

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Telecommunications Relay Services And)
Speech-to-Speech Services for Individuals)
with Hearing and Speech Disabilities)

To: The Commission

**APPLICATION FOR REVIEW
OF THE CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU'S
NOVEMBER 7, 2014 ORDER WITHHOLDING TRS PAYMENTS**

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SUMMARY

The Commission should reverse and vacate the Consumer and Governmental Affairs Bureau's ("CGB") November 7, 2014 order (the "November 7 Order") denying Purple Communications, Inc. ("Purple" or the "Company") more than \$1,629,411.35 in compensation for calls placed through its web and wireless Internet Protocol Captioned Telephone Service applications ("IP CTS applications") from the inception of the IP CTS applications on January 9, 2011 through August 31, 2014.

The *November 7 Order* is based on the flawed and grossly retroactive conclusion that Purple's IP CTS applications were not in compliance with Telecommunications Relay Service ("TRS") emergency call handling requirements, and represents a blatant overstep of authority by CGB in denying Purple reimbursement for all calls processed in full compliance with all contemporaneous Commission rules. CGB's interpretation is not only fundamentally wrong, the withholding of reimbursement for all calls in the manner directed by staff violates basic principles of fairness and due process.

The emergency call handling requirements only apply to services where the assisted user ("AU") *initiates* the *call*. The emergency call handling requirements do not apply to Purple's IP CTS applications because in those applications the AU does not initiate the call. Instead, the AU sends an e-mail request to receive a telephone call back, and the *communications assistant* ("CA") receives the request and then initiates the telephone call. In March 2008, the Commission specifically and expressly exempted such IP CTS applications from TRS emergency call handling requirements, and the Company relied, in good faith, on clear precedent and the plain language of the Commission's explanation regarding when the rule does and does not apply, in offering its IP CTS services.

Now, six years after the Commission expressly provided the exemption, and more than three years after the Company began offering IP CTS services in full reliance on the defined terms and clear guidelines stated by the Commission concerning IP CTS and provider obligations, CGB has taken it upon itself, without affording any due process protections and in violation of the Administrative Procedure Act (“APA”), to ignore the express direction provided by the Commission regarding the applicability of the rules and eliminate the exemption. Even worse, CGB has retroactively applied its *post facto*, wholly new and previously unpublished interpretation – an interpretation inconsistent with all prior Commission statements – to conclude that the Commission’s rules *always* required Purple’s IP CTS applications to provide emergency call handling service.

CGB not only lacks a legal basis for the *November 7 Order* but also fails to acknowledge that the *November 7 Order* is without factual support. Purple consistently provided a clear disclosure to customers that they may not place 911 calls through IP CTS applications and that any 911 emergency calls should be made through a standard telephone or TTY. Moreover, Purple is not aware of any customer who attempted to place an emergency call through the IP CTS applications. Indeed, Purple is aware of only four 911 calls made through its IP CTS applications, and all four of these calls were either misdials or non-emergencies. These calls confirm what the Commission already knows: TRS users do not use IP CTS applications for emergency purposes because of the inherent delays in such technology. Nevertheless, earlier this year, under financial pressure and in response to the Commission’s withholding of reimbursement in connection with Purple’s provision of IP CTS, Purple implemented 911 service on its IP CTS applications even though not required to do so.

Despite these facts, CGB nonetheless disproportionately withholds not only the minutes associated with these four non-emergency calls, but all minutes Purple handled and processed through its IP CTS applications since the inception of the service. CGB cannot impose such an unlawful seizure of compensation due and owing to Purple for the provision of valid TRS calls on the mere hypothetical possibility that a TRS user might have unsuccessfully attempted to use IP CTS applications for emergency services – which no TRS user did – in such a retroactive way. Providers simply cannot function as viable operating businesses in a fluid regulatory environment where rules are essentially back-dated and entire categories of minutes processed are deemed non-reimbursable after the fact. CGB acted without authority. The Commission should accordingly reverse and vacate the *November 7 Order*.

In the alternative, and without any admission or acknowledgment regarding the accuracy of the *November 7 Order*, if the Commission agrees with CGB’s interpretation of the rule, the Company requests that the Commission grant Purple a retroactive waiver of Commission rule sections 64.604 and 64.605, as well as the *March 2008 Emergency Call Handling Order*¹ covering the period referenced in the *November 7 Order*. Special circumstances exist that warrant a deviation from the general rules and orders, and in this case, that deviation will serve the public interest. Specifically, Purple believes a retroactive waiver would serve the public interest because (1) Commission precedent interpreting “call initiation” could lead to reasonable uncertainty among regulatees about the Commission’s expectations; (2) there is no evidence that Purple should have known or understood CGB’s interpretation of “call initiation” based on the FCC’s previous precedent; (3) the confusion caused by the Commission’s change in policy is not

¹ 47 C.F.R. §§ 64.604, 64.605; *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, WC Docket No. 05-196, Report and Order, 23 FCC Rcd 5255, ¶ 29 (Mar. 19, 2008) (“*March 2008 Emergency Call Handling Order*”); see 47 C.F.R. § 1.3.

tantamount to simple ignorance of the rules; and (4) the Company will face substantial monetary deprivation if the denial in the November 7 Order is allowed to stand. Finally, Purple has expended significant resources to implement the emergency call handling requirements and the Company is now in compliance with CGB's interpretation of those rules.

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To: The Commission

APPLICATION FOR REVIEW

Purple Communications, Inc. (“Purple” or the “Company”), by its undersigned counsel and pursuant to Section 5(c)(4) of the Communications Act of 1934, 47 USC § 155(c)(4), and Section 1.115 of the Commission’s Rules, applies for review and reversal of the Consumer and Governmental Affairs Bureau’s (“CGB”) November 7, 2014 order (the “November 7 Order”)² denying Purple more than \$1,629,411.35 in compensation from the Telecommunications Relay Services (“TRS”) Fund for calls placed through its web and wireless Internet Protocol Captioned Telephone Service applications (“IP CTS Applications”).³

I. FACTUAL BACKGROUND

A. The Commission Specifically Exempted IP CTS Applications Such As Purple’s From Emergency Call Handling Requirements.

In January 2007, the Commission recognized that IP CTS delivery designs and protocols

² *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Purple Communications, Inc.; Request for Review of Withholding of TRS Payments*, CG Docket 03-123, Order, 2014 FCC Lexis 4201, DA 14-1625, (Nov. 7, 2014) (“November 7 Order”).

³ CGB claims Purple is denied compensation from the inception of the Company’s IP CTS applications, but the November 7 Order only provides cumulative totals of 918,173.8 minutes in the amount of \$1, 629,411.35 for the period beginning on May 1, 2011. *Id.* ¶ 15 (stating that CGB is using these figures since that is the only data provided by RLSA at the time of the November 7 Order).

may vary, stating that IP CTS “may be initiated, set up, and provided in numerous ways.”⁴ In 2008, based on these very factors, the Commission specified that TRS emergency call handling requirements would apply to IP CTS providers “*only in circumstances where the call is initiated, or can be initiated, by the user contacting the provider via the Internet.*”⁵ The Commission went so far as to emphasize *twice* that:

The 2007 IP CTS Declaratory Ruling recognized that IP CTS “may be initiated, set up, and provided in numerous ways,” using “various combinations of the PSTN and IP-enabled networks.” 2007 IP CTS Declaratory Ruling, 22 FCC Rcd at 388, para. 22. For this reason, we note that *the requirements adopted herein shall apply to IP CTS providers only in circumstances where the call is initiated, or can be initiated, by the user contacting the provider via the Internet.*⁶

Put another way, the Commission created a carve-out that would exempt from its new emergency call handling requirements providers who initiated the calls themselves in contrast to a situation wherein the user initiated – ie., dialed a voice call – without assistance from a CA. Pursuant to this explicit language, the emergency call handling requirements expressly do not apply where *the call is not* initiated, or cannot be initiated, by the assisted user (“AU”). In an IP CTS application protocol such as Purple’s, the AU is *not* the person initiating *the call*. The AU merely submits an electronic *request* that a call be made. After the request is sent, the next available Communications Assistant (“CA”) is notified. It is then the CA who *initiates the call* and actually dials the numbers.⁷

⁴ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities Internet-based Captioned Telephone Service*, CG Docket No. 03-123, Declaratory Ruling, 22 FCC Rcd 379, ¶ 22 (Jan. 11, 2007) (“2007 IP CTS Declaratory Ruling”) (“A service will be considered [IP CTS] as long as it allows the user to simultaneously listen to, and read the text of, what the other party in a telephone conversation has said, and the connection carrying the captions between the service and the user is via the Internet rather than the PSTN.”).

⁵ *March 2008 Emergency Call Handling Order* ¶¶ 1 n.7, 13 n.59 (emphasis added).

⁶ *Id.* (emphasis added).

⁷ In the First and Second Numbering Orders, issued later in 2008, the Commission further confirmed that “IP CTS raises distinct technical and regulatory issues” and did not alter its 2008 exemption for IP CTS applications. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech*

The FCC, the expert federal government agency in charge of rules and policies related to the use of the interstate telephone network, was not sloppy when it used the very specific language – “call is initiated, or can be initiated.” The term “call” is a specific term referencing the physical placement of a telephone call through the telephone network.⁸ The term “initiated” has also been specifically evaluated by the FCC. As recently as 2013, the Commission confirmed that the word “initiate” should not be read broadly, due to the concern that it “would logically encompass a host of activities which have only a tenuous connection with the making of a telephone call.”⁹ Instead, the Commission found that “the word ‘initiate’ suggests a far more direct connection between a person or entity and the making of a call.”¹⁰ The Commission went on to conclude that “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to *physically place a telephone call.*”¹¹

In the context of collect calls, the Commission similarly noted that “[t]he plain meaning of ‘initiate’ is to ‘commence,’ ‘start,’ or ‘originate,’ and we think that the ‘initiating’ party . . . is,

Disabilities; E911 Requirements for IP-Enabled Service Providers, Report and Further Notice of Proposed Rulemaking, CG Docket No. 03-123; WC Docket No. 05-196, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591, ¶¶ 1 n.5, 116 (Jun. 24, 2008) (“*First Numbering Order*”); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123; CC Docket No. 98-67; WC Docket No. 05-196, Second Report and Order and Order on Reconsideration, 24 FCC Rcd 791, ¶ 1 n.2 (Dec. 19, 2008) (“*Second Numbering Order*”).

⁸ “The FCC’s interpretation of 47 U.S.C. § 227 (b)(1)(A) is consistent with the dictionary’s definition of call in that it is defined as ‘to communicate with or try to get into communication with a person by telephone.’” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

⁹ See *The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the TCPA Rules, et al.*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, ¶ 26 (May 9, 2013) (“*2013 TCPA Declaratory Ruling*”) (concluding that a seller does not necessarily “initiate” a call placed by a third-party telemarketer on the seller’s behalf; “the word ‘initiate’ suggests a far more direct connection between a person or entity and the making of a call. We conclude that a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call.”).

¹⁰ *Id.*

¹¹ *Id.*

literally, the calling party, *who originates or commences the call by dialing it.*¹² In yet a third context, the Commission characterizes the person dialing a number as the one initiating a call. Specifically, in an order on Speech-to-Speech and IP Speech-to-Speech TRS, the Commission noted that “[a] person with a speech disability *can initiate an STS call by dialing 711* (the nationwide access code for state relay providers) and giving the CA the number of the person he or she wishes to call.”¹³

The *March 2008 Emergency Call Handling Order* is consistent with the Commission’s repeated and common-sense conclusion that “initiating” requires some active step to physically place and make the call, because the obligation of providers to “*accept* emergency calls and to deliver them to an appropriate PSAP,” implies that the IP CTS provider must route an *active* telephone call.¹⁴ Given this backdrop, it is clear that the Commission did not intend that an *e-mail request* be considered the equivalent of a telephone “call” – and that requesting via e-mail that *another party initiate* a call cannot itself be considered the initiation of a call.

B. Purple’s IP CTS Applications Provide A Valuable Call Back Service To Customers That Is Initiated By The CA, Not The AU.

Purple’s IP CTS applications are a call back service. That is, when using Purple’s IP CTS applications, an AU does not initiate *the call*.¹⁵ Instead, an AU requests a call from Purple by first logging into an account via an Internet application on a mobile smartphone or through

¹² *Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-158, 11 FCC Rcd 4532, ¶ 13 (Mar. 5, 1996).

¹³ *Speech-to-Speech and Internet Protocol (IP) Speech-to-Speech Telecommunications Relay Services; Telecommunications Relay Services And Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 08-15; CG Docket No. 03-123, 28 FCC Rcd 10702, ¶ 4 (July 19, 2013).

¹⁴ *March 2008 Emergency Call Handling Order* ¶¶ 1 n.7, 13 n.59 (emphasis added).

¹⁵ See *Purple Communications, Inc., Emergency Request for Review of the Decision by the TRS Administrator to Withhold TRS Funding from Purple Communications, Inc.*, CG Docket No. 03-123, at 5-6 (filed Feb. 20, 2014) (“*Purple Emergency Request for Review*”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521074271>; see also ¶ 7, Exhibit F of the Declaration of Aaron Humes in Support of Purple’s Application for Review of CGB’s November 7, 2014 Order (“*Humes Decl.*”).

Purple's ClearCaptions website. The AU then clicks a box and enters two numbers—one is the telephone number of the party with whom the AU wants to communicate, and the other is the telephone number on which the AU would like to be called back. The AU clicks "Send" and an e-mail request for a call back is sent through the ClearCaptions servers, is queued, and then delivered to the next available CA. By completing this process, the AU has sent a message via the Internet, not over the telephone line provided by a traditional telecommunications provider. The message that is sent requests that a ClearCaptions CA call the AU back through the PSTN at the phone number requested. Accordingly, *no* "call" by the AU has taken place.

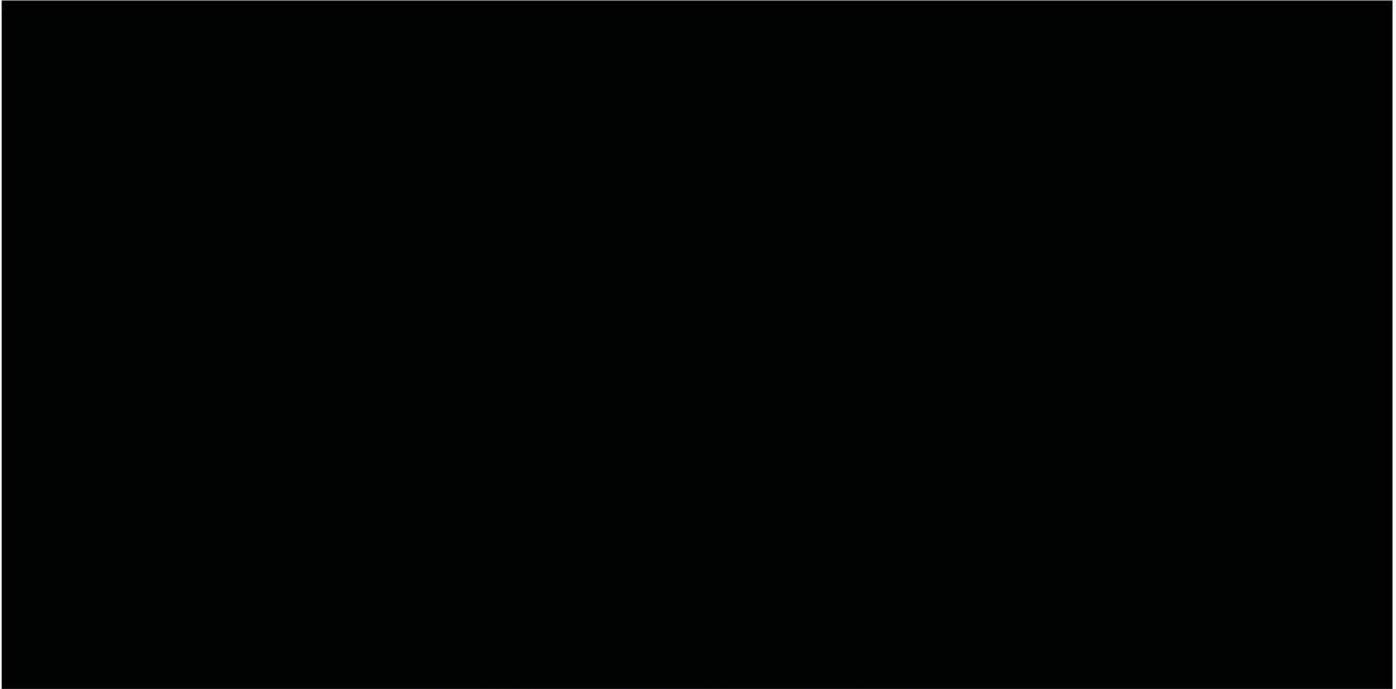
When the next available ClearCaptions CA receives notification of the message that an AU has requested a call, the CA then initiates a telephone call by physically dialing the number to reach the AU. When the AU answers the phone, it is only at that point that a call between the AU and the CA is established. The AU then waits on the phone line while the CA places a second call to the party that the AU desires to reach. When the called party answers, the AU and called party are linked through a conference call, allowing the AU and the called party to speak directly to each other through the phones on which the CA called each of them.

C. There Is No Evidence Of Any Failed Emergency Call Made Through Purple's IP CTS Applications.

Since the inception of Purple's IP CTS application service, Purple is only aware of four calls that customers have made to 911 using the Company's IP CTS applications.

***** BEGIN CONFIDENTIAL INFORMATION *****





*** END CONFIDENTIAL INFORMATION ***

The reason there has been such limited use of IP CTS applications for 911 calls is customers make a choice to use other means of communication in the context of an emergency. The logistical steps of a call back service necessarily limit the likelihood that a customer would use the service in an emergency. An AU is required to:

- turn on a mobile device and/or computer;
- open the ClearCaptions Internet application or visit the ClearCaptions website;
- log into the AU's account;
- click a box and enter two numbers – 911 and the number at which the AU would like to be called back; and

- wait for the CA to initiate a call back to the AU, at which point the CA will dial 911 and captioning will begin.

It is safer and more reasonable for an AU to dial emergency personnel directly through a traditional telecommunications provider by using Purple's Ensemble phone,¹⁶ a standard landline, or a mobile telephone than to contact emergency services through an Internet application that utilizes a call back system.¹⁷ Indeed, an IP CTS customer proficient with mobile technology and Internet applications would likely be aware that the functionality provided by directly initiating a telephone call through a telecommunications provider is a more expedient means of reaching emergency services than an Internet-based call back service.

The Commission itself acknowledged this safety concern in the March 2008 order when it stated: "because the use of TRS . . . in an emergency situation represents a less efficient method of accessing emergency services, the Commission has encouraged TRS users to access emergency services directly . . . rather than making calls through a TRS provider."¹⁸ The Commission's acknowledgement is sensible and is analogous to hearing users who, of course, have a *choice* to first call Information or 4-1-1 to be routed to 911, but they would not choose to do so because this adds an extra logistical step and would be "a less efficient method of accessing emergency services." Hearing users, like deaf and hard-of-hearing users, will choose to dial 911 directly since they are familiar with the various ways to reach 911 and will select the fastest and most efficient way to receive help in an emergency.

¹⁶ Only Purple's web and wireless forms of ClearCaptions are configured as a call back service. *Purple Emergency Request for Review* at 7. When utilizing Purple's service through the Ensemble phone, an AU dials a phone number or receives a call on the Ensemble phone. These actions initiate the call. Once the CA hears the audio of the call, captioning begins. Under these circumstances, the AU is connected directly to the applicable PSAP through his/her telecommunications provider.

¹⁷ See *March 2008 Emergency Call Handling Order* ¶ 4; accord *Purple Emergency Request for Review* at 7.

¹⁸ See *March 2008 Emergency Call Handling Order* ¶ 4.

II. PROCEDURAL BACKGROUND

A. CGB And The TRS Fund Administrator Act In Concert To Withhold Compensation Due To Purple Without Prior Notice Or Any Subsequent Timely Notice Justifying The Withholding.

On January 10, 2014, the Disability Rights Office of CGB sent Purple a letter requesting additional information on Purple's IP CTS recertification filing.¹⁹ Purple filed a timely response on January 17, 2014 whereby it fully addressed CGB's inquires and explained in detail that its IP CTS applications were currently fully compliant with applicable emergency call handling requirements as detailed in footnote 7 of the *March 2008 Emergency Call Handling Order*.²⁰

On February 6, 2014, Purple received an e-mail, without any prior warning or any justification or explanation, from Rolka Loube Saltzer Associates (the "TRS Fund Administrator") stating "[w]e have been instructed by the FCC to withhold payment for IP CTS service until Purple is able to explain to the Commission's satisfaction that certain applications are able to properly address emergency call handling."²¹ On February 7, 2014, Purple again wrote to CGB explaining that Purple's IP CTS applications were in full compliance with applicable emergency call handling requirements.²² Purple explained that this withholding came without any acknowledgement of Purple's January 17 letter or any basis for the withholding and applied to *all* IP CTS minutes (including wireline-based minutes), not just those related to Purple's IP CTS applications.

On February 14, 2014, the TRS Fund Administrator sent a request for information

¹⁹ *Humes Decl.* ¶ 2, Ex. A.

²⁰ *Id.* ¶ 3, Ex. B.

²¹ *Id.* ¶ 4, Ex. C.

²² *Id.* ¶ 5, Ex. D.

accompanying its notice to Purple of a withholding of reimbursement.²³ Purple promptly filed an Emergency Request for Review of the Decision by the TRS Administrator (“Purple Emergency Request for Review”) on February 20, 2014 seeking reversal of the TRS Fund Administrator’s unexplained decision to withhold reimbursement for *all* of Purple’s IP CTS minutes from November 2013.²⁴ Here, Purple provided a detailed explanation of the process of completing a call using Purple’s IP CTS applications. Purple further explained that the emergency call handling requirements do not apply to Purple’s IP CTS applications because an AU does not initiate the call. Purple also explained that it is not in the public’s interest to attempt to reach 911 through IP CTS applications because of the number of logistical steps that must be completed before actually connecting with a 911 operator.

On March 7, 2014 and again on April 18, 2014, Purple notified²⁵ the Commission that the TRS Fund Administrator was withholding *all* reimbursement for Purple’s IP CTS minutes, not only those related to IP CTS applications, and that the TRS Fund Administrator still had not provided any written explanation as required by the Commission’s rules as to why Purple’s claim for compensation had been withheld.’’²⁶

On June 2, 2014, having still not having received any acknowledgement from the Commission of the TRS Fund Administrator’s violation of Purple’s due process rights, Purple filed an *ex parte* response with the Commission explaining that the Company had voluntarily taken the initiative to implement 911 capability for its IP CTS applications even though the

²³ *Id.* ¶ 6, Ex. E.

²⁴ *Id.* ¶ 7, Ex. F.

²⁵ *Id.* ¶¶ 8, Ex. G; 9, Ex. H.

²⁶ 47 C.F.R. § 64.604(c)(5)(iii)(L); *see also* 5 U.S.C. § 706.

emergency call handling requirements do not apply to them.²⁷

On September 25, 2014, Purple received a letter from CGB alleging that based on recent testing, Purple was not in compliance with the emergency calling requirements.²⁸ Purple promptly and diligently investigated this concern and filed a timely response on October 1, 2014.²⁹

Finally, on October 8, 2014, the TRS Fund Administrator informed Purple that it would be withholding any future reimbursement for all IP CTS minutes and would also be retroactively investigating withholding reimbursement for an “indefinite” period.³⁰

B. The Enforcement Bureau Launches An Investigation Based On CGB’s And The TRS Fund Administrator’s Erroneous Withholding Decisions.

On October 7, 2014, the Telecommunications Consumers Division of the Enforcement Bureau (the “Division”) issued a letter of inquiry (the “LOI”) to Purple concerning Purple’s provision of IP CTS 911 services. Purple filed timely responses on October 22, 2014; October 30, 2014; November 4, 2014; November 17, 2014; and November 20, 2014. In each of its responses, Purple addressed the inquiry fully and explained in detail that its IP CTS applications were compliant and not covered by the Commission’s emergency call handling requirements.

C. The Commission Has Authority To Address This Application For Review And To Reverse And Vacate CGB’s Flawed November 7 Order.

The Commission has authority to review orders issued pursuant to delegated authority for conflict with federal statutes, Commission rules and regulations, or Commission precedent; to

²⁷ *Id.* ¶ 10, Ex. I.

²⁸ *Id.* ¶ 11, Ex. J.

²⁹ *Id.* ¶ 12, Ex. K.

³⁰ *Id.* ¶ 13, Ex. L. Purple also made other filings where it summarized what occurred in meetings between Purple and CGB on February 28, 2014; April 18, 2014; April 21, 2014; and June 16, 2014. *Id.* ¶¶ 14, Ex. M; 9, Ex. H; 15, Ex. N; 16, Ex. O.

address a question of policy not previously resolved by the Commission; to reverse application of a precedent or policy to a specific carrier; to correct an erroneous finding as to an important fact; and to provide redress for prejudicial procedural error.³¹ CGB's November 7 Order is an order issued pursuant to delegated authority.³² As shown herein, CGB's November 7 Order is in conflict with Commission rules and policy. Purple has been adversely impacted by the decision and has timely filed this appeal within 30 days of receiving notice of CGB's November 7 Order.

III. ARGUMENT

A. The TRS Fund Administrator Failed To Give Timely Notice Justifying The Withholding Of TRS Payments.

The TRS Fund Administrator is required to review monthly requests for compensation to the TRS Fund within two months after they are filed with the TRS Fund Administrator.³³ If the "TRS Fund Administrator in consultation with the Commission, or the Commission on its own accord, determines that payments for certain minutes should be withheld, *a TRS provider will be notified within two months from the date for the request for compensation was filed, as to why its claim for compensation has been withheld in whole or in part.*"³⁴ TRS providers then have two additional months from the date of the notice to provide additional justification for compensation.³⁵

Here, the TRS Fund Administrator informed Purple in February 2014 that it was withholding compensation for November IP CTS minutes but without providing any analysis or explanation for the withholding, including no description of why the TRS Fund Administrator

³¹ 47 C.F.R. § 1.115(b)(2).

³² 47 C.F.R. §§ 0.11; 0.231.

³³ See 47 C.F.R. § 64.604(c)(5)(iii)(L).

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

was withholding all IP CTS minutes as opposed to those only related to IP CTS applications. It was not until *eight months later*, in October 2014, well past the two month requirement, that the TRS Fund Administrator offered the legally incorrect explanation that Purple's IP CTS applications were not in compliance with emergency call handling requirements, and that as a result the TRS Fund Administrator would be withholding any future reimbursement for IP CTS minutes and would also be retroactively investigating withholding reimbursement for an "indefinite" period. Had the TRS Fund Administrator actually complied with its obligations under the TRS rules, the TRS Fund Administrator and CGB could have avoided at least another eight months of allegedly improper IP CTS application minutes that are now the subject of the November 7 Order. The Commission should consider the TRS Fund Administrator's and CGB's unclean hands as a basis for reversing and vacating the November 7 Order.

B. CGB's Order Violates Due Process And The APA By Retroactively Applying A New, Unpublished Rule To Purple Without Fair Notice.

Retroactively interpreting the TRS emergency calling requirements to apply to Purple's IP CTS applications, despite the Commission's clear exemption, is a violation of due process. "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."³⁶ Similarly, due process precludes an agency from retroactively applying a current interpretation of a regulation to past conduct.³⁷ Moreover, Section 706 of the

³⁶ *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

³⁷ *See, e.g., Trinity Broad of Fla., Inc. v. FCC*, 211 F.3d 618, 629-30 (D.C. Cir. 2000) (emphasizing the party's interpretation was reasonable, and "the Commission never clearly articulate[d] its theory"); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355-56 (D.C. Cir. 1998) (finding retroactive liability inappropriate "if [the party] had no reason to know, in exercising reasonable care, that the vehicle did not comply with the applicable safety standards," and "an agency is hard pressed to show fair notice when the agency itself has taken action in the past that conflicts with its current interpretation of a regulation"); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330-31 (D.C. Cir. 1995) (observing the agency's "interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have fairly informed GE of the agency's perspective," and "the agency itself . . .

Administrative Procedure Act (the “APA”) prohibits federal agencies from taking action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”³⁸

This means an agency must act consistently and follow its own rules.³⁹

Under these standards, it is wholly inconsistent for CGB to retroactively withhold reimbursements to Purple for all IP CTS application calls when the Commission articulated a standard in 2008 *expressly* exempting Purple’s IP CTS applications from the emergency call handling requirements.⁴⁰ Moreover, CGB makes no attempt to explain the Commission’s specific and repeated statements that call “initiation” refers to the physical placement of a telephone call. Ignoring these developments, the November 7 Order simply represents CGB’s apparent disagreement with the Commission’s exemption.⁴¹ CGB’s interpretation of the exemption (that “initiate” means something other than the physical placement of a call, contrary to prior Commission precedent) has never previously been disclosed in a rulemaking proceeding and amounts to retroactive implementation of new liability standards in violation of principles of due process. Before an agency can sanction a company for its failure to comply with regulatory requirements, the agency “must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation].”⁴² Moreover, CGB is not entitled to deference

recognized that its interpretation . . . [was] not apparent”); *Satellite Broad. Co.*, 824 F.2d at 2 (confronting “baffling and inconsistent” FCC rules).

³⁸ 5 U.S.C. § 706(2)(A).

³⁹ *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 390 (1932) (holding Interstate Commerce Commission (“ICC”) could not order a railroad to make refunds to shippers on the ground that the railroad’s shipping rates were unreasonable after the ICC had itself established that the very rates at issue were reasonable in a previous proceeding).

⁴⁰ See *March 2008 Emergency Call Handling Order* ¶¶ 1 n.7, 13 n.59.

⁴¹ See *November 7 Order* ¶¶ 1, 15.

⁴² *Chrysler*, 158 F.3d at 1356.

towards a retroactive application of a determination, when, as here, to do so will work a substantial burden on Purple.⁴³

C. Purple Is Entitled To Compensation For The IP CTS Application Minutes It Actually Handled And Processed For Customers, Which Neither CGB Nor The TRS Fund Administrator Dispute.

Nowhere does the November 7 Order allege Purple did not actually handle and process the IP CTS application calls in question, or that any customer was not a true TRS user, or that any customer ever complained about a supposed lack of 911 capabilities or failed to reach 911 through Purple’s IP CTS applications. The November 7 Order is based entirely on the hypothetical possibility that TRS users could have tried, even though they did not, to access 911 services and might not have been successful. This is not a basis to seize compensation owed.

The TRS program is designed to reflect the costs and a reasonable return on investment that providers incur in handling TRS calls. Specifically, TRS Fund payments are “designed to compensate TRS providers for reasonable costs of providing interstate TRS . . . based on total monthly interstate TRS minutes of use.”⁴⁴ The Commission has defined “reasonable costs” to be “those direct and indirect costs necessary to provide the service consistent with . . . the TRS mandatory minimum standards.”⁴⁵ TRS providers submit their costs data to the TRS Fund Administrator.⁴⁶ Retroactively eliminating the Commission’s exemption for IP CTS applications, when the Commission expressly provided such exemption, and on which Purple

⁴³ See, e.g., *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Circ. 1972).

⁴⁴ 47 C.F.R. § 64.604(c)(5)(iii)(E); see also *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140, ¶¶ 3-5 (Nov. 19, 2007) (“2007 Rate Methodology Order”).

⁴⁵ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 90-571, CC Docket No. 98-67, CG Docket No. 03-123, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd 12475, at ¶ 181 (Jun. 10, 2004) (“2004 Rate Methodology Order”).

⁴⁶ 2007 Rate Methodology Order ¶¶ 46 n.141, 49, 56 n.170.

reasonably relied in providing IP CTS application services since 2011, is contrary to the Commission's cost-based system of reimbursement. The TRS program is designed to reflect the *actual* costs that providers incur in handling calls the Commission mandates.⁴⁷ If only some of the calls that are processed in good faith are reimbursable, well after the fact of their provision, then the fundamental concept of rate calculation is lost and does not take into account any potential non-reimbursement of minutes processed.

D. Purple's IP CTS Applications Are Not Subject To Emergency Call Handling Requirements Because They Do Not Involve AU-Initiated Calls.

Because Purple's IP CTS applications do not allow the AU to initiate the call—the service provided is a call back service—the emergency call handling requirements do not apply. As described in detail above, it is the CA, and *not* the AU, who initiates the actual phone call; no phone call has taken place until the CA takes the physical steps necessary to place a call to the AU at the AU's requested phone number.⁴⁸ The Commission's emergency call handling requirements *explicitly* do not apply in circumstances where the AU does not initiate the call.⁴⁹

Indeed, this is just one example of how the Commission's rules as applied to IP CTS may differ from those that apply to other TRS services such as VRS and IP Relay, due to the unique attributes of IP CTS technology, and as contemplated in the *March 2008 Emergency Call Handling Order*. There are also other requirements where e911 works differently with IP CTS than it does with other relay services. For example, 47 C.F.R. § 64.605(a)(2)(iii) states that “each provider of Internet-based TRS shall . . . [r]equest, at the beginning of each emergency call, the caller's name and location information, unless the Internet-based TRS provider already

⁴⁷ 47 C.F.R. § 64.604(c)(5)(iii)(E); *see also* 2007 Rate Methodology Order ¶¶ 3-5.

⁴⁸ *See* 2013 TCPA Declaratory Ruling ¶ 26.

⁴⁹ *See* March 2008 Emergency Call Handling Order ¶¶ 1 n.7, 13 n.59.

has, or has access to, a Registered Location for the caller.” *Id.* In IP Relay and VRS, the representative, or CA, asks for the user’s location at the beginning of the call. With IP CTS, the CA is purposefully transparent during the call. In approving IP CTS as a compensable form of TRS, the Commission expected that caption service would be provided without the CA (acting for the provider) having the ability to interact with the customer at the beginning of an emergency call.⁵⁰ Purple’s call back system is just another example of the “numerous ways” in which IP CTS may be provided.⁵¹

This is consistent with the nature of emergency call handling through TRS. As the Commission has recognized, “[b]ecause the use of TRS (which requires two separate calls) in an emergency situation represents a less efficient method of accessing emergency services, the Commission has encouraged TRS users to access emergency services directly (by dialing 911 as a text-to-text, TTY-to-TTY call), rather than making emergency calls through a TRS provider.”⁵² This policy reason for encouraging a direct call by the AU to 911 is even stronger in the context of Purple IP CTS application protocol, where the CA dials both calls (first, the call to the AU at the AU’s requested call back number, and then the call to the party that the AU desires to reach).

E. Even Though Not Required To, Purple Has In Good Faith Spent Significant Resources To Implement Emergency Services On Its IP CTS Applications, Yet CGB Has Continued To Insist Purple Is Not Compliant.

At all times, Purple has operated with the reasonable and good faith belief that it is in full compliance with the Commission’s emergency call handling requirements.

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⁵⁰ See 2007 IP CTS Declaratory Ruling ¶ 23 (stating that the Commission expected “the service will be provided in a way that is automated and invisible to both parties on the call.”).

⁵¹ 2007 IP CTS Declaratory Ruling ¶ 22.

⁵² March 2008 Emergency Call Handling Order ¶ 4.

[REDACTED]

*** END CONFIDENTIAL INFORMATION ***

[REDACTED]

Nevertheless, CGB has continued to insist that Purple’s IP CTS applications are not in compliance even though Purple has implemented the very system CGB requested. CGB’s pretext is a September 25, 2014 letter stating that certain “test 911 calls were attempted by a registered user using Purple’s wireless and web-based ClearCaptions services, which were not routed to a public safety answering point (PSAP) or other emergency authority serving the user’s registered location.” Upon receiving this, the Company immediately reviewed the functionality of its web and wireless IP CTS e911 services.

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The Commission should consider Purple’s good faith efforts and CGB’s incorrect analysis as further reasons to reverse and vacate the November 7 Order.⁵⁵

F. If Left Standing, CGB’s Order Will Discourage Innovation And Limit Competition And Consumer Choice In The TRS Marketplace.

Withholding more than \$1,629,411.35 for Purple’s provision of IP CTS application calls will stifle an innovative service valued by consumers. If Purple is not compensated after expending significant resources to develop an innovative technology that customers have been using since 2011, Purple has no incentive to continue providing these services or to pursue future

⁵⁵ Agencies must follow a “logical and rational” decision making process. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

innovations. This in turn will limit competition and consumer choice in the TRS marketplace—undermining the Commission’s own stated objectives to foster competition and encourage the “freedom of users to have more than one choice” of provider.⁵⁶ Indeed, providers simply cannot function as viable operating businesses in such uncertain economic environments where entire categories of minutes are retroactively deemed non-reimbursable.

IV. IN THE ALTERNATIVE, THERE IS GOOD CAUSE FOR THE COMMISSION TO GRANT PURPLE A RETROACTIVE WAIVER

In the alternative, if the Commission agrees with CGB that “call initiation” can mean the same thing as an e-mail request for a call back, in spite of all Commission precedent to the contrary, then the Company respectfully requests that the Commission grant Purple a retroactive waiver of Commission rule sections 64.604 and 64.605, as well as the *March 2008 Emergency Call Handling Order*⁵⁷ covering the period referenced in the November 7 Order. Special circumstances exist that warrant a deviation from the general rules and orders, and in this case, that deviation will serve the public interest. Specifically, Purple believes a retroactive waiver would serve the public interest because (1) Commission precedent interpreting “call initiation,” could lead to reasonable uncertainty among regulatees about the Commission’s expectations; (2) there is no evidence that Purple should have known or understood the Commission’s current interpretation of “call initiation” based on the FCC’s previous precedent; (3) the confusion caused by the Commission’s change in policy is not tantamount to simple ignorance of the rules; and (4) the Company will face substantial monetary deprivation if the denial in the *November 7 Order* is allowed to stand. Finally, Purple has expended significant resources to implement the

⁵⁶ *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Further Notice of Proposed Rulemaking, 26 FCC Rcd 17367, Appendix C, ¶ 11 (Dec. 15, 2011).

⁵⁷ 47 C.F.R. §§ 64.604, 64.605; *March 2008 Emergency Call Handling Order* ¶ 29; see 47 C.F.R. § 1.3.

emergency call handling requirements and the Company believes it is now in compliance even with the Bureau's interpretation of the rule.

A. The Commission May Waive Its Rules Pursuant to the Public Interest Waiver Standard.

Pursuant to 47 C.F.R. § 1.3, the Commission may waive its rules for good cause when the facts would make strict compliance inconsistent with the public interest.⁵⁸ Thus, an applicant for a public interest waiver must show that (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule.⁵⁹ Indeed, the Commission has an obligation to seek out the public interest in particular, individualized cases.⁶⁰ When considering a waiver, the FCC may take into account “hardship, equity, or a more effective implementation of overall policy” on an individual basis.⁶¹ In addition, requests for a waiver of the FCC's rules must be given a “hard look” and may not be rejected out-of-hand.⁶²

To illustrate, in a recent order the Commission granted a retroactive waiver of its solicited fax opt-out requirement in order to provide regulatees with temporary relief from certain past obligations.⁶³ In its decision, the Commission explained that the language in its previous orders may have led to confusion among regulatees, leaving them unsure as to what the

⁵⁸ *Nat'l Ass'n Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

⁵⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 2014 FCC LEXIS 4445, ¶ 23 (Oct. 30, 2014) (“*Junk Fax Order*”).

⁶⁰ *P&R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984).

⁶¹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), appeal after remand, 459 F.2d 1203 (D.C. Cir. 1972).

⁶² *P&R Temmer*, 743 F.2d at 929.

⁶³ See *Junk Fax Order* ¶ 1.

FCC really required.⁶⁴ In pertinent part, the Commission noted that the inconsistency between language in a footnote located in a Commission order—which made it seem like the requirement did not apply to solicited faxes—and the text of a related rule, caused confusion among regulatees.⁶⁵ As a result, the Commission found it would be unfair and inequitable to enforce the rules, and therefore in the public interest to waive the requirements.⁶⁶ In so finding, the Commission noted that “simple ignorance of the regulations is not grounds for a waiver,”⁶⁷ and that the risk of substantial liability *alone* is not grounds for a waiver.⁶⁸ Finally, the FCC explained that it is unlikely to grant a waiver if it can find in the record some implication that regulatees should have known the rule requirement existed and understood how to comply.⁶⁹

B. Purple Meets the Factors Required for a Public Interest Waiver; Commission Precedent Could Lead to Reasonable Uncertainty Among Regulatees About the Commission’s Expectations.

FCC precedent on the meaning of “call initiation” could lead to reasonable uncertainty among regulatees about the Commission’s expectations in this context – and at the very least, supports Purple’s interpretation of the language in question. For example, although the general rule requires that “TRS providers be capable of handling all types of calls, including 911 calls,” footnote 7 of the *March 2008 Emergency Call Handling Order* specifically clarifies that the e911 requirements “shall apply to IP CTS providers only in circumstances *where the call is initiated, or can be initiated, by the user* contacting the provider via the Internet.”⁷⁰

⁶⁴ *Id.* ¶ 27.

⁶⁵ *Id.*

⁶⁶ *Id.* ¶ 28.

⁶⁷ *Id.* ¶ 26.

⁶⁸ *Id.* ¶ 28.

⁶⁹ *Id.* ¶ 26.

⁷⁰ *March 2008 Emergency Call Handling Order* ¶ 1 n.7 (emphasis added).

As discussed above, previous Commission decisions provide context and guidance regarding the Commission’s intended meaning when it referenced a call being “initiated.” In several contexts, the Commission *defines* call initiation as more than just requesting that a call be placed; rather, the Commission defines call initiation as the act of *physically dialing a number into the network*. Nowhere does the Commission suggest that an e-mail requesting a call be initiated by a separate party itself be considered the “initiation” of a “call.” Instead, the Commission has described “calling party” to mean the person physically dialing into the network or the one “who originates or commences the call.” Accordingly, *that* person is the “initiator of the call.”

Against that backdrop, CGB’s determination that an AU’s e-mail request for the CA to initiate a call seems clearly out of step, or at least inconsistent, with Commission precedent. CGB’s analysis that when “the user connects to Purple via the Internet and enters the phone number the consumer wishes to call . . . *the consumer is clearly initiating the call*. The fact that the *completion* of the call to the PSAP may be delayed for a few seconds until a CA ‘calls back’ the consumer does not make the CA the initiator of the call”⁷¹ appears to miss completely the question that the Commission previously held up as the most obvious determinant and the deciding factor when considering who was responsible for initiating a call: Who is the *calling party* responsible for “*originat[ing] or commenc[ing] the call by dialing it*”? Put another way, which party physically dialed into the network to initiate the call?

Given the clear Commission precedent, good cause exists for a retroactive waiver. Moreover, there is no indication in the record that Purple should have known or understood how to comply with CGB’s new articulation of the “call initiation” carve-out, similar to the waiver

⁷¹ *November 7 Order* ¶ 9 (emphasis added).

recipients in the *Junk Fax Order*. Also, similar to the waiver recipients in the *Junk Fax Order*, the confusion caused by the Commission's previous precedent on call initiation and the *November 7 Order* cannot be chalked up to "simple ignorance" of the rules. Finally, in addition to the reasons detailed above, Purple also faces substantial monetary deprivation if the denial in the *November 7 Order* is allowed to stand. Purple has performed the services as it understood the Commission required consistent with a reasonable reading of the Commission's relevant precedent, and the possibility that it will not be paid for those services due to this new articulation of FCC policy would have a significant and negative impact on the Company. In sum, there are special circumstances at play warranting deviation from the rule, and a retroactive waiver—rather than application of the rule as currently explained in the *November 7 Order*—would better serve the public interest.

V. CONCLUSION

For the foregoing reasons, Purple respectfully requests that the Commission reverse and vacate CGB's November 7 Order to withhold payment of more than \$1,629,411.35 to Purple. Alternatively, Purple requests that the Commission grant a retroactive waiver, if the Commission agrees with CGB's interpretation of the emergency call handling requirements.

**FOIA CONFIDENTIALITY
TREATMENT REQUESTED**

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Respectfully submitted,

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