that it is not the product of reasoned decisionmaking, and which underscore the need for rulemaking procedures to "ensure[] fairness to affected parties and provide[] a well-developed record" prior to taking the proposed action.[9] For example:

- The draft *Declaratory Ruling* fails to acknowledge the explicit and repeated references, throughout the Commission's regulations governing mandatory minimum standards and emergency call handling regulations, to the role of CAs in ensuring that these requirements are met.[10] The draft item also fails to articulate any standards by which the Consumer & Governmental Affairs Bureau ("Bureau") can conclude that fully-automated ASR can satisfy these requirements without any human intervention. For example, the emergency call handling rule requires that, at the outset of an emergency call, the IP CTS provider must "[d]eliver to the PSAP," among other information, "the CA's callback number, and the CA's identification number, thereby enabling the PSAP . . . to re-establish contact with the CA in the event the call is disconnected."[11] The draft *Declaratory Ruling* does not even acknowledge these emergency call handling requirements, much less address how these requirements can be met through fully-automated ASR without any human intervention by a CA. Agency action is arbitrary and capricious when, as here, it "entirely fail[s] to consider an important aspect of the problem" it faces.[12]

- As noted in the ex parte filed by consumer groups,[13] the draft *Declaratory Ruling* leaves open how ASR providers' envisioned collection, storage, and use of the content of a user's speech to improve the technology[14] can be squared with the confidentiality and privacy provisions

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[7] Draft Item ¶ 54, n.175.
[8] *See Mendoza*, 754 F.3d at 1021 ("To be interpretive" and thus exempt from notice-and-comment rulemaking, "a rule 'must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.'") (quoting *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010)).
[9] *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003) (internal quotation marks omitted).
[10] *See* 47 C.F.R. § 64.604; *id.* § 64.605(a)(2).
[11] 47 C.F.R. § 64.605(a)(2)(iv).
[12] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[13] *Ex Parte* Letter from Blake E. Reid, Counsel for Telecommunications for the Deaf and Hard of Hearing, Inc., Hearing Loss Association of America, and Gallaudet University Technology Access Program, CG Docket Nos. 03-123, 13-24 (May 25, 2018).
[14] Draft Item ¶ 61 & n.202.

applicable to such content.[15] It is not enough for the draft *Declaratory Ruling* to simply state that such content will be "kept confidential."[16] The Commission is required to provide a reasoned explanation for how its proposed rule will uphold these confidentiality protections; "conclusory statements cannot substitute for the reasoned explanation."[17]

- The draft *Declaratory Order* appears to permit certified IP CTS providers to begin offering stand-alone ASR without the need for any additional certification or other oversight by the Commission. Instead, the draft item simply provides that "[i]f a certified IP CTS provider incorporates ASR in its offerings, it must describe this change in its annual update."[18] Thus, the draft *Declaratory Ruling* does not provide *any* standards for ensuring that the provision of ASR by certified IP CTS providers complies with statutory requirements.[19]

- In discussing interim compensation, the draft *Declaratory Order* suggests that interim compensation will be based on a subjective determination by the Fund administrator as to what payments are "justified."[20] This failure to identify the applicable standard for interim compensation is not only arbitrary and capricious,[21] but it also raises concerns under the non-delegation doctrine.[22]

Finally, any decision to authorize a new form of TRS without first providing for notice and comment would be an abrupt and unexplained departure from the agency's longstanding precedent. When the Commission has previously recognized a new form of compensable TRS—including in prior orders relied upon by the draft *Declaratory Ruling*—it has provided public notice and an opportunity to comment prior to doing so.[23] "The FCC cannot silently depart from

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[15] 47 C.F.R. § 64.604(a)(2); *see also* 47 U.S.C. § 225(d)(1)(F) (requiring TRS call confidentiality).
[16] Draft Item ¶ 58 & n.187.
[17] *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001).
[18] Draft Item ¶ 63 & n. 206 (citing 47 C.F.R. § 64.606(g)).
[19] *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018) ("Administrative action is arbitrary and capricious if it fails to articulate a comprehensible standard," and "if a purported standard is indiscriminate and offers no meaningful guidance to affected parties, it will fail the requirement of reasoned decisionmaking") (brackets and internal quotation marks omitted).
[20] Draft Item ¶ 64.
[21] *See, e.g.*, *ACA Int'l*, 885 F.3d at 700.
[22] *See Dep't of Transp. v. Ass'n. of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring) ("By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'") (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).
[23] *See 2008 IP STS Order*, 23 FCC Rcd. 10663, 10667, ¶ 12 (June 24, 2008) (tentatively concluding that IP STS is form of TRS compensable by the Fund after the request to do so "was placed on Public Notice and one comment and one reply were filed"); *2007 IP CTS Declaratory Ruling*, 22 FCC Rcd 379, 386-87, ¶¶ 17-18 (Jan. 11, 2007) (concluding on an interim basis, after

previous policies or ignore precedent as it has done here."[24] Rather, "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[25] In contrast to these prior orders, in which the Commission developed a detailed record following public comment, the draft *Declaratory Ruling* relies on a single study and unsubstantiated assertions made by two companies that have filed IP CTS applications contemplating the use of ASR technology. Thus, in contrast to the Commission's prior TRS orders, and in light of the substantial concerns noted above, the Commission's authorization of ASR "cannot stand on the current administrative record."[26]

As a result, Hamilton reiterates that all issues related to ASR should be moved to the *Further Notice*. Hamilton believes that a robust review of these issues, including peer-reviewed studies analyzing ASR in actual use by consumers, must occur before ASR-only service can be authorized. As an additional safeguard, the Commission should seek public comment on any application by a party that is not currently providing IP CTS and is proposing an ASR-only form of IP CTS, in order to ensure that such providers are capable of meeting mandatory minimum standards of service and performance requirements.

This filing is made in accordance with Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1). In the event that there are any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

/s/ David A. O'Connor
Counsel for Hamilton Relay, Inc.

cc (via email): Nirali Patel
Amy Bender
Jamie Susskind
Travis Litman

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placing a petition on public notice and receiving comments, that IP CTS constitutes TRS service compensable by the fund); *2003 CTS Declaratory Ruling*, 18 FCC Rcd 16121, 16123, ¶ 6 (Aug. 1, 2003) (recognizing enhanced captioned telephone VCO service as a form of TRS after having placed the petition following a public notice and receipt of comments); *2002 IP Relay Declaratory Order*, 17 FCC Rcd 7779, 7781-83 (Apr. 22, 2002) (issuing declaratory order that IP relay qualifies as compensable TRS following notice and a comment period); *2000 TRS Report and Order*, 15 FCC Rcd 5140, ¶¶ 15-20, 21-27 (2000) (recognizing STS and VRS as forms of TRS eligible for compensation from the fund following notice and comment period).

[24] *AT&T Corp.*, 236 F.3d at 736.

[25] *Id.* at 737 (quoting *Comm. for Cmty. Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984)).

[26] *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 147 (D.C. Cir. 2005).