Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Misuse of Internet Protocol (IP) Captioned Telephone Service	)	CG Docket No. 13-24
	)	
	)	
Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities	)	CG Docket No. 03-123

PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION

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Pursuant to the rules of the Federal Communications Commission ("FCC" or "Commission"),[1] Sprint Corporation ("Sprint") hereby seeks the Commission's clarification of the *Declaratory Ruling* recently issued in the above-captioned proceeding,[2] or, in the alternative, reconsideration of certain policies adopted therein.

I. INTRODUCTION AND SUMMARY

Sprint supports the Commission's goal of "taking advantage of technological advances to modernize [Internet Protocol Captioned Telephone Service or 'IP CTS'] while achieving greater efficiencies."[3] Accordingly, Sprint applauds the Commission's desire to ensure that individuals who rely on IP CTS have access to modern captioning technologies, such as Automatic Speech Recognition ("ASR").

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1 47 C.F.R. §§ 1.106, 1.429.

2 *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 and 03-123, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 18-79 (rel. June 8, 2018) ("*Order*," "*Declaratory Ruling*," "*Further Notice*," or "*Notice of Inquiry*," as appropriate).

3 *Id*. ¶ 1.

In advancing this goal, however, the Commission must ensure that new technologies truly are capable of delivering efficient service. Moreover, the Commission must be mindful of its statutory imperative to "ensure that interstate and intrastate telecommunications relay services are available" to individuals with communications disabilities in "a manner that is functionally equivalent" to communications services used by individuals without such disabilities.[4]

The Commission's *Declaratory Ruling*, however, defers the rate-related issues necessary to ensure "efficiency" and relies on an inadequate record that falls far short of establishing that ASR is "functionally equivalent." Consequently, the Commission risks jeopardizing the health of the TRS Fund and "puts the cart before the horse by introducing [ASR] into the IP CTS program before [the FCC] address[es] [its] most basic regulatory responsibilities."[5] Further, by effectively revising the Commission's rules without affording parties notice and an opportunity to comment, the *Declaratory Ruling* is inconsistent with the Administrative Procedure Act ("APA").

The Commission can correct these issues in two ways. First, to ensure that "functionally equivalent" service is advanced in an efficient manner when ASR technologies are used for IP CTS, Sprint respectfully requests that the Commission clarify that:

(1) the FCC or the Consumer and Governmental Affairs Bureau (the "Bureau") will provide notice of all applications seeking certification to provide IP CTS using ASR and an opportunity for all interested parties to submit comments;

(2) the Bureau may only grant an ASR provider's certification application if it demonstrates that its offering is at least as robust as current IP CTS offerings with

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4 47 U.S.C. § 225(b)(1); 47 U.S.C. § 225(a)(3).

5 *Declaratory Ruling* at Statement of Commissioner Jessica Rosenworcel.

regard to accuracy, privacy, emergency communications, and seamless communications; and

(3) it will not provide funding for ASR-based IP CTS until after it resolves the rate-related aspects of the *Further Notice*.

Second and in the alternative, Sprint requests that the Commission reconsider the *Declaratory Ruling* and instead review all ASR-related matters via rulemaking proceedings.

II. THE COMMISSION SHOULD CLARIFY THAT IT WILL IMPLEMENT SAFEGUARDS DESIGNED TO ENSURE THAT ALL CERTIFIED ASR PROVIDERS OFFER FUNCTIONALLY EQUIVALENT SERVICE IN AN EFFICIENT FASHION

Contrary to the Commission's determination, the record in this proceeding does not demonstrate that ASR currently is "a viable alternative" to existing IP CTS offerings that rely on communications assistants ("CAs").[6] As a result, the record does not support a finding that compensating ASR providers from the TRS Fund will result in the provision of "functionally equivalent" services. To ensure that any ASR providers certified by the Commission in fact are providing services that are "functionally equivalent," the Commission should clarify that it will provide notice and an opportunity for comment on all ASR certification applications. The Commission also should make clear that the Bureau must evaluate whether each applicant seeking ASR certification will provide service that is comparable to current IP CTS offerings. Finally, the Commission should clarify that it will ensure ASR is provided in an efficient, cost-effective manner.

[6] *See Declaratory Ruling* ¶ 51 (concluding that ASR is "a viable alternative to the use of human relay intermediaries for CTS and IP CTS").

A. The Commission Should Provide Notice and Opportunity to Comment on All Requests for Certification to Provide IP CTS Using ASR

The Commission should clarify that it will provide notice and an opportunity to comment on each application seeking certification to provide IP CTS by means of ASR. As the Consumer Groups indicate, this is the "bare minimum" that the Commission should do to avoid "risk[ing] substantial harm to the civil rights of consumers who are hard of hearing," especially since the Commission is "proceeding with the deployment of ASR technologies without developing a more rigorous approach to ensuring quality and privacy."[7]

In requesting this clarification, Sprint acknowledges that the Commission does "not agree that an ASR provider cannot be certified until [the FCC] conduct[s] 'further study' of [the] data" obtained in response to the *Further Notice*.[8] The Commission bases this finding on an expectation that the agency will receive only "general data" in response to the *Further Notice*.[9] Beyond the *Further Notice*, however, the Commission also seeks comment in the *Notice of Inquiry* "on establishing objective, quantifiable, and measurable performance goals and service quality metrics to evaluate the efficacy of the IP CTS program."[10] Far from simply garnering "general data," the Commission's *Notice of*

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7 Letter from Telecommunications for the Deaf and Hard of Hearing, Inc., the Hearing Loss Association of America, and the Gallaudet University Technology Access Program, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123 and 13-24, at 4 (May 25, 2018) ("Consumer Groups *Ex Parte*") (requesting that the Commission "put out on public notice and solicit public comment on all IP CTS applications, specifically on quality and privacy issues, to ensure that quality and privacy issues are not overlooked when the Bureau considers ASR (and other) IP CTS applications").

8 *Declaratory Ruling* ¶ 63.

9 *Id.* ¶ 63.

10 *Notice of Inquiry* ¶ 155.

Inquiry proceeding is designed to both "enable consumers to make more informed decisions in their selection of IP CTS providers" and "provide valuable empirical evidence for Commission policy makers to craft rules for effective implementation and oversight of the IP CTS program."[11]

In moving forward with ASR certifications before the *Notice of Inquiry* is resolved, the Consumer Groups express a valid concern that the Commission effectively has relegated functional equivalence to a *Notice of Inquiry* "with no obvious timeline while immediately opening the door to the deployment of ASR solutions with potentially serious quality shortcomings."[12]

To ensure that this concern is not realized and that the hard-of-hearing community does not suffer from inadequate TRS services, the Commission must provide notice and an opportunity to comment on each and every application for ASR certification in order to make certain that all issues specific to ASR technology are fully considered.[13] By doing so, the Commission can advance both its goal of advancing the use of new technologies in a timely fashion and its imperative to ensure functional equivalence.

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11 *Id.* ¶¶ 155, 161.

12 Consumer Groups *Ex Parte* at 2; *see also* Statement of Commissioner Jessica Rosenworcel (It is "inexplicabl[e]" that the FCC authorizes ASR "today but puts off for the future figuring out . . . what service quality standards hard-of-hearing users can expect. Can we acknowledge that if functional equivalency is our mandate, we should be doing these things right here and now at the same time that we authorize the service?").

13 We recognize that it would be inefficient for each interested party to have to review every ASR certification application and submit multiple sets of comments regarding issues that may apply to all ASR providers. Similarly, it would be inefficient to require the Bureau to review every such comment. To avoid these inefficiencies, the Commission could reconsider the ruling in the *Declaratory Ruling* that permits ASR certification at this time and, instead, conclude that it will not consider ASR certification applications until adequate service-specific standards have been established. *See* discussion *infra* at Section III.

Seeking comment on each application also would enhance the Commission's ability to consider the ongoing work by industry groups to develop a standard that will ensure hard-of-hearing users have access to the best possible service and that adequate assessment practices are established.[14] Indeed, MITRE Corporation, the Commission's own contractor, recommended this continued work to assess the feasibility of ASR-based IP CTS offerings and develop the appropriate "minimum specifications and requirements," as well as further engagement with the hard-of-hearing community "to identify areas for service improvements" and "assist with a smooth transition to future technologies."[15]

B. The Commission Should Clarify that All ASR Providers Seeking Certification Must Demonstrate that They Provide Service at Least as Robust as Current IP CTS Offerings

The Commission rightly recognizes that "for a period of time, ASR-provided IP CTS will remain a nascent form of the service, and that there are various factors that may influence its effectiveness for different calls."[16] Nevertheless, the Commission delegates the important task of "review[ing] and approv[ing] applications for certification to

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14 *See, e.g.*, FCC Disability Advisory Committee, *Recommendation of the FCC Disability Advisory Committee – Methods for Assessing the Quality of IP Captioned Telephone Service (IPCTS)*, https://www.fcc.gov/file/13125/download (adopted Oct. 16, 2017).

15 The MITRE Corporation, *Internet Protocol Caption Telephone Services (IP CTS) – Summary of Phase 2 Usability Testing Results*, CG Docket Nos. 03-123 and 13-24, at 15 (Apr. 11, 2018) ("MITRE Study") (further indicating that research is required "in developing minimum specifications and requirements for a fully functional automated system"); *see also* Letter from ClearCaptions, LLC, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123 and 13-24, Attachment 1, at 3 (June 1, 2018) ("At this point in time, contrary to the claims of MITRE and those trying to enter this market, ASR is untested in IP CTS. ClearCaptions has been engaged in the development of ASR for IP CTS for some time and we are aware of the complexities integrators face for ASR to be successful at scale.").

16 *Declaratory Ruling* ¶ 52.

provide IP CTS by means of ASR in whole or in part" to the Bureau, but provides very little guidance to the Bureau regarding how to evaluate these applications.[17]

In addition, the limited guidance contained in the *Declaratory Ruling* is internally inconsistent regarding how the Bureau should approach ASR providers' requests for certification. Perhaps most notably, the Commission states that the "provision of CTS and IP CTS using ASR to generate captions is a form of relay service eligible for compensation from the TRS Fund if provided in compliance with applicable TRS mandatory minimum standards."[18] Elsewhere in the *Declaratory Ruling*, however, the Commission implies that an applicant must demonstrate that it will provide service that is no less usable by the hard-of-hearing community than today's IP CTS offerings – a standard separate and apart from meeting the mandatory minimums. For example, the Commission indicates that applicants could provide information regarding "trials and quantitative test results demonstrating that the applicant's service will afford a level of quality that is at least comparable to currently available CA-assisted IP CTS with respect to captioning transcription delays, accuracy, speed, and readability."[19] While these specific service quality benchmarks are not prescribed in the Commission's rules setting

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17 *Id.* ¶ 60. *See* Consumer Groups *Ex Parte* at 1-2 ("[T]he Declaratory Ruling's approach of delegating to the Bureau the responsibility of applying the existing TRS minimum standards to IP CTS applicants proposing to use ASR does not acknowledge that the minimum standards are replete with explicit references to human communications assistants (CAs) and provides little guidance as to how the Bureau should evaluate compliance with those standards by machine-learning algorithms.").

18 *Declaratory Ruling* ¶ 48; *see also*, *e.g.*, *id.* ¶ 52 ("We further affirm that any provider offering ASR must ensure that its service complies with the mandatory minimum standards of Section 64.604 of our rules in order to obtain and retain certification to provide IP CTS.").

19 *Id.* ¶ 63.

forth mandatory minimum standards, they are integral to ensuring that an ASR provider offers functionally equivalent service.

Consistent with the Commission's Section 225 obligations, the Commission should resolve this inconsistency (and the resulting uncertainty) by clarifying that the Bureau must ensure that providers seeking ASR certification offer functionally equivalent service.[20] In particular, at a minimum, the Commission should clarify that the Bureau must conclude that every certified ASR provider offers service that: (1) provides an acceptable level of accuracy; (2) protects the privacy of communications; (3) facilitates successful emergency communications; and (4) operates in a seamless fashion. As explained below, the need to provide meaningful guidance regarding these particular issues is bolstered by concerns that, in the absence of a reasonable opportunity for comment, parties raised after the draft *Declaratory Ruling* was released.[21] These concerns demonstrate that the record does not adequately support the Commission's finding that ASR is likely to satisfy Section 225's functional equivalence mandate.

1. Accuracy

In the *Declaratory Ruling*, the Commission concludes that "ASR appears to be approaching – if not exceeding – the levels of accuracy achieved by CA-assisted IP CTS."[22] To support this finding, the Commission primarily relies on the 2016 MITRE

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[20] *See* 47 U.S.C. § 225(a)(3) (outlining the standard for functional equivalence); *see also Notice of Inquiry* ¶ 157 (indicating that the Commission believes that one of three primary goals for the IP CTS program should be functional equivalence).

[21] *See, e.g.*, Consumer Groups *Ex Parte*; Letter from David A. O'Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 13-24 and 03-123 (May 24, 2018) ("Hamilton Relay *Ex Parte*"); Letter from Scott R. Freiermuth, Sprint Corporation, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 13-24 and 03-123 (June 1, 2018).

[22] *Declaratory Ruling* ¶ 51.

Study.[23] This study, however, does not demonstrate that ASR technologies can consistently match the level of accuracy achieved by an IP CTS CA. To the contrary, MITRE's study demonstrates that speech-to-text engines often have extremely poor accuracy and are not usable.[24]

In addition, the MITRE Study makes clear that "users . . . prefer[] accuracy over speed as the more important variable to a successful calling experience,"[25] in direct contrast to the Commission's suggestion that the converse is true.[26] To ensure that users have access to the reliable captions they need, the Consumer Groups recognize that there must be "assurances that the quality of ASR is good enough to ensure that the consumer

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23 *See generally* MITRE Study.

24 *See, e.g., id.* at 13 (demonstrating that only one of three ASR providers had accuracy that is equivalent to current IP CTS offerings and that one ASR provider had accuracy of only 48.9%), 30 (demonstrating that ASR providers generally scored much lower than current IP CTS providers with respect to device usability and learnability). Moreover, the MITRE Study may overstate the accuracy and usability of ASR relative to today's IP CTS offerings. For example, it appears that few of the test calls in the MITRE Study were conversational in nature or included typical conversational attributes (*e.g.*, overlapping voices, use of "um" or "uh"). It also is unclear that the MITRE Study provided IP CTS CAs with context cues that ASR systems often cannot take into account. *See, e.g.*, Awni Hannun, *Speech Recognition Is Not Solved* (Oct. 11, 2017), and Clark University, *Automated Speech Recognition for Captioned Telephone Conversations* (Nov. 3, 2017), Attachments 1 and 2 to Letter from John T. Nakahata, Counsel to CaptionCall, LLC and Sorenson Communications, LLC, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123 and 13-24 (Nov. 28, 2017).

25 MITRE Study at iii; *see also id.* at 31 ("All participants stated that if they could only improve one, they would choose accuracy over speed.").

26 *See Declaratory Ruling* ¶ 49 (citing a survey that found "some consumers prefer captions generated using ASR over captions facilitated by CAs" and concluding that higher speeds or lower latencies should be prioritized over accuracy because they "may improve users' ability to 'keep up' with a conversation").

who uses these services can rely on it for an accurate and complete and understandable text display of what was said."[27] Regrettably, ASR cannot yet provide these assurances.

2. Privacy

The Commission concludes in the *Declaratory Ruling* that the "provision of IP CTS utilizing ASR will . . . enhance the privacy . . . of IP CTS offerings,"[28] apparently relying on the lack of "human intervention."[29] The Commission's finding, however, does not adequately account for other privacy concerns, such as the need to encrypt transcription information and how providers that rely on cloud-based captioning methods will limit access to transcription data.[30] Instead, the FCC simply states that applicants for ASR certification will be required to comply with "Commission rules [that] prohibit the disclosure of call content and the retention of records of any TRS call beyond [its] duration."[31] The rules the Commission cites, however, are squarely focused on confidentiality protections that apply only to CAs.[32] As the Commission makes clear, an ASR certification applicant may not be relying on CAs at all. To ensure that users are

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27 Letter from Hearing Loss Association of America, Telecommunications for the Deaf and Hard of Hearing, and Deaf and Hard of Hearing Tech RERC at Gallaudet University, to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 03-123 and 13-24, at 2 (Nov. 14, 2017).

28 *Declaratory Ruling* ¶ 57.

29 *Id*. ¶ 50.

30 *See, e.g.*, Consumer Groups *Ex Parte* at 3 ("[T]he Declaratory Ruling leaves open serious questions about protecting the privacy of sensitive conversations conducted over IP CTS systems. For example, the Declaratory Ruling declares that conversations must be 'kept confidential' but appears to contemplate that ASR providers can use internet-based ASR engine providers, which inherently require transferring call recordings to third-party providers.").

31 *Declaratory Ruling* ¶ 63 (citing 47 C.F.R. § 64.604(a)(2)).

32 47 C.F.R. § 64.604(a)(2) ("CAs are prohibited from disclosing the content of any relayed conversation regardless of content, and . . . from keeping records of the content of any conversation beyond the duration of a call.").

adequately protected, the Commission must clarify the measures the Bureau should employ to ensure that ASR offerings that are certified actually do "enhance" privacy.

3. Emergency Communications

In the *Declaratory Ruling*, the Commission dismisses parties' concerns regarding the ability to successfully place 911 calls using ASR.[33] Specifically, the Commission observes that adequate safeguards are already in place to ensure that ASR users can place emergency calls.[34] In the accompanying *Notice of Inquiry*, however, the Commission asks whether there are "unique challenges with respect to relaying calls to 911 associated with any of the methods used to generate IP CTS captions," including "fully automated ASR" and "CA-assisted ASR."[35] By seeking comment on public safety issues related to ASR-based IP CTS, the Commission betrays its concerns that such services currently cannot offer "functionally equivalent" service on par with current IP CTS offerings. Consequently, the Commission should clarify how the Bureau should ensure that certified ASR offerings will work in emergency calling situations.

4. Seamless Communications

The Commission finds that the "provision of IP CTS utilizing ASR will . . . ensure seamless communications,"[36] particularly "when exigent circumstances, such as

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33 *See* Consumer Groups *Ex Parte* at 4 (indicating that the draft *Declaratory Ruling* "does not sufficiently address the interaction of ASR-based IP CTS providers with 9-1-1 to ensure their ability to safely handle emergency calls" and that "[t]o forge ahead with ASR-based solutions without confidence that they will work properly in an emergency could seriously jeopardize the lives and safety of consumers with disabilities").

34 *See Declaratory Ruling* ¶ 60 ("[P]roviders using ASR must demonstrate that their services support 911 emergency calling and meet the applicable emergency call handling requirements.").

35 *Notice of Inquiry* ¶ 153.

36 *Declaratory Ruling* ¶ 57.

severe weather events, threaten IP CTS call center operations."[37] This Commission statement, however, ignores the exigencies that are more likely to impact ASR-based systems (*e.g.*, cyber-attacks, bandwidth disruptions, platform upgrades). Moreover, to the extent that ASR companies do not employ enough qualified staff members who can provide CA-based IP CTS in the event of an ASR disruption, users may be left with no means of receiving captions. Simply stated, the Bureau must ensure that providers do not face unnecessary disruptions. Consequently, the Commission should clarify the criteria the Bureau should use to evaluate showings that ASR-based systems provide "seamless communications."

C. Section 225 Requires the Commission to Ensure that ASR Is Provided in an Efficient, Cost-Effective Manner

Section 225 requires the Commission to "ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner."[38] The Commission rightly has viewed the worthy goal of curbing waste, fraud, and abuse in the TRS Fund as part of its statutory obligation to ensure that TRS is provided "in the most efficient manner."[39] With these obligations in mind, the Commission should clarify that it does not intend to provide funding to ASR providers until an appropriate rate-making methodology is established pursuant to the ongoing rulemaking proceeding.

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37 *Id.* ¶ 50.

38 47 U.S.C. § 225(b)(1).

39 *See, e.g.*, *Notice of Inquiry* ¶ 160 ("Section 225 directs that TRS be made available 'in the most efficient manner.' To this end, we ask whether the third program goal should be to improve the efficiency of the IP CTS program and to reduce this program's incidence of waste, fraud, and abuse.").

Specifically, if it is less expensive to provide ASR than it is to provide today's IP CTS technologies,[40] a decision to compensate ASR providers at the current IP CTS rate, even on an interim basis, would plainly be inefficient and wasteful. Accordingly, the Commission should clarify that it does not intend to do so, notwithstanding the indication in the *Declaratory Ruling* that ASR is now "eligible for compensation from the TRS Fund."[41]

Furthermore, the Commission finds in the *Declaratory Ruling* that it is not "empowering the TRS Fund administrator to set interim rates for ASR IP CTS" because the "FNPRM seeks comment on an appropriate rate for IP CTS provided using ASR."[42] Consistent with this language and to ensure the efficient allocation of limited TRS funds,[43] the Commission should further clarify that it does not intend to provide any funding for ASR-based IP CTS until after it receives comment and acts on the rate-related aspects of the *Further Notice*.[44]

Moreover, in reviewing the record, the Commission should more carefully consider the costs associated with ASR-assisted CTS and IP CTS. Indeed, parties have not yet had an opportunity to submit any cost analyses for the Commission's

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40 Sprint does not necessarily agree that implementing ASR-based solutions that are functionally equivalent will lower the costs of providing IP CTS, as the Commission has suggested. *See Declaratory Ruling* ¶ 50 ("[T]he substantially lower costs of operation for ASR can allow for the provision of IP CTS with far greater efficiency.").

41 *Id.* ¶ 48.

42 *Id.* ¶ 66 n.223.

43 *See Declaratory Ruling* at Statement of Chairman Ajit Pai ("[W]e are aiming for an IP CTS framework that stretches scarce federal dollars as far as possible to meet the needs of Americans with hearing loss."); Statement of Commissioner Brendan Carr (describing the funds available as "scarce").

44 *Further Notice* ¶¶ 96-100 (seeking comment on "setting a compensation rate for . . . IP CTS calls using ASR").

consideration. Parties also have not been afforded the opportunity to express concerns about the potential for waste, fraud, and abuse in a system that compensates ASR from the TRS Fund. For example, a CA may serve as an important check to ensure that users are actually relying on captions and the TRS Fund is not being unnecessarily overdrawn.[45] Permitting compensation for the automatic generation of captions would eliminate this safeguard. This issue warrants further consideration in a rulemaking proceeding before the Commission authorizes payments from the TRS Fund to ASR providers.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD RECONSIDER ITS DECLARATORY RULING

To the extent the Commission declines to issue the clarifications requested above, the Commission should reconsider the *Declaratory Ruling*. The decision was, as a procedural matter, an improper vehicle for determining that ASR is eligible as an IP CTS service for compensation from the TRS Fund. Rather, the Commission should have provided notice and an opportunity for comment, as required by the APA and its rulemaking procedures.[46] Accordingly, the Commission should reconsider its decision and conclude that any further consideration of whether ASR can be funded through the TRS Fund will be part of a broader rulemaking proceeding that considers the record developed in response to the *Further Notice* and *Notice of Inquiry*.

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45 *Id.* ¶ 152 ("Should the FCC impose requirements on providers that they enable or require CAs to flag individual calls that may suggest that IP CTS functionality is being used improperly?"); *see also* Statement of Commissioner Brendan Carr.

46 *See* 47 C.F.R. § 1.411 *et seq.* ("Rulemaking Proceedings").

A. The Commission Improperly and Substantively Changed a Commission Rule in the Declaratory Ruling

Rather than "terminating a controversy or removing uncertainty,"[47] the Commission used the *Declaratory Ruling* to substantively alter a rule,[48] in contravention of its own procedural requirements and the APA. Specifically, Section 64.1601(a)(16) of the Commission's rules defines "internet-based TRS" (or "iTRS") as a "telecommunications relay service (TRS) in which an individual with a hearing or a speech disability *connects to a TRS communications assistant* using an Internet Protocol-enabled device via the Internet."[49] The Commission clearly indicates in the *Declaratory Ruling* that ASR can be "achieved solely through automated speech recognition engines with no human involvement."[50] Since this definition of ASR relies on the absence of involvement by a CA, ASR cannot satisfy the Commission's definition of "iTRS." As a result, by making an ASR service eligible for compensation from the TRS Fund, the Commission essentially deletes a requirement ("connects to a TRS communications assistant") from its rule. In short, the Commission's action effectively amends an existing rule without complying with the APA.

The Commission attempts to evade this issue by indicating that "the operative part of [Section 64.1601(a)(16)] focuses on the need for a caller to use the Internet to connect to TRS"[51] and that the definition simply "was intended to distinguish between services

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47 47 C.F.R. § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, . . . issue a declaratory ruling terminating a controversy or removing uncertainty."); *see also* 5 U.S.C. § 554(e) (codifying section 5(d) of the APA).

48 *See* 47 C.F.R. § 64.601(a)(16) (defining "Internet-Based TRS (iTRS)").

49 47 C.F.R. § 64.601(a)(16) (emphasis added).

50 *Declaratory Ruling* ¶ 48 n.160.

51 *Id.* ¶ 56.

that do and do not use the Internet."[52] The Commission reasons that the definition of iTRS "does not preclude the use of new forms of iTRS that are not reliant on CAs."[53] The definition in the Commission's rule, however, specifies that an eligible iTRS offering must include "connect[ing] to a TRS communications assistant."[54] Permitting the Commission to ignore any unambiguous provision of a Commission rule because the FCC does not view it as "operative" would allow the Commission to revise any existing rule without notice and comment and thereby violate both its rules and the requirements of the APA.

Additionally, the precedents cited in the *Declaratory Ruling* do not support the Commission's decision. First, the Commission cites the *TRS Numbering Order* on the grounds that the decision concluded that "IP CTS presented 'distinct technical and regulatory issues'" and, therefore, that the FCC declined to address IP CTS in that proceeding.[55] That Commission decision is wholly irrelevant to whether a CA must be involved as part of an IP CTS communication, as required by the current rule.[56]

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52 *Id.*

53 *Id.*

54 47 C.F.R. § 64.1601(a)(16).

55 *Declaratory Ruling* ¶ 56 n.186 (citing and quoting from *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities Internet-Based Captioned Telephone Service; E911 Requirements for IP-Enabled Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591, ¶ 1 n.5 (2008) ("*TRS Numbering Order*")).

56 Curiously, the portion of the *TRS Numbering Order* cited by the Declaratory Ruling states:

> [The Commission] use[s] the term "Internet-based TRS" herein to refer to both VRS and IP Relay, unless otherwise specified. Although presently there is a third Internet-based form of TRS – IP captioned telephone service (IP CTS) – we will address any issues relating to IP

Second, the Commission cites the 2011 *iTRS Certification Order* for the proposition that "in the future, iTRS may include other forms of TRS that use an Internet connection, again emphasizing such connection, rather than the need for a CA."[57] The *Declaratory Ruling* omits the remainder of the Commission's finding, which expressly references the role of a CA:

> [W]e use the term "iTRS" to reflect the definition of "Internet-based TRS" in our rules, essentially meaning all forms of TRS in which an individual with a hearing or speech disability uses an Internet connection *with the TRS communications assistant (CA)*. . . . We note that in the future "iTRS" may also include other forms of relay services that utilize an Internet connection.[58]

In sum, the Commission not only disregards the inadequate record regarding the functional equivalency of ASR,[59] but also fails to set forth any credible legal or precedential basis for ignoring the current requirement that iTRS "connect[] to a TRS communications assistant." Doing so amounts to an arbitrary and capricious decision that goes well beyond the scope of a declaratory ruling.[60]

> CTS, if appropriate, in a separate order because IP CTS raises distinct technical and regulatory issues.

TRS Numbering Order ¶ 1 n.5. Nowhere in the above quote does the *TRS Numbering Order* interpret iTRS in a way that would allow the *Declaratory Ruling* to ignore the requirement that iTRS providers "connect[] to a TRS communications assistant." Importantly, the above quote fails to even pertain to IP CTS, simply stating that the item will focus on VRS and IP Relay, services that are not at issue in the *Declaratory Ruling*.

[57] *Declaratory Ruling* ¶ 56 n.187 (citing and quoting from *Structure and Practices of the Video Relay Service Program*, Second Report and Order and Order, 26 FCC Rcd 10898, ¶ 1 n.1 (2011) ("*iTRS Certification Order*")).

[58] *Id.* ¶ 1 n.1 (emphasis added).

[59] *See supra* Section II.

[60] In accordance with the APA, reviewing courts will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Notably, an agency action is arbitrary and capricious if "the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency." *Sorenson Commc'ns,*

B. The Commission Should Have Provided Notice and Opportunity for Comment in Accordance with Its Rulemaking Procedures

In the *Declaratory Ruling*, the Commission disagrees with arguments that the APA requires notice and comment before it may make the rule changes it has implemented,[61] although it fails to offer any support for this conclusion.[62] In doing so, the Commission apparently ignored the codified procedural rules that govern rulemaking proceedings.[63] As described above, it is clear that the *Declaratory Ruling* substantively changed the definition of "iTRS."[64] Accordingly, the Commission was required to follow its rules regarding rulemaking proceedings.

The Commission's rules state that notice "will be given" when a rule is substantively changed. The rules also provide discrete exceptions to this general requirement in Sections 1.412(b) and 1.412(c).[65] Importantly, none of those exceptions apply to the actions taken in the *Declaratory Ruling*, and, thus, they do not eliminate the need for the Commission to adopt the desired changes pursuant to a notice of proposed rulemaking.

Inc. vs. FCC, 659 F.3d 1035, 1046 (10th Cir. 2011) (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

61 *See*, *e.g.*, Hamilton Relay *Ex Parte* at 1 (stating that authorizing ASR "as a reimbursable form of IP CTS" would violate law without "appropriate notice and comment").

62 *See Declaratory Ruling* ¶ 55 n.184 (disagreeing that "a notice-and-comment period is needed" but offering no reasoning).

63 47 C.F.R. § 1.411 *et seq.* ("Rulemaking Proceedings").

64 It also is possible that any grant of an ASR certification application effectively would represent an improper modification of the Commission's mandatory minimum standards. *See* note 17 *supra*.

65 *See* 47 C.F.R. §§ 1.412(b), (c).

Only two provisions in Section 1.412(b) arguably could apply to the current circumstances, subsections (b)(3) and (b)(4).[66] Neither of these provisions applies, however, because the Commission did not issue the *Declaratory Ruling* as nonbinding guidance that merely clarified its interpretation of the definition of iTRS. Rather, the Commission rewrote Section 64.601(a)(16) by effectively deleting the "communications assistant" clause from the rule, thus substantively changing the rule's content. Such a change requires APA notice and comment and does not meet the criteria of the limited exceptions expressed in Sections 1.412(b)(3) and 1.412(b)(4) of the Commission's rules.[67]

Section 1.412(c) also plainly does not apply. Section 1.412(c) indicates that notice is not necessary when "the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest."[68] That rule requires that "[t]he finding of good cause and a statement of the basis for that finding"

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66 47 C.F.R. § 1.412(b)(3) ("Rule changes . . . relating to the following matters will ordinarily be adopted without prior notice: . . . Interpretative rules."); 47 C.F.R. § 1.412(b)(4) ("Rule changes . . . relating to the following matters will ordinarily be adopted without prior notice: . . . General statements of policy."). The remaining exceptions in Section 1.412(b) can be dismissed immediately as inapplicable. In particular, prior notice is unnecessary for "rule changes . . . relating to the following matters": (1) "[a]ny military, naval, or foreign affairs function of the United States"; (2) "[a]ny matter relating to Commission management or personnel or to public property, loans, grants, benefits, or contracts"; and (3) "[r]ules of Commission organization, procedure, or practice." 47 C.F.R. §§ 1.412(b)(1), (2), and (5). Clearly, these provisions do not relate to the issue of whether ASR-driven IP CTS is compensable from the TRS Fund.

67 *See generally* 47 C.F.R. § 1.412(b) (listing the exceptions to the notice and comment requirement found in the APA at 5 U.S.C. § 553(d)); *see also New Jersey Dep't of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) ("[I]t should be clear beyond contradiction . . . that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced.").

68 47 C.F.R. § 1.412(c).

must be "published with the rule changes."[69] Here, however, the Commission made no such finding and published no such statement in the *Declaratory Ruling* (or elsewhere in the item). Furthermore, the release of the *Further Notice* and *Notice of Inquiry* seeking comment on issues raised by the *Declaratory Ruling* undermines any potential claim that providing notice on the *Declaratory Ruling* would have been "impracticable, unnecessary, or contrary to the public interest."[70]

C. The Requirements for Grant of a Petition for Reconsideration Have Been Fulfilled

As shown above, in view of the numerous procedural and substantive problems with the *Declaratory Ruling*, the Commission must reconsider its action. As an initial matter, the Commission has established that "reconsideration is generally appropriate where the petitioner shows . . . a material error or omission in the original order."[71] Because the Commission failed to seek comment on the issues dealt with in the *Declaratory Ruling* and ignored its own rules and procedures governing rule changes, the agency clearly made a "material error."[72]

Moreover, under the Commission's rules, a petition for reconsideration may be supported by facts or arguments not previously presented when the Commission "determines that consideration of the facts or arguments relied on is required in the public

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69 *Id.*

70 *Id.*

71 *Amendment of Section 73.3555(e) of the Commission's Rules*, Order on Reconsideration, 32 FCC Rcd 3390, ¶ 16 (2017) ("*2017 Section 73.3555(e) Order on Reconsideration*"); *see also* 47 C.F.R. §§ 1.106 ("Petitions for reconsideration in non-rulemaking proceedings"), 1.429 ("Petition for reconsideration of final orders in rulemaking proceedings").

72 In accordance with the APA, reviewing courts will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

interest."[73] Here, the need to ensure that hard-of-hearing individuals have access to functionally equivalent IP CTS offerings plainly serves the public interest. The record simply does not support a finding that ASR is a functionally equivalent service.

Conversely, even assuming *arguendo* that the Commission believes that it has addressed all of the concerns raised herein, a petition for reconsideration also may be supported by facts and arguments that were previously raised and considered in the underlying proceeding, even when those arguments are discussed in the underlying order. As the Commission recently observed, "[n]either the Communications Act nor Commission rules preclude the Commission from granting petitions for reconsideration that fail to rely on new arguments,"[74] including when the FCC "failed to fully consider important arguments and lacked a reasoned basis for its conclusion."[75] As explained above, the Commission failed to fully address the substantive concerns parties raised regarding the capabilities of ASR to meet the needs of the hard-of-hearing community and the evidence on which the Commission relied was inadequate to support its decision.[76]

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73 47 C.F.R. §§ 1.106(c)(2), 1.429(b)(3). Here, Sprint has had no true opportunity to raise any of its concerns – issuing a draft *Declaratory Ruling* simply is not the same as providing notice and an opportunity to comment. Accordingly, there would be no basis upon which the Commission plausibly could assert that Sprint should have raised its concerns previously.

74 *2017 Section 73.3555(e) Order on Reconsideration* ¶ 16.

75 *Id.* ¶ 17.

76 *See generally* Section II.

IV. CONCLUSION

For the foregoing reasons, Sprint asks the Commission to clarify and/or reconsider the policies adopted in the *Declaratory Ruling*.

Respectfully submitted,

SPRINT CORPORATION

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