

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

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

INITIAL COMMENTS OF CLEARCAPTIONS, LLC

Paul C. Besozzi
Peter M. Bean
Squire Patton Boggs (US) LLP
2550 M Street, N.W.
Washington, DC 20037
202-457-6000 (tel)
202-457-6315 (fax)
paul.besozzi@squirepb.cpm
peter.bean@squirepb.com

Michael Strecker
ClearCaptions, LLC
3001 Lava Ridge Court, Suite 100
Roseville, CA 95661
916-274-8429 (tel)
mike.strecker@clearcaptions.com

*Vice President of Regulatory and Strategic
Policy, ClearCaptions, LLC*

Counsel for ClearCaptions, LLC

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EXECUTIVE SUMMARY

Internet Protocol Captioned Telephone Service (“IP CTS”) provides a much-needed service to individuals that can no longer utilize the telephone. For these individuals, the telephone is a lifeline or tool ensuring that they remain connected to friends and family and retain their independence. Losing that lifeline impacts one’s ability to maintain social ties and can lead to loneliness and depression. Studies have shown that “[s]ociability plays an important role in protecting people from the experience of psychological distress and in enhancing well-being” and the “well-supported effects of social factors on depressive symptoms later in life” are well known.¹

IP CTS is a critical tool in ensuring continued connectivity to daily life. ClearCaptions, LLC (“ClearCaptions” or “Company”) understands that the Federal Communications Commission (“FCC” or “Commission”) is trying to slow the growth of the IP CTS industry to ensure its long-term longevity and viability. However, such protections should not come at the risk of negatively impacting those individuals whose mental and physical health depend on the ability to stay connected and retain their independence. Many of these individuals are Seniors who have been paying into the Interstate Telecommunications Relay Services Fund (“TRS Fund” or “Fund”) for over twenty years and now that they need the service, the Commission is considering implementing administrative processes that, as the Company demonstrates in its comments, could foreclose access to this important service for these individuals.

ClearCaptions understands that IP CTS must be provided in the most efficient manner possible. However, continuing to use a single rate based on industry weighted average costs will only perpetuate many of the issues the Commission is trying to address. It forces small providers

¹ See Archana Singh & Nishi Misra, *Loneliness, depression and sociability in old age*, 18 Indus. Psychiatry J. 51 (2009).

to either aggressively grow or risk financial ruin due to rates that are based on the industry market leader's cost structure. It provides for excessive margins to those largest providers who have achieved significant scale advantages, thereby encouraging those largest providers to invest unreasonable amounts of capital into growth through marketing and sales. To address those issues, ClearCaptions has developed a tiered rate model² that would achieve many of the Commission's objectives including (1) materially reducing the demand on the TRS Fund to support the service; (2) eliminating excessive margins, thereby creating a natural disincentive for providers to overspend in marketing and sales programs; and (3) eliminating the need for states to become actively involved in the administration and provision of IP CTS. In light of these and other benefits, ClearCaptions therefore continues to advocate for the adoption of a tiered rate model.

In addition to rate issues addressed in the Commission's Further Notice of Proposed Rulemaking ("FNPRM"), ClearCaptions also has serious concerns about relying on certification of IP CTS consumers by hearing healthcare professionals and/or state equipment distribution programs insofar as such reliance may result in otherwise qualified individuals not gaining access to a service that is critical to their continued well-being. Many IP CTS consumers face mobility and/or financial constraints that could prevent them from obtaining certification from a healthcare professional or state program. In order to alleviate these concerns, ClearCaptions proposes the development and use of a standardized online eligibility assessment that would ensure that those with hearing disabilities are able to fully participate in all aspects of society consistent with the mandate of the Americans with Disabilities Act ("ADA").

² See *infra* note 6.

ClearCaptions thanks the Commission for the opportunity to provide its initial comments on these and the other issues set forth in the FNPRM and looks forward to continuing to develop a viable regulatory framework for IP CTS for the future.

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INITIAL COMMENTS OF CLEARCAPTIONS, LLC

ClearCaptions hereby submits these initial comments in response to the Commission's Further Notice of Proposed Rulemaking proposing further changes to the IP CTS compensation structure and certain other rules.³

I. INTRODUCTION

ClearCaptions provides IP CTS throughout the United States, is a leading innovator in the delivery of quality IP CTS service, and is a fervent follower of the rules related to IP CTS. The Company has been an active participant in the Commission's various proceedings relating to IP CTS rules. It has been directly impacted by the Commission's recent decision to reduce reimbursement rates for the next two years. Therefore, it is unquestionable that the Company has

³ *In the Matter of Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, CG Docket Nos. 13-24 and 03-123, FCC 18-79 (rel. June 8, 2018) ("Report and Order" or "FNPRM," as appropriate). These comments are timely filed in accordance with the publication of the FNPRM in the Federal Register and the Commission's public notice regarding the same. IP CTS Modernization and Reform, 83 Fed. Reg. 33899 (July 18, 2018); *Consumer and Governmental Affairs Bureau Announces Comment Deadlines for Internet Protocol Captioned Telephone Service Further Notice of Proposed Rulemaking and Notice of Inquiry*, Public Notice, CG Docket Nos. 13-24 and 03-123, DA 18-756 (rel. July 23, 2018).

a direct and substantive interest in the FCC's proposals to revamp further its rules relating to IP CTS.

As set forth in the following initial comments, the Company supports a number of those initiatives, in whole or in part. Others, however, may have a profound effect on the market for IP CTS and the number of competing providers of the services. More specifically, many of the proposed changes will have significant impacts on the IP CTS industry and the cost of service. These impacts will manifest themselves as either an increase in the cost of the service or a threat to the financial viability of some service providers. This will ultimately impact the number of competitive providers in IP CTS and will affect the ability of providers to fulfill the obligation under the law to provide service to the hard-of-hearing and limit access. ClearCaptions looks forward to discussing its views with the Commission, as it has in the past, as this proceeding moves forward.

II. CLEARCAPTIONS CONTINUES TO ADVOCATE FOR A TIERED RATE STRUCTURE FOLLOWING THE EXPIRATION OF THE INTERIM IP CTS RATES

The Commission's ultimate goal with respect to IP CTS compensation is to "ensure that IP CTS rates align with costs."⁴ The FNPRM proposes "the use of average provider costs to set per-minute compensation rates for a multi-year rate period," as the Commission has found to be appropriate in the context of the Video Relay Service ("VRS") and IP Relay.⁵ ClearCaptions supports cost-based rates as long as those rates take into consideration that providers with different scale have different cost structures and that the use of an industry weighted average cost to set a single tier rate is harmful to the industry and to consumers.

⁴ FNPRM ¶ 85.

⁵ *Id.* ¶ 70.

The currently adopted interim rates are barely sustainable for smaller providers. The single largest contributor to the cost efficiency of an IP-CTS provider is the volume of minutes processed. As minutes increase, cost per minute decreases due to fixed costs that are required in this industry. If the Commission implements policy in the interest of curbing access or slowing growth of the IP CTS industry, smaller providers would never be able to achieve the necessary scale to survive the currently scheduled interim rates or any future single tier rate based on industry weighted average costs. As such, any further rate reductions would be unsustainable and would drive providers out of the market if they are not allowed to grow to the necessary scale to survive those cuts. Eliminating competition and reducing incentive for providers to invest in the service will result in diminished quality of services offered to IP CTS customers.

Over the past year, ClearCaptions has spent considerable time illustrating to the Commission the problems associated with cost-based rates based on a weighted average of industry costs.⁶ The flaws with such an approach and the potential competitive impact persist. As

⁶ See *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed Aug. 25, 2017; substitute version filed Sept. 19, 2017) (“ClearCaptions August 25, 2017 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed Sept. 1, 2017; substitute version filed Sept. 19, 2017) (“ClearCaptions September 1, 2017 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed Sept. 5, 2017; substitute version filed Sept. 19, 2017) (“ClearCaptions September 5, 2017 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed Sept. 29, 2017) (“ClearCaptions September 29, 2017 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed Oct. 2, 2017) (“ClearCaptions October 2, 2017 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed Dec. 20, 2017) (“ClearCaptions December 20, 2017 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123, 10-51, and 13-24 (filed May 18, 2018) (“ClearCaptions May 18, 2018 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed May 21, 2018) (“ClearCaptions May 21, 2018 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed May 25, 2018) (“ClearCaptions May 25, 2018 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed May 31, 2018) (“ClearCaptions May 31, 2018 Ex Parte”); *ClearCaptions, LLC Notice of Ex Parte*, CG Docket Nos. 03-123 and 13-24 (filed June 1, 2018) (“ClearCaptions June 1, 2018 Ex Parte”).

a result, ClearCaptions continues to advocate for a tiered rate structure. A tiered rate structure has significant benefits including (1) savings to the TRS Fund;⁷ (2) ensuring that competitive providers remain financially viable; (3) directly aligning reimbursement rates to the appropriate scale of the provider operating in that tier and providing a consistent and reliable rate “glide path,” while adjusting to the realities of the IP CTS market; and (4) ensuring that providers continue to seek efficiencies as they gain the scale necessary to effectively compete against the dominant providers, all while ensuring providers operate within a “zone of reasonableness” as has been previously endorsed by the Commission.⁸ Scale has a significant impact on the cost efficiencies in the IP CTS industry. ClearCaptions submits that a tiered rate structure should be adopted following the expiration of the interim rates⁹ adopted in the Report and Order. The Company submits the following comments on various metrics associated with the Commission’s compensation proposal based on average costs and illustrates how and why a tiered rate structure would eliminate many of the issues associated with its proposal for determining cost-based rates.

⁷ For example, for calendar year 2017 ClearCaptions has estimated that savings to the TRS Fund under a tiered rate structure would have amounted to approximately \$146 million. *See e.g.*, ClearCaptions May 21, 2018 Ex Parte, Attachment 1 at 7. As shown in section II(B) below, a tiered rate model would have saved the TRS Fund approximately \$140 million for calendar year 2018. *See infra* section II(B).

⁸ *See In the Matter of Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Order, CG Docket Nos. 10-51 and 03-123, 32 FCC Rcd 5891, ¶ 26 (rel. July 6, 2017) (“2017 VRS Compensation Order”) (establishing a 7.6% to 12.35% “zone of reasonableness” with respect to operating margins for VRS providers); Report and Order ¶ 23 (concluding that it is “reasonable to allow an operating margin for IP CTS providers in the same ‘zone of reasonableness’ that applies to VRS providers.”).

⁹ Report and Order ¶ 16.

A. Certain IP CTS Cost Categories Will Require Refinement And/Or Adjustment

As part of any cost-based rate methodology, the Company submits that certain TRS costs as currently reported in the TRS Fund Administrator's ("Administrator") annual cost report need rethinking. ClearCaptions would argue that a more beneficial analysis of the costs associated with providing the service should be broken down into the following categories:

- 1) the cost to caption a minute of service;
- 2) the cost to add a new user (i.e. customer acquisition cost);
- 3) the cost associated with supporting an existing customer and providing the necessary infrastructure to support; and
- 4) other overhead costs necessary to do business in the industry.

In other words, an appropriate rate methodology analyzes takes into consideration the costs to (a) acquire and install a customer, (b) maintain that customer, (c) caption a minute for that customer, (d) conduct research and develop technology to serve that customer and (d) account for general and administrative overhead to operate the service. It is critical for the Commission to understand these cost elements for IP CTS providers and, most importantly, to understand fixed costs, costs that are variable to the number of consumers served or added, and costs that are variable to the volume of minutes processed. Only through this analysis can the FCC set the appropriate rates and therefore guide the industry. By analyzing the service in these categories, the Commission and the Fund Administrator could better understand what this service costs on an individual basis as well as how economies of scale will impact different components of the business.

1. Subcontractor Expenses Need To Be Uniformly Reported

With respect to subcontractor expenses, costs associated with call centers that are employee-operated are currently reported under the "CA related" category in Exhibit 1-3 to the

2018 TRS Rate Report.¹⁰ By contrast, costs associated with call centers with outsourced operations are submitted under the “Other” category.¹¹ As a result, and as the FNPRM noted, costs in the “Other” category are difficult to parse for reasonableness because subcontractor expenses are intermingled with other expenses (i.e., licensing fees, marketing fees, customer support fees). To alleviate this problem ClearCaptions recommends that Rolka Loube (“Rolka”) update its reporting form to include costs associated with employee-operated call centers and those that are outsourced in the same category (i.e., the current annual cost reports should be updated to include subaccounts under the “Other” category for licensing fees, CA-related fees, and other similar costs). Designing the form in a way that will allow the Administrator to differentiate these costs will only improve the analysis the Administrator will be able to perform. This will also add visibility around what these costs are going forward.

2. Licensing Fees Versus Research And Development

The Commission seeks comment on whether licensing fees that are paid by providers for the technology to provide IP CTS should be included in allowable costs and what method the Commission should use to determine whether such fees are “reasonable.”¹² The reality is that all technology companies have licensing fees that are “reasonable” insofar as the market participants who need access to the technologies continue to pay such fees. So “reasonable” in this context is not a workable standard, particularly in a market where the technology integral to providing the service is rapidly changing.

¹⁰ Rolka Loube, Interstate TRS Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 and 10-51, at 22 and Exhibit 1-3 (filed May 4, 2018) (“2018 TRS Rate Report”).

¹¹ *Id.*

¹² FNPRM ¶ 75.

Putting aside the potential definitional issues associated with determining whether a licensing fee is “reasonable,” ClearCaptions submits that the Commission’s emphasis on licensing fees is misplaced. Allowing recovery for licensing fees unduly privileges existing technology over research and development that could be directed to developing new technologies, like Automatic Speech Recognition (“ASR”). In effect, allowing cost recovery for IP CTS technology licensing fees only serves to bolster Ultratec, Inc.’s lucrative licensing of its Captioned Telephone Service (“CTS”) and IP CTS technologies,¹³ while deemphasizing research and development. To the extent that the Commission desires to address Ultratec’s large licensing fees it should do so by other means that do not deter IP CTS providers from continuing to invest in research and development and to innovate, especially with respect to ASR.

Further, by disallowing research and development costs, yet allowing these licensing fees, the Commission would be in effect sanctioning “related-party” transactions, where IP CTS providers pay license fees to their own affiliates. As ClearCaptions previously has argued elsewhere, research and development costs to advance IP CTS technologies should be allowable expenses.¹⁴

ClearCaptions would like to point out that if the Commission were to adopt the Company’s four-tier rate proposal, which forces providers to ensure their contracts and operations are as efficient as possible based on their location on the cost curve, the Commission would not need to

¹³ See, e.g., *id.* ¶ 74 (quoting *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Internet-based Captioned Telephone Service*, Declaratory Ruling, CG Docket No. 03-123, FCC 06-182, 22 FCC Rcd 379, ¶ 24 (rel. Jan. 11, 2007) (“2007 IP CTS Declaratory Ruling”)).

¹⁴ See Comments of ClearCaptions, LLC on Rolka Loube Associates Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 and 13-24, at 5 (filed May 29, 2018) (“ClearCaptions 2018-2019 TRS Fund Comments”); Comments of ClearCaptions, LLC on Rolka Loube Associated Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 and 13-24, at 8 (filed May 24, 2017) (“ClearCaptions 2017-2018 TRS Fund Comments”).

have this discussion. The elegance of a tiered model is that it enables providers to earn an operating margin within a zone of reasonableness. If providers enter into contracts that provide lucrative returns for those subcontractors, these providers are sacrificing their ability to earn an operating margin. In other words, a provider's self-interest in survival will force them to renegotiate these contracts. By utilizing industry weighted average costs to establish a single industry rate, licensing fees and inefficient contracts with subcontractors become materially more significant and no natural mechanism is introduced to control those costs.

3. Marketing And Outreach Expenses

ClearCaptions contends that without marketing and outreach, very few qualified customers will be reached. The delivery of this service to any customer, especially a Senior, requires assistance and connection. Removing marketing and/or outreach costs from the rate calculation is a veiled attempt at containing the growth of the service and would thereby limit U.S. residents' awareness of a service that can improve their quality of life and that derives from the ADA's guarantee of a "person's right to fully participate in all aspects of society" free from discrimination based on a disability.¹⁵ Instead of veiling a growth reduction strategy by removing necessary costs from the rate, the Commission should define it for what it is rather than undercompensating providers for unavoidable costs. Furthermore, the Company contends that the industry's marketing has successfully promoted the availability of IP CTS to consumers in accordance with the Commission's rules¹⁶ and cautions the Commission against imposing limits and constraints on expenses associated with marketing. The Commission is justifiably concerned "about having the TRS Fund support marketing activities that have the potential to promote widespread abuse of the

¹⁵ 42 U.S.C. § 12101(a).

¹⁶ 47 C.F.R. § 64.604(c)(3).

service by individuals who may not need it to obtain functionally equivalent telephone service.”¹⁷ However, ClearCaptions contends that limiting marketing expenses is not the optimal approach to limiting or preventing unauthorized usage. The issue of unauthorized usage most naturally falls within the purview of the Commission’s rules regarding IP CTS registration and certification and should be dealt with in the context of those rules.¹⁸ As for “outreach” expenses, in the Company’s experience, such efforts are generally company-branded initiatives and therefore should be adequately covered as part of marketing expenses, which should be allowable costs.

ClearCaptions would also like to point out that if the Commission were to adopt the Company’s four-tier rate model, the Commission would create a natural mechanism that would ensure providers are not able to over invest in marketing. The inherent benefit of this four-tier model is that providers will be forced to operate within a certain zone of reasonableness with respect to their operating margins based on their scale, which is in contrast to the current single industry weighted rate that results in the largest providers being able to utilize their exorbitant operating margins to spend beyond what should be reasonable on marketing. For example, if a provider that was handling approximately 18 million minutes per month and had a fully loaded cost structure that equated to approximately \$1.00 per minute, that provider is making \$0.75 per minute of operating margin under the current 2018-2019 interim rates. If the company chose to spend ½ of that excessive margin towards marketing, that would equate to an annual marketing spend of almost \$76 million. Under the Company’s tiered model, that same company would only make approximately \$0.33 per minute of operating margin. If that company chose to spend ½ of that operating margin towards additional marketing that would equate to an annual marketing

¹⁷ FNPRM ¶ 80.

¹⁸ 47 C.F.R. § 64.604(c)(9).

spend of \$35 million. As this example illustrates, a tiered rate would severely limit providers' ability to overspend in the area of marketing (i.e., the above example shows a \$41 million reduction in marketing expenditures), unless they choose to sacrifice reasonable operating margin returns in this effort. The adoption of a tiered model would naturally lead to reduction and/or control of marketing expenses and would save the Commission from trying to regulate what is and is not allowable using definitions that would be subject to varying interpretations and debate.

4. Operating Margin

ClearCaptions agrees that the use of an operating-margin approach and the “zone of reasonableness” established in the 2017 VRS Compensation Order¹⁹ would be appropriate for purposes of setting IP CTS rates for 2020-2021. However, ClearCaptions reiterates that a rate based on weighted average industry cost is not appropriate as it penalizes the smaller providers, placing them at financial risk, while enabling the largest providers to earn excessive margins.

As ClearCaptions has argued, the Commission's past cost-based rate structures in the TRS context have failed.²⁰ In addition, cost-based rates have forced service providers out of the market, limiting consumer choice and reducing quality and functionality.²¹ Like the VRS market, the IP CTS market is fundamentally unbalanced with one dominant market leader and a series of other competitive providers.²² The costs incurred by the dominant provider are “dramatically lower than the average costs of other competitive providers.”²³ As a result, any proposal to set a rate based

¹⁹ 2017 VRS Compensation Order ¶¶ 23-26.

²⁰ ClearCaptions 2018-2019 TRS Fund Comments at 3; ClearCaptions 2017-2018 TRS Fund Comments at 6.

²¹ ClearCaptions 2018-2019 TRS Fund Comments at 3-4; ClearCaptions 2017-2018 TRS Fund Comments at 6.

²² *See, e.g.*, ClearCaptions 2017-2018 TRS Fund Comments at 7.

²³ *Id.*

on weighted average industry cost in such an unbalanced market “virtually assures vastly inequitable margins among providers and inhibits marketplace competition.”²⁴ This reality dictated the Commission’s move to a tiered rate structure for VRS.²⁵ The same logic should apply to IP CTS given the factual parallels.

5. Further Adjustment of Interim Rates

ClearCaptions’ position on the interim rates adopted is unchanged. The Company asserts that the double 10% drop over the two-year period will harm those smaller providers trying to build up the scale of their operations.²⁶ The \$1.75 per minute rate for 2018-2019 is a fait accompli at this moment, but ClearCaptions recommends that if the Commission cannot adopt a tiered rate structure by July 1, 2019, the \$1.75 rate be kept in place for 2019-2020 while the Commission finalizes its decisions on a cost-based rate structure.

B. A Tiered Rate Structure Is The Most Appropriate Method To Align Rates With Provider Costs

ClearCaptions maintains that a tiered rate structure will most effectively meet the Commission’s goal of aligning IP CTS rates with costs because it compensates higher-cost but lower market share providers at higher rates than lower-cost but higher market share providers, which are compensated at lower rates. Thus, a tiered rate structure approximates the IP CTS market realities more accurately and also allows competitive providers to invest in growth and to reach a scale where rates can be reduced. Rate reductions over time are a function of scale growth. Once fixed costs are overcome, rate reductions follow. Historical Rolka cost reports support that economies of scale exist in IP CTS. ClearCaptions has also demonstrated this phenomenon in its

²⁴ ClearCaptions 2018-2019 TRS Fund Comments at 4.

²⁵ 2017 VRS Compensation Order ¶ 42.

²⁶ ClearCaptions May 25, 2018 Ex Parte, Attachment 1.

many filings over the last year in explaining the justification for a tiered rate structure.²⁷ Furthermore, the Commission has a “statutory obligation to ensure that TRS is available in the most efficient manner.”²⁸ By establishing rates along a cost curve driven by economies of scale, the Commission is able to ensure that no provider is earning excessive margins all while ensuring competition and innovation continue to take place within the industry.

In looking at the interim rates the Commission has adopted for 2018-2019 and 2019-2020 (\$1.75 and \$1.58, respectively), ClearCaptions would argue that the tiered rate proposal previously submitted to the Commission is better positioned to allow the Commission to meet its statutory obligation to ensure TRS is available in the most efficient manner than the interim rates adopted. This is supported by mathematical facts showing potential savings to the Fund under a tiered rate structure. First, ClearCaptions’ four-tier rate model would have resulted in an estimated industry realized rate of \$1.56 for calendar year 2017 versus the Multistate Average Rate Structure Plan (“MARS”) rate at the time of \$1.9467.²⁹ For the TRS Fund 2018-2019 fund year, ClearCaptions estimates that the realized industry rate would be \$1.47 per minute under the four-tier rate model. As shown in the below chart, the Company’s proposed four-tier rate model would have saved the Fund an additional \$140 million above and beyond the savings associated with the 2018-2019 interim rates.

²⁷ See *supra* note 6.

²⁸ Report and Order ¶ 16.

²⁹ See ClearCaptions August 25, 2017 Ex Parte; ClearCaptions September 1, 2017 Ex Parte; ClearCaptions September 15, 2017 Ex Parte; ClearCaptions September 29, 2017 Ex Parte; ClearCaptions October 2, 2017 Ex Parte; ClearCaptions December 20, 2017 Ex Parte; ClearCaptions May 21, 2018 Ex Parte.

2018/2019 Estimated IP CTS Minutes	2018/2019 Interim Rate	Interim 2018/2019 Fund Demand	Tiered Model Estimated Realized Rate	Tiered Model 2018/2019 Fund Demand	2018/2019 Fund Savings from Tiered Rates
499,000,000	\$ 1.75	\$ 873,250,000	\$ 1.47	\$ 733,530,000	\$ 139,720,000

Furthermore, the 2018-2019 tiered realized rate of \$1.47 is still lower than the 2019-2020 interim rate of \$1.58 currently scheduled. If the Commission’s goals are to (1) ensure that TRS is available in the most efficient manner and (2) correlate TRS rates to the “actual reasonable costs”³⁰ of providing IP CTS then ClearCaptions would argue that the tiered rate model proposed by the Company is fundamentally, mathematically, and philosophically fully aligned with these goals and should be adopted by the Commission.

The Commission appears to fully support and recognize the benefits of a tiered model by both adopting a tiered model for VRS and adjusting that model over time to reflect the market realities.³¹ In fact, the Commission advocated the benefits of a tiered model in the 2017 VRS Compensation Order³² and later defended that model and its appropriateness in the United States

³⁰ Report and Order ¶ 18.

³¹ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and order and Declaratory Ruling, CG Docket No. 03-123, FCC 07-186, 22 FCC Rcd 20140, ¶ 67 (rel. Nov. 19, 2007) (adopting tiered rates for VRS); *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket No. 03-123, FCC 10-115, 25 FCC Rcd 8689, ¶¶ 6, 10 (rel. June 28, 2010) (adjusting VRS tiered rates in order to “better approximate the actual cost of providing VRS”); *In the Matter of Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket Nos. 10-51 and 03-123, FCC 13-82, 28 FCC Rcd 8618, ¶ 197-208 (rel. June 10, 2013) (“2013 VRS Reform Order”) (again adjusting the VRS tiered rates); 2017 VRS Compensation Order ¶¶ 49-64 (adjusting the VRS tiered rates and declining to initiate a transition to a single rate structure).

³² 2017 VRS Compensation Order ¶ 37 (noting that “under a tiered rate structure the Commission can ensure greater efficiency without sacrificing competition, by tailoring compensation rates more closely to the costs of those competitors falling within each tier.”).

Court of Appeals for the District of Columbia Circuit.³³ It only stands to reason that the same benefits associated with a tiered model in the VRS context, which the Commission itself acknowledges, would be applicable in a multi-provider IP CTS industry where one provider owns such a significant and material share of the market.

1. There Is No Need For An Extended Glide Path Because A Tiered Rate Structure Has A Built In “Glide Path”

The Company does not believe that there is a need for an extended glide path towards a single rate. The Commission should move immediately to a tiered rate structure following the expiration of the interim rates.

From ClearCaptions’ perspective, the Commission is now faced with essentially the same decision point that arose at the time the Commission was considering a glide path toward a single cost-based rate with respect to VRS.³⁴ The Commission’s decision to implement a glide path for VRS effectively cemented Sorenson as the dominant market share provider of VRS.³⁵ When that approach was unsuccessful, the Commission maintained the tiered rate structure based on specific provider costs that exists today instead of implementing a single rate based on an industry weighted average.³⁶

Implementing a glide path for IP CTS will foster similar conditions “by allowing the dominant providers to achieve both excessive market share and excessive operating margins.”³⁷ As an additional matter, one of the beneficial features of a tiered rate structure is a built-in glide path that compensates IP CTS providers at decreasing rates based on scale (i.e., minutes handled).

³³ See generally *Sorenson Commc’ns, LLC v. FCC*, 897 F.3d 214, 222 (D.C. Cir. 2018).

³⁴ 2013 VRS Reform Order ¶¶ 212-13.

³⁵ ClearCaptions May 25, 2018 Ex Parte, Attachment 1 at 3.

³⁶ See generally 2017 VRS Compensation Order.

³⁷ ClearCaptions May 25, 2018 Ex Parte, Attachment 1 at 3.

The tiers effectively provide a glide path to decreased rates as a provider's scale, measured by the number of minutes handled, increases. Furthermore, this tiered rate glide path is indifferent to the provider it applies to, and holds all providers equal relative to their size and scale. A tiered model based on economies of scale ensures that as providers grow in scale, they must apply those scale-based cost savings to their company to ensure they remain financially viable.

2. A Tiered Rate Structure Appropriately Allows All Providers To Invest In New Technology And Equally Constrains Growth Across All Providers

As ClearCaptions has noted in the past, the VRS experience provides a clear precedent for a tiered rate structure. In the 2017 VRS Compensation Order, the Commission recognized that there were “vast differences in the per-minute costs of VRS providers, which roughly track the vastly different market shares of each current provider.”³⁸ The Commission noted that the transition to a single rate model based either on the level of allowable costs of the lowest-cost provider or at the level of average costs for the VRS industry would “be likely to eliminate all VRS competition” given the “current disparate cost structures.”³⁹ In the end, the Commission chose to continue with the tiered rate structure because that structure was “most likely to ensure that functionally equivalent VRS remains available and is provided in the most efficient manner with respect to TRS Fund resources.”⁴⁰

ClearCaptions maintains that the same market dynamics that were and are present in the VRS market are also present in the IP CTS market. Like VRS, there are large differences in the

³⁸ See ClearCaptions September 1, 2017 Ex Parte at 2 (citing 2017 VRS Compensation Order ¶ 31).

³⁹ 2017 VRS Compensation Order ¶ 31.

⁴⁰ *Id.* ¶ 33.

per-minute costs among IP CTS providers that roughly correspond to the vastly different market shares held by each.⁴¹ In general, those providers with the largest market share have lower per-minute costs while those with small market shares, like ClearCaptions, have higher per-minute costs.⁴² The imposition of a single rate – whether based on the rate of the lowest-cost provider or an industry weighted average – makes it “highly unlikely that any of the non-dominant providers can compete successfully to gain market-share vis-à-vis the largest, least-cost provider.”⁴³ Given these realities, a multi-tiered rate structure, with a built in reasonable margin of profit, is more faithful to the different market shares of IP CTS competitors.

ClearCaptions submits that a weighted average industry rate structure creates barriers that effectively prevent small providers from ever achieving the scale that would be necessary to sustain those rates, while also enabling the largest providers to continue with business as usual and warrants the adoption of a tiered rate structure. Fixed IP CTS costs are static and difficult for all but the largest providers to overcome. Once such costs barriers are overcome, it is routinely the largest providers that are ultimately successful. Those same large providers benefited from years of MARS rate structures to allow them to grow their business. To ensure the continued presence of competitive offerings, smaller providers must be afforded the opportunity to scale their businesses upwards in order to compete with the largest providers while remaining financially viable. Scaling will, in the long term, lead to rate reductions. However, it will be impossible for smaller competitive providers to achieve sufficient scale if the rates are tied to the costs of the lowest-cost and largest market share providers.

⁴¹ See, e.g., ClearCaptions September 1, 2017 Ex Parte, Attachment at 2-3.

⁴² *Id.*

⁴³ 2017 VRS Compensation Order ¶ 31.

When compared to a single rate based on average costs, a tiered rate will incentivize investment in new technologies, including ASR. As ClearCaptions has argued previously, a successful rate structure is one that ensures competition, drives efficiencies, limits excessive margins, and drives innovation.⁴⁴ A single IP CTS rate based on, for example, the costs of the lowest-cost provider, would generate “an extremely uneven set of operating margins . . . huge windfall profits for one provider and minimally sufficient margins or actual operating losses for the others . . .”⁴⁵ As a result, smaller competitors would have capital constraints that would prevent their ability to invest in research and development of new technologies like ASR. By contrast, a tiered rate based on number of minutes per month would ensure that providers have an opportunity to earn reasonable operating margins, thereby enabling them to balance their investments in growth and research and development.

3. A Tiered Rate Structure Already Includes An “Emergent Provider Rate”

ClearCaptions submits that the same factors that were present in the VRS market that led the Commission to adopt an emergent provider rate are present in the IP CTS context and would support the adoption of an emergent provider rate to “encourage new entry and provide appropriate growth incentives.”⁴⁶ As was the case with VRS, the IP CTS market is unbalanced and characterized by extreme variations in costs between the largest providers and the smaller competitive providers in the market. In sum, very similar market conditions exist between VRS and IP CTS.

⁴⁴ See, e.g., ClearCaptions October 2, 2017 Ex Parte, Attachment at 2.

⁴⁵ 2017 VRS Compensation Order ¶ 32.

⁴⁶ FNPRM ¶ 90.

Due to the similar market conditions between VRS and IP CTS ClearCaptions supports the adoption of a rate for certain, higher-cost providers that “take[s] into account the generally much higher cost of service for very small providers.”⁴⁷ Yet, this is exactly what ClearCaptions’ proposed tiered rate structure would do. It compensates smaller, higher-cost providers with smaller market shares (i.e., number of minutes handled) at higher rates than the larger, lower-cost providers who handle significantly more minutes per month. And, as smaller, higher-cost providers acquire scale their rate will decrease. Thus, an “emergent provider rate” is already built in to the ClearCaptions model as Tier 1.⁴⁸

4. Rate Period

For the next rate period starting in 2020-2021, ClearCaptions recommends adopting the four-tier model that it has been proposing over the past year for the next four years following the expiration of the interim rates, with potential adjustments for exogenous costs as discussed below.

In the long-term, a permanent rate structure needs to be adopted for IP CTS provided by a Communications Assistant (“CA”). Such a permanent rate would be important in driving investment. If such a structure is properly engineered the rates will go down as a given provider increases in scale. Eventually, there would need to be an ASR rate added to the rate structure. However, because the operating costs of ASR are not yet known, ClearCaptions would oppose any permanent rate for ASR at this time.

⁴⁷ 2017 VRS Compensation Order ¶ 49.

⁴⁸ See, e.g., ClearCaptions September 29, 2017 Ex Parte, Attachment 2 at 5.

5. Price Cap Factors Are Not A Relevant Consideration Under A Tiered Model Based Upon Minutes Handled

Price cap factors to reflect inflation and productivity would not be relevant under the tiered rate model which ClearCaptions advocates. This is because the tiered rates are based on number of minutes handled as opposed to average provider costs, which would necessarily require consideration of metrics such as inflation over time. Should the Commission adopt a tiered model there would be no need to adjust for such metrics. Instead, IP CTS providers would be compensated at varying rates according to how many minutes they handle.

6. Exogenous Costs

ClearCaptions believes that the Commission should allow for the adjustment of the compensation rate during the rate period based on exogenous costs, subject to the conditions adopted in the 2017 VRS Compensation Order.⁴⁹ However, ClearCaptions notes that there are different types of exogenous costs – one-time costs and recurring costs – that require further consideration by the Commission in terms of how they are accounted for. One-time exogenous costs include costs like the requirement to replace all existing marketing materials to include the introduction of new FCC required disclaimers or any other type of one-time expense that is not available to Rolka at the time their annual report is filed but that is necessary to satisfy new Commission requirements. Ongoing exogenous costs include costs such as a requirement to meet certain new service level requirements or costs associated with adopting the TRS User Registration Database in the context of IP CTS. For one-time exogenous costs, providers should submit documentation to justify reimbursement and the reimbursement would be subject to a mark-up that falls within the 7-12% zone of reasonableness that the Commission has blessed for IP CTS profit

⁴⁹ FNPRM ¶ 93 (citing 2017 VRS Compensation Order ¶ 66).

margins. For recurring costs either the rate needs to be adjusted upward to reflect those costs or providers can be reimbursed on an ongoing basis for such costs.

C. The Commission's Alternatives To Averaging Costs And Cost-Based Rates Are Flawed

In its discussion of alternatives to rate-setting based on averaging costs the Commission seeks comment on the optimal number of competitors to ensure that functional equivalence is achieved efficiently.⁵⁰ ClearCaptions strongly discourages the Commission from limiting or otherwise dictating the number of competitors in the IP CTS market. As the Commission concluded with respect to VRS, “the presence of *multiple competitors* can be highly beneficial in ensuring the provision of functionally equivalent service.”⁵¹ The Commission did not decide that a specific number of competitors would most efficiently achieve functional equivalence in the VRS context. The same must apply to IP CTS. Functional equivalence can be achieved through a robustly competitive market for IP CTS and the Commission should undertake rate setting designed to permit and foster competition. However, setting a limit on the number of competitors would be overly restrictive in the Company's estimation.

More problematic, however, is Sorenson's suggestion to hold a reverse auction to set a multi-year compensation rate for IP CTS.⁵² The IP CTS business is not the same as that of a traditional public utility that requires auctionable resources, like, for example, spectrum, to provide services. The business is fundamentally about the costs of acquiring a customer, serving existing customers, fixed costs associated with being in this business, and the variable cost associated with captioning. Once a company has customers and employees are trained, the actual process of

⁵⁰ *Id.* ¶ 94.

⁵¹ *Id.* (emphasis added) (citing 2017 VRS Compensation Order ¶ 31).

⁵² *Id.* ¶ 95.

captioning the service that customers are seeking is approximately one third of the cost of running the entire business. Applying a market-based mechanism such as an auction to IP CTS would essentially result in auctioning off a customer base to the most deep-pocketed bidder(s). This would be confiscatory and grounds for litigation if some existing providers were suddenly forced out of business. Further, the rules for such an auction could be subject to legal challenges.⁵³ Moreover, customers are not “portable.” Shifting a customer base to implement a reverse auction would require a change-out of technology, which would take a significant amount of time. Additionally, all such customers would have to be requalified with the new provider representing an administrative and financial burden.

Again, ClearCaptions would argue that a tiered rate model would solve a majority of the issues being raised within this FNPRM without having to implement new regulatory policy, rules, disclaimers, and other dramatic adjustments.

D. It Is Premature To Be Discussing A Compensation Rate For ASR

As stated in its previous filings, ClearCaptions fully supports the implementation of ASR in IP CTS and also believes that, over time, ASR will be able to completely serve the IP CTS market.⁵⁴ However, that time has not yet arrived. As of today, ClearCaptions is unaware of any IP CTS provider that has shown a commercially viable version of IP CTS solely using ASR. Because research and development of ASR is still in its relatively early days, any discussion about setting a compensation rate for ASR is premature.

As an initial matter, ASR will require substantial startup investment and experimentation for at least two years before a standard could be developed and rates could be set. When ASR is

⁵³ 47 U.S.C. § 402(a).

⁵⁴ See, e.g., ClearCaptions May 25, 2018 Ex Parte, Attachment 1 at 3.

initially deployed, it will be significantly more expensive. ClearCaptions hypothesizes that this will be the case because each minute will need to be tested using both ASR and a CA in order to determine which minutes can be handled using ASR. This will require significant time and investment. After the initial testing phase, a standard would need to be formulated and an operational service could then be deployed. Only once an operational service is deployed could the industry begin cost analyses and consider ratemaking for ASR-provided IP CTS. Any claim, such as that made in the 2018 TRS Rate Report, that the future costs of operation utilizing ASR are known at this time is simply false.⁵⁵

In light of the foregoing, ClearCaptions believes the rate proposed in the 2018 TRS Rate Report of \$0.49 per minute is flawed. It appears that Rolka relied, in part, on the average fixed cost of IP CTS service and the average total cost of IP CTS service to arrive at its proposed ASR rate. But, as the Commission knows, those “average” costs, which are the projected costs for 2018-2019, reflect the costs of the largest but lowest-cost IP CTS provider. Accordingly, the use of such weighted average costs is not accurate as it fails to take into account the potential cost of ASR for competitive providers. As ClearCaptions previously noted, research and development into ASR is simply not at the stage where any provider can accurately estimate the future costs of IP CTS using ASR. Accordingly, the Rolka rate proposed in the 2018 TRS Rate Report should be disregarded.

In setting rates for ASR or, for that matter, IP CTS in general, the Commission and the Administrator need to focus on the fixed versus variable components of the IP CTS business and ensure that any rate structure is sufficient for all competitive providers to earn a reasonable

⁵⁵ 2018 TRS Rate Report at 24 (noting that while at least two entities have requested certification for IP CTS using ASR “[n]either applicant has offered ASR cost of service or ASR demand projections.”).

operating margin above and beyond those cost components. ClearCaptions looks forward to working with the Commission to help identify what this type of methodology would look like for ASR as the technology improves.

III. ADMINISTRATION OF IP CTS SHOULD NOT BE MOVED TO THE STATES

While ClearCaptions supports the Commission’s proposal to expand the TRS Fund base through the inclusion of a percentage of annual intrastate revenues from telecommunications carriers and Voice over Internet Protocol (“VoIP”) providers, the Company adamantly opposes any shift of IP CTS administration to the state level.⁵⁶

As an initial matter, IP CTS is jurisdictionally interstate. As the Commission has recognized, IP CTS is “used extensively nationwide.”⁵⁷ Moreover, IP CTS is offered over the Internet, which has long been recognized by the Commission to be a “jurisdictionally interstate service.”⁵⁸ Because IP CTS is fundamentally an interstate service, ClearCaptions respectfully submits that state administration is not appropriate.

State administration of IP CTS, especially in the area of intrastate provider certification, will, without a doubt, significantly increase regulatory compliance costs for IP CTS providers. The Commission has asked “whether state TRS programs should be required or permitted to certify IP CTS providers that are allowed to deliver IP CTS services to residents of their states.”⁵⁹ This approach to certification opens the door to state-specific requirements to achieve certification in a given state. Requiring IP CTS providers to become certified in every state in which they provide

⁵⁶ See FNPRM ¶¶ 111-116.

⁵⁷ *Id.* ¶ 103.

⁵⁸ See, e.g., *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166, 33 FCC Rcd 311, 429, ¶ 199 (rel. Jan. 4, 2018).

⁵⁹ FNPRM ¶ 115.

service is inefficient and will only increase operating costs. Further, it could create a patchwork of different certification requirements that would only further exacerbate cost increases. Moreover, state administration is also a prescription for potentially fifty different service offerings.

The Commission's legal basis for moving at least some IP CTS functions to the states is unconvincing. The Commission cites section 225(c) of the Communications Act of 1934, as amended ("Act")⁶⁰ under which common carriers "may fulfill their obligation to offer TRS throughout the areas in which they offer telephone service . . . by complying with the requirements of state TRS programs certified by the Commission."⁶¹ The Commission then notes that all fifty states and six U.S. territories have Commission-certified TRS programs that offer TTY-voice and speech-to-speech TRS and that "all TRS state programs offer, oversee, and support a non-IP version of CTS on a voluntary basis."⁶²

The Commission's argument appears to be that since the Act allows common carriers to fulfill their obligations to offer TRS by complying with the requirements of state TRS programs and because state TRS programs offer the two forms of TRS currently required for state certification and some states voluntarily support CTS there is a firm legal basis to move the administration of IP CTS to the state level. It is difficult to see how a statutory authorization that discusses how carriers can comply with an obligation to provide TRS also provides the basis for the regulation of IP CTS by the states, especially in light of the Act's explicit requirement that "*the Commission shall ensure that interstate and intrastate telecommunications relay services are*

⁶⁰ *Id.* ¶ 111.

⁶¹ *Id.*

⁶² *Id.*

available, to the extent possible and in the most efficient manner . . .”⁶³ While ClearCaptions respects and appreciates the efforts undertaken by state programs, it is unclear if state programs “have the expertise, demonstrated skills, and on-the-ground experience to assume administrative functions with respect to IP CTS,”⁶⁴ specifically as it relates to access. As the Commission has pointed out, IP CTS is at a scale far and above where state programs currently operate. ClearCaptions is highly concerned that if these efforts are passed to states, it could result qualified users facing larger obstacles to gaining access to the service. For example, it is entirely unclear whether states could handle the sudden increase in volume with their current support personnel if every IP CTS provider sent every qualified customer it came across to states to get qualified. And it is decidedly less clear whether the passing of administration to the states is legally permitted under the statute.

Further, if some or all of the states decided to create a reverse auction process, the result could be an environment where many customers of the losing bidders in the state would immediately lose their provider and IP CTS service. These consumers rely on this service to perform daily functions, call their doctors, call the pharmacy, stay connected to loved ones and, in some cases, maintain their independent living. Immediately suspending services to these individuals because a provider lost some type of auction process would not be in the best interest of consumers and does not meet the intent of the ADA. In addition, there would be no incentive for disenfranchised providers to ensure that their devices would be transferrable to the winning bidder and very little possibility that the state or winning bidder would compensate the losing provider(s) for the customer base developed by the loser. From a definitional standpoint, IP CTS

⁶³ 47 U.S.C. § 225(b)(1) (emphasis added).

⁶⁴ FNPRM ¶ 112.

provider devices are currently interoperable in the sense that VRS video phones are interoperable: a ClearCaptions customer can successfully call a customer of one of the Company's competitors and both customers would be able to receive captions. The Company feels that the distinction between transferable phones and interoperable phones is important. Since there is no requirement to make IP CTS phones transferable and because the Commission has consistently argued that customer premises equipment ("CPE") is not part of the costs covered by the per-minute compensation rates, there is no legal basis to require the losing providers of a bidding process to enable all deployed phones in that state to be transferred to the winning bidder. As such, the winning bidder would be faced with replacing possibly thousands of devices and the even more significant cost of visiting thousands of customers to transition them to their service. The net result will be denial of service for all existing customers. In the aggregate, this scenario would most certainly end in lawsuits.

From ClearCaptions' perspective, the Commission should not abdicate its responsibility under the Act and its rules with respect to IP CTS by handing off, in whole or in part, administration to fifty different states. Additionally, it is not clear that there is full support from even a significant minority of states asking for this change.

IV. WHILE CLEARCAPTIONS BELIEVES THE GOLDEN RULE FOR CUSTOMERS TO REGISTER FOR THE SERVICE SHOULD BE BASED ON THEIR SELF-CERTIFICATION, AS A POTENTIAL ALTERNATIVE, CLEARCAPTIONS WOULD RECOMMEND THAT THE INDUSTRY MOVE AWAY FROM RELIANCE ON EDPS AND HCPS IN FAVOR OF AN ONLINE ELIGIBILITY ASSESSMENT TOOL

ClearCaptions agrees that "IP CTS user need must be specifically focused on the consumer's ability to hear and understand speech over the telephone and on whether the

consumer's communications needs can be met by other assistive technologies.”⁶⁵ However, the Commission's proposals, which focus on assessment by state equipment distribution programs (“EDPs”) or hearing healthcare professionals (“HCPs”), would create cost increases for providers and consumers. Moreover, these proposals would not adequately address some of the industry's most egregious abuses, including exclusive marketing arrangements and other incentives that arise out of such relationships. ClearCaptions is concerned that these types of arrangements could result in customers being caught in the middle of territorial battles over HCP relationships. Setting that aside, implementing a nationwide qualification process through EDPs or HCPs presents many challenges.

ClearCaptions believes it is the Commission's intent that some type of standardized qualification process be implemented for potential IP CTS customers. As such, implementing a requirement for individuals (either HCPs or EDPs) to perform this assessment will be dependent on that specific individual's thoughts, biases, and/or opinions. When looking at the thousands of HCPs/EDPs that are in the market, it is easy to imagine a scenario in which customer A in state A is deemed to be unqualified by EDP A, but if that customer was to move to state B or visit HCP/EDP B they might be deemed to be qualified by that individual. This is not to say that there is ill intent in the market, but rather to point out the reality that any qualification based on an individual's assessment will vary by individual, by day, and by location.

The Company is also very concerned that by implementing a HCP/EDP requirement, customers who face mobility or accessibility challenges (i.e., living 70 miles from the nearest HCP) could face situations where they would be denied access to IP CTS insofar as such mobility or accessibility challenges could prevent the consumer from physically reaching an HCP and

⁶⁵ *Id.* ¶ 119.

thereby being certified by that HCP. ClearCaptions does not believe it is the intent of the Commission to create barriers to an individual's civil right to "fully participate in all aspects of society"⁶⁶ free from discrimination based on disability through administrative procedures.

ClearCaptions comments on the Commission's proposals below, but in light of and to alleviate some of these concerns, ClearCaptions proposes an online IP CTS eligibility test ("Eligibility Assessment") along with an appeal process that would move the industry away from eligibility certification based on HCPs and EDPs.

A. If the Commission Intends To Rely On HCPs and EDPs To Determine Eligibility ClearCaptions Generally Supports Proposals To Ensure The Accuracy Of Certifications With Certain Clarifications and Qualifications

If the Commission is committed to use of HCPs and EDPs as a solution to ensure the accuracy of certifications, ClearCaptions partially supports, with the clarifications and qualification set forth below, the Commission's proposals.

1. In General, The Imposition Of New Certification Criteria Will Raise Costs

A certification procedure requiring attestation by a third party or other professional that the consumer's needs could not be met by other assistive technologies, such as an amplified telephone, would unquestionably raise a provider's cost per customer. For example, ClearCaptions, in accordance with the current rules, does not presently require an affirmation by a certification professional that the consumer's communications needs cannot be met through other assistive technologies. ClearCaptions proposes that if this were to become a requirement, there would need to be an exogenous cost mechanism to understand what this would mean to providers from a cost

⁶⁶ See 42 U.S.C. § 12101(a).

perspective. In addition, there would be costs to the third-party professional required to make such an assessment for the customer.

While ClearCaptions believes the golden rule should be that it is the customer who decides which service best meets their needs, if the Commission is determined to move away from any type of self-certification to determine eligibility, ClearCaptions does not oppose the Commission's underlying goal with respect to assessment of each potential customer's needs. To the extent that costs are increased, the Company would expect be to compensated for those extra costs through the IP CTS per-minute rates. Additionally, ClearCaptions would hope the Commission would consider all potential barriers that exist for consumers in those assessments as part of their final determination and ensure those barriers do not prevent qualified users from gaining access to the services they need.

2. The Complexities Of Hearing Loss Require Professional Assessment

The Commission's proposed requirement that "IP CTS providers ... obtain from each potential IP CTS user a certification from an independent, third-party hearing health professional affirming the user's eligibility to use IP CTS"⁶⁷ appears to assume that a such a professional will ensure only qualified users gain access to the service. ClearCaptions agrees that hearing loss or other medical issues that require access to IP CTS services are extremely complex. For this reason, the Company has concerns that some type of simple, single step qualification process could be considered (i.e., only customers with "x" level of hearing loss could qualify for the service). Any eligibility process should be multi-faceted and do the most to ensure that a wide range of issues affecting an individual's ability to utilize the telephone are considered. However, and as noted above, the Commission's proposal to require independent third-party professional certifications

⁶⁷ FNPRM ¶ 129.

will cost providers more to execute and will result in delay in customers obtaining service. If the Commission were to impose such a requirement, the cost thereof would have to be accounted for in determining IP CTS reimbursement rates.

3. The Commission Must Take Action Against HCPs That Engage In Joint Marketing And Other Schemes That Result In The Certification Of Ineligible IP CTS Users And Drastically Affect Competition In The IP CTS Market

As the Commission notes, there are serious abuses taking place in the IP CTS market that could lead to certification of ineligible IP CTS users and that affect competition among IP CTS providers. Indeed, there appear to be IP CTS providers that have established “exclusive arrangements” with certain HCPs that involve the HCPs “helping to promote these providers’ IP CTS offerings at the same time as they purportedly provide an objective certification of their clients’ need for IP CTS.”⁶⁸ Some providers develop co-marketing materials for these HCPs to download and use to help drive leads to these HCPs. These co-marketing arrangements often provide incentives for HCPs to offer one provider’s free phone in conjunction with no-cost testing for consumers.⁶⁹ The nature of this relationship creates incentives for HCPs to “acquiesce to their customers’ requests for IP CTS eligibility certification,” which could result in the certification of IP CTS users that do not actually need the service.⁷⁰ More egregiously, the exclusive relationships between HCPs and IP CTS providers have resulted in HCPs referring consumers to one provider to the exclusion of other competitors and, in some cases, against the express wishes of the consumer. These types of quid-pro-quo relationships have the potential to result in waste within the industry.

⁶⁸ *Id.* ¶ 120.

⁶⁹ *Id.*

⁷⁰ *Id.* ¶ 121.

These improper practices are at the heart of what plagues the TRS Fund and the IP CTS industry at large. Today IP CTS providers, as part of their own outreach and expense and without a mandate to do so, contact HCPs and provide them with professional certification forms (“PCFs”) and other forms designed to support a customer’s self-certification of their need for IP CTS. It is entirely inappropriate for HCPs with exclusive arrangements with one provider to direct prospective consumers to that HCP’s “preferred” or “exclusive” provider, especially when the consumer might prefer another IP CTS provider. In many cases, HCPs refuse to sign a PCF purely because the requesting IP CTS provider has not established a relationship with them. Allowing such practices effectively sanctions unfair competitive and thwarts consumer choice. Moreover, to the extent that it encourages the certification of ineligible users created by these exclusive arrangements, the practices also prompt fraud, waste, and abuse and are a drain on the TRS Fund. As such, ClearCaptions asks that these concerns be addressed as the Commission considers any type of HCP/EDP solution.

4. Relationship To An HCP

With respect to the Commission’s certification requirements, ClearCaptions generally agrees with the proposal to “prohibit an IP CTS provider from accepting a certification from any professional that has a business, family, or social relationship with the IP CTS provider or with any officer, director, partner, employee, agent, subcontractor, sponsoring organization, or affiliated entity . . . of the IP CTS provider.”⁷¹ ClearCaptions also agrees that this prohibition should include instances where the professional, the professional’s organization, or a colleague within the organization has been referred to the consumer by a given IP CTS provider.⁷²

⁷¹ *Id.* ¶ 131.

⁷² *Id.*

If the Commission considers moving eligibility determination to state EDPs, ClearCaptions has concerns around current relationships between amplified phone manufacturers and EDPs. While the Company is not implying any state would knowingly deny an individual access to IP CTS, ClearCaptions is saying that there are relationships that have been in place for many years between amplified phone manufacturers and EDPs. These long-term relationships may include inherent incentives for manufacturers to press EDPs to prefer their product so that they are in a position to gain access to a pool of hard-of-hearing individuals that they currently are not reaching. ClearCaptions trusts the good intention of a majority of EDPs, but the Commission has not typically relied on trust, but rather relied on policy making and rules ensuring compliance and ethical operations.

5. Free Screenings Offered At Conferences, Meetings, Or Other Events

ClearCaptions recommends that the Commission clarify the proposed prohibition on IP CTS providers from “facilitating or otherwise playing a role in the acquisition of professional certifications” by “arranging, sponsoring, hosting, conducting, or promoting seminars, conferences, meetings, or other activities in community centers, nursing homes, apartment buildings, or any other location where hearing health professionals offer free hearing screenings.”⁷³ This should not be read as a prohibition on attending such events where free screenings may be provided by another attendee at the event.

6. Solicitation, Facilitation, Or Collection Of User Certifications

The prohibition on providers “soliciting, facilitating, or collecting user certifications directly from hearing health professionals” should be clarified.⁷⁴ In particular, ClearCaptions

⁷³ *Id.*

⁷⁴ *Id.*

believes that providers should be able to assist a customer by asking a hearing professional who has previously evaluated the hearing of a customer to fill out a PCF to attest to the customer's self-certification as to their need for IP CTS. ClearCaptions submits that this process can be extremely beneficial in weeding out potential customers who are not eligible.

7. Functional Assessments To Determine Viability Of Other Solutions

As noted above, the Commission's proposal to require certifying professionals to conduct "functional assessments" and to assess whether an amplified telephone or other service or device would be sufficient to achieve functional equivalence would impose additional costs on both IP CTS users and providers. While the complexities of hearing loss require some type of professional assessment, consumers will have costs imposed on them in the time and money it will take to obtain such an assessment from a professional and may face delays in receiving needed services. In addition, there will be additional costs imposed on providers relating to, for example, follow-up with hearing professionals in cases where the assessment was inconclusive or incorrect.

8. Technical Specifications With Respect To Third Party Certifications

With respect to the Commission's proposed technical specifications as to the third-party certifications that may be accepted by an IP CTS provider, ClearCaptions would suggest that the Commission adopt some flexibility in this regard. Specifically, the Commission should clarify that the certification may be electronic, may or may not be typed, may or may not have an electronic signature, and may be received by U.S. mail, electronic transfer, electronic mail or by facsimile.⁷⁵

⁷⁵ ClearCaptions would suggest that the Commission revisit the proposed retention period for third-party professional certifications. FNPRM ¶ 134. Ten years is too onerous, especially given that the retention period for call detail records is five years. 47 C.F.R. § 64.604(c)(7). ClearCaptions would recommend no more than five years. The five-year retention period is also in keeping with other Commission retention periods, including those for TRS providers. *See, e.g.*, 47 C.F.R. §

B. Rather Than To Rely On HCPs And/Or EDPs ClearCaptions Would Propose The Use Of An Professionally Designed Online Eligibility Assessment

As noted above, ClearCaptions would recommend the use of an online Eligibility Assessment as an alternative to the use of HCPs and state EDPs to determine eligibility, which is fraught with the issues identified above. ClearCaptions understands that any type of online or application based assessment would be very complex, but the Company recommends that the Commission work with the Disability Advisory Committee (“DAC”), IP CTS providers, and HCPs to develop such a test. ClearCaptions would suggest that, from a conceptual standpoint, the Eligibility Assessment could have at least two principal components:

- (1) a word recognition test component; and
- (2) an appeal process for consumers who do not qualify under the test but still believe they are qualified for the service.

A formula would need to be derived that could consider both decibel hearing loss and cognitive issues relating to word recognition such that consumers whose decibel hearing loss would not qualify them for IP CTS might still be qualified if they have cognitive issues that cause them to struggle with word recognition or vice versa.

This is a conceptual scenario and ClearCaptions realizes something along these lines is much more complex than what is being defined above. ClearCaptions also realizes that for some type of online testing system to be successful, the Commission will need to work with the DAC, HCPs, and IP CTS providers to design a test that best determines, based on technological

54.704(e) (“Any entity required to contribute to the federal universal service support mechanisms shall retain, for at least five years from the date of the contribution, all records that may be required to demonstrate to auditors that the contributions were made in compliance with the Commission’s universal service rules.”); 47 C.F.R. § 64.604(c)(7).

limitations, an individual's eligibility. The final Eligibility Assessment could, of course, have many more components than the two listed above; however, ClearCaptions strongly believes there needs to be an appeal process for those outliers who have medical conditions that the test cannot simply screen for that would make them eligible IP CTS customers. The Company would also recommend the Commission consider some type of telemedicine solution through a nationally contracted agency to determine such assessments. The goal should be a consistent, definable, and somewhat quantitative approach.

ClearCaptions proposes that each customer should have to register to take the Eligibility Assessment with the same information they must use when registering for the service today and that it could be part of a Commission "test kit," that would include a laptop or tablet and hearing aid compatible headphones and an application or website address where the test is stored. The results of the test could be stored as part of the TRS User Registration Database ("URD").

ClearCaptions believes that there are a number of important benefits to this approach to the FCC, consumers, and the IP CTS industry generally. First, there would be benefits to the Commission. To the extent that test results were stored in the URD, the Commission could track the results and run analytics on them to gain a broader understanding of IP CTS customers, which could better inform decisions about, for example, IP CTS ratemaking in the future. In addition, because the Eligibility Assessment would be universal there would be no need to educate HCPs or state EDPs on eligibility criteria as proposed by the Commission in the FNPRM. The reality of having either HCPs or EDPs perform eligibility assessments is that, as previously stated, the assessments will be highly subjective based on the individual performing the test. ClearCaptions believes that the odds of educating each HCP or EDP nationwide on what qualifications are required before signing a PCF are extremely low and that the results will be inconsistent at best.

Second, there would be obvious benefits to consumers. Because the test could be done from the consumer's home, accessibility and/or mobility issues would not prevent those that wanted to take the assessment from doing so. Additionally, consumers would save the money they would otherwise spend in order to have a hearing assessment conducted by an HCP at an office location. These expenses could be in the form of transportation expenses, a doctor's visit expense, or some other expense the consumer would not otherwise have to incur. ClearCaptions does not want an individual's financial position to determine whether they gain access to the service. In addition, the home environment is where consumers are most likely to make and take calls. Administration of the assessment in the home would therefore more accurately approximate everyday conditions. Cumulatively, these benefits are decidedly pro-consumer.

Finally, the Eligibility Assessment would also create benefits for the IP CTS industry as a whole. Because the test results would be stored in the URD, other IP CTS providers would be prevented from signing up a customer that was already deemed not qualified for IP CTS because the assessment tool would recognize a given individual and would reflect a failed test score. This would lead to a reduction in fraud, waste, and abuse to the TRS Fund. Additionally, the Eligibility Assessment would completely eliminate the exploitative joint marketing and preferred provider contractual arrangements with HCPs that currently plague the industry. Costs to hearing professionals would also be alleviated insofar as they would not be subject to a large volume of visits or requests for provider certification forms that are not revenue generating for them.

Of course, ClearCaptions recognizes that one of the principal concerns with the proposed Eligibility Assessment would be that IP CTS providers might be able to "coach" customers on how to fail the test and become eligible for IP CTS. Yet, that concern exists under the present certification regime. There is nothing that would prevent an IP CTS provider today from

instructing customers to pretend they cannot hear during a test administered by a hearing professional in order to achieve certification. With the Eligibility Assessment, however, the Commission would have a measure of control insofar as it could see percentages of customers that pass or fail the assessment, investigate anomalies in the data, and even adjust the assessment accordingly. This measure of control or visibility does not exist if certification is passed to hearing professionals or EDPs.

Given the issues associated with continued reliance on HCPs and EDPs for IP CTS eligibility certification, ClearCaptions would recommend adoption of an online Eligibility Assessment. ClearCaptions would be happy to work with the Commission, HCPs, and the industry in further defining what this assessment might look like.

V. PROVIDER PRACTICES

ClearCaptions provides the following comments on the Commission's proposals relating to provider practices and measures to limit the unnecessary use of IP CTS and waste of the TRS Fund resources.

A. Communications And Messaging On IP CTS

The Commission's proposal to require that "all provider-distributed online, print, and orally delivered materials used to market IP CTS be complete and accurate"⁷⁶ is sensible. ClearCaptions does not oppose the various prohibitions proposed by the Commission regarding, for example, advertising statements suggesting that any amount of hearing loss would qualify a customer for IP CTS. ClearCaptions would only say that the cumulative effect of any required warnings and/or prohibitions should not outweigh the purpose of the marketing material, which is to advise and educate potential consumers. A piece of marketing that is consumed by lengthy

⁷⁶ FNPRM ¶ 140.

conditions or prohibitions will fail to have its intended effect, and result in sunk marketing costs for IP CTS providers.

ClearCaptions also does not oppose the Commission's equipment installer notification proposal, which would require the installer to explain to the consumer how IP CTS works, the per-minute cost of providing captioning on each call, and that the cost of captioning is federally funded.⁷⁷ ClearCaptions would propose to accomplish the foregoing notification both by explaining this verbally to the consumer and also providing them with a written disclosure to the same effect. However, ClearCaptions notes that any additional requirements imposed by the Commission, such as this notification requirement, do add costs.

Finally, ClearCaptions supports the Commission's proposal to prohibit providers from "offering or providing any form of direct or indirect incentives, financial or otherwise, to any person or entity for the purpose of encouraging referrals of potential users, registrations, or use of IP CTS."⁷⁸ This requirement is consistent with prior Commission policies on the issues of improper incentives.

B. IP CTS Registration Renewal And Phone Reclamation

Requiring IP CTS providers to obtain a biennial self-certification from their users that attests to the consumer's continuing need for IP CTS is entirely appropriate.⁷⁹ However, as noted above, a retention period of ten years is too long.⁸⁰ ClearCaptions would recommend a five-year retention period from the date the individual is no longer a customer of the IP CTS provider, which

⁷⁷ *Id.* ¶ 142.

⁷⁸ *Id.* ¶ 143.

⁷⁹ *Id.* ¶ 146.

⁸⁰ *See supra* note 75.

is consistent with current FCC rules.⁸¹ In addition, and to reduce compliance costs, ClearCaptions would request that the Commission allow the biennial certification to be done electronically by email, text message, or on the phone display at the option of the provider. The Company would like to point out that even if this biennial certification were electronic, it still drives costs to the provider that need to be considered in any new type of rate proceeding.

Regarding device reclamation and termination of service, ClearCaptions always disables the IP CTS capability of an end-user device and/or attempts to ensure that the device is returned to ClearCaptions when a consumer provides a notification that the authorized user is no longer using the device. The issue that ClearCaptions often faces is that an authorized user dies and the Company is not notified and the device is simply unplugged. When ClearCaptions attempts to call the phone number there is no response. This makes device reclamation difficult. Presently, ClearCaptions is implementing a more aggressive process to shut off an account after the Company's calls go unanswered.

C. Requiring an Easy Way to Turn Captions On or Off

ClearCaptions generally agrees with the principle that providers of IP CTS equipment should “provide[] an easy way to turn captions *on or off*, either before placing a call or while a call is in progress.”⁸² For example, equipment should not require captions to be on when a customer wants to listen to voicemail or require captions be turned on in order to access amplification features of the phone.

⁸¹ See 47 C.F.R. §§ 64.604(c)(7), (9)(x).

⁸² FNPRM ¶ 149 (emphasis in original).

VI. ADDITIONAL MEASURES TO PREVENT WASTE, FRAUD, AND ABUSE

ClearCaptions is committed to working with the Commission to prevent and identify waste, fraud, and abuse in the provision of IP CTS. ClearCaptions takes its responsibilities in this endeavor seriously. However, the Company opposes the Commission's proposal to require IP CTS providers to require CAs to "flag individual calls that may suggest that IP CTS functionality is being used improperly."⁸³ ClearCaptions places great value on the confidentiality of the consumers that use the Company's IP CTS and believes that this proposal unnecessarily jeopardizes important consumer confidentiality interests. Moreover, in its experience, ClearCaptions questions whether such consumer conduct could be accurately detected by a CA. Inaccurate detection could lead to false accusations and erroneous claims against customers. The Company has serious concerns that qualified customers who rely on this service could have their captioning service terminated purely based on a subjective decision by a CA. Furthermore, CAs are trained to merely relay the conversation. Asking them to split their cognitive load to also try and make some type of qualification assessment risks diminishing the quality of the service. ClearCaptions would not recommend adoption of such a rule.

With respect to 911 calls,⁸⁴ ClearCaptions fully supports regular, mandated testing to ensure compliance with the Commission's 911 IP CTS call handling requirements.

VII. TECHNOLOGICAL ADVANCES

ClearCaptions believes that alternative communications services, including: amplified telephones; high definition VoIP services; video over broadband and cellular networks; noise-canceling techniques; audio personalization; non-telephony services such as FaceTime, Google

⁸³ *Id.* ¶ 152.

⁸⁴ *Id.* ¶ 153.

Voice, and Amazon Echo; and other forms of text-based communications will, over time, reduce reliance on IP CTS. Seniors, as late adopters of new and alternative services, will likely sustain IP CTS, but will eventually adopt these alternative communications services. ClearCaptions believes that adoption will follow a natural curve over time and that there is nothing that the Commission or the IP CTS industry can or should do to force consumers prematurely to adopt alternative technologies that may not meet their functional equivalence needs.

VIII. CONCLUSION

ClearCaptions appreciates the opportunity to comment on the FNPRM and looks forward to continuing to engage with the Commission on the important issues raised therein. It expects to continue to take an active role in helping to define the future landscape of IP CTS regulation. ClearCaptions believes in a regulatory framework that encourages competition among providers, provides for sensible, evenhanded oversight, and provides maximum benefits to consumers.

Respectfully submitted,

CLEARCAPTIONS, LLC

By: /s/ Michael Strecker

Paul C. Besozzi
Peter M. Bean
Squire Patton Boggs (US) LLP
2550 M Street, N.W.
Washington, DC 20037
202-457-6000 (tel)
202-457-6315 (fax)
paul.besozzi@squirepb.cpm
peter.bean@squirepb.com

Counsel for ClearCaptions, LLC

Michael Strecker
ClearCaptions, LLC
3001 Lava Ridge Court, Suite 100
Roseville, CA 95661
916-274-8429 (tel)
mike.strecker@clearcaptions.com

*Vice President of Regulatory and Strategic
Policy, ClearCaptions, LLC*

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