

April 30, 2015

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**REDACTED PUBLIC VERSION  
VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Kris Anne Monteith  
Acting Chief, Consumer and Governmental  
Affairs Bureau  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Ex Parte Written Communication Regarding Petition for Declaratory Ruling on Ultratec's Obligation to License IP CTS-Related Patents to TRS Providers, CG Docket Nos. 03-123 & 13-24.**

Dear Ms. Dortch and Ms. Monteith:

Without swift action by the Commission, CaptionCall, LLC and Sorenson Communications, Inc. (together "CaptionCall") face the imminent threat of being barred from providing IP CTS relay services. Ultratec, Inc. ("Ultratec") is seeking a permanent injunction in a patent lawsuit between the parties.<sup>1</sup> This injunction would harm not only CaptionCall and its

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<sup>1</sup> As the Commission and its staff well know, Ultratec and CaptionCall are embroiled in a multi-  
fora dispute over the validity and alleged infringement of Ultratec's IP CTS-related patents. Ultratec has filed three separate lawsuits against CaptionCall in the Western District of Wisconsin, while the U.S. Patent and Trademark Office's Patent Trial and Appeal Board ("PTAB") recently ruled that Ultratec's patents are invalid and unenforceable. Despite the PTAB's decisions, Ultratec's request for injunctive relief is still pending before the District Court in Wisconsin.

more than 80,000 users, it would destroy the competitive market for IP CTS by preventing CaptionCall from serving any new customers, likely driving CaptionCall from the industry, and preventing others from entering without Ultratec's permission.

The reason for this problem is simple. While Ultratec attempts to distract the Commission with claims that it has offered CaptionCall a reasonable patent license, Ultratec's real and official position is just the opposite: Ultratec insists that it has *no* obligation to license to CaptionCall whatsoever.<sup>2</sup> In fact, Ultratec has convinced the District Court presiding over one of Ultratec's patent suits that Ultratec need not license to CaptionCall at all, and the District Court is now considering Ultratec's request for a permanent injunction.<sup>3</sup>

Fortunately, the solution to this problem is just as simple: To avoid massive disruption to this important service and harm to the public interest, the Commission need only affirm that its 2007 Declaratory Ruling requires Ultratec to license its IP CTS-related patents to TRS providers, including CaptionCall, at reasonable rates.<sup>4</sup> Ultratec's arguments to the contrary are meritless.

*First*, contrary to Ultratec's misdirection,<sup>5</sup> the Commission need not engage in *any* fact finding about the existence or sufficiency of licensing offers or make *any* determinations about what would or would not be a reasonable licensing rate. These contested issues can and should be resolved by the parties, likely during the course of the three current patent lawsuits Ultratec has brought in federal court. The Commission need only make clear that Ultratec has an obligation to license to CaptionCall at *reasonable* rates.

*Second*, Ultratec's claim that the Commission's prior order does not obligate it to license to CaptionCall defies logic and common sense.<sup>6</sup> CaptionCall will not retread all the arguments in its Petition and Reply, but Ultratec's insistence that the Commission would need to add the words "all providers"—and that CaptionCall's position would require Ultratec to license to absolutely anyone—are both red herrings. The 2007 Declaratory Order's requirement that Ultratec "continue to license its captioned telephone technologies, including technologies

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<sup>2</sup> "Forcing [Ultratec] to license [CaptionCall] would force [Ultratec] to place [its] imprimatur on [CaptionCall's] brand of captioning telephone service. This form of licensing is exactly what [Ultratec] do[es] not want to engage in." Pls. Response Br. Regarding Effect of IPR Final Written Decisions (Redacted for Public Filing), Case No. 13-cv-346, Dkt. No. 869 at 50 (Apr. 20, 2014).

<sup>3</sup> Pls. Mot. for Permanent Injunction, Case No. 13-cv-346, Dkt. No. 700 (Nov. 11, 2014).

<sup>4</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, 22 FCC Rcd 379, ¶ 24 ("2007 Declaratory Ruling").

<sup>5</sup> Comments of Ultratec, Inc. and CapTel, Inc. CG Dkt. Nos. 03-123, 13-24, at 31-33 (filed Dec. 29, 2014) ("Ultratec Comments").

<sup>6</sup> *Id.* at 17-20.

relating to IP CTS” raises the obvious logical issue: license to whom?<sup>7</sup> Ultratec’s nonsensical answer is “to whomever Ultratec wants.” But this flies in the face of the Commission’s prior statements and clear purpose of a compulsory patent license—to keep the patent holder from restricting competition by denying a license to its competitors.<sup>8</sup> Nor does Ultratec need to license to uncertified, fly-by-night providers. The Commission need only make clear that Ultratec must license on reasonable terms to certified IP CTS providers, including CaptionCall.

*Third*, the injunction would be highly detrimental to the IP CTS consumers, contrary to Ultratec’s claims.<sup>9</sup> The Commission was explicit in its 2007 Declaratory Ruling that it did not expect IP CTS to be “under the control of one vendor or provider” and conditioned its approval accordingly.<sup>10</sup> But the permanent injunction Ultratec seeks would do just that by eliminating customer choice among IP CTS providers with different equipment, features and offerings, thereby returning the IP CTS market to one in which the only two remaining major providers are both reliant on Ultratec’s CapTel service.<sup>11</sup>

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CaptionCall’s continued ability to provide IP CTS services rests on the Commission’s willingness to declare that it meant what it said in the 2007 Declaratory Ruling: Ultratec must license its IP CTS-related patents to CaptionCall. Both the plain language and the purpose

<sup>7</sup> 2007 Declaratory Ruling, ¶ 24.

<sup>8</sup> *Id.* (Commission stating that “we expect that [IP CTS] will not be a service under the control of one vendor or provider.”).

<sup>9</sup> Ultratec Comments at 15-16.

<sup>10</sup> 2007 Declaratory Ruling, ¶ 24.

<sup>11</sup> Though Ultratec has attempted to distract the Commission with claims that its offers have been reasonable, it will not allow its supply agreement with Hamilton and Sprint to be produced to the Commission. Ultratec and CaptionCall were also unable to agree on what documents to provide the Commission because settlement offers in litigation, unlike licensing offers, reflect a number of external factors wholly distinct and apart from their subject matter. For that reason, among others, such discussions are confidential and inadmissible under Federal Rule of Evidence 408. These issues are all irrelevant, however, because the Commission need only make clear that Ultratec has an obligation to license, contrary to Ultratec’s official position, and need *not* determine what a reasonable license would be.

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behind the 2007 Declaratory Ruling require such an interpretation. A short statement from the Commission that the 2007 Declaratory Judgment requires licensing to all certified providers of IP CTS would eliminate the risk of a devastating injunction and allow the parties to resolve the details of any licensing agreements under the supervision of the District Court. Without the Commission's reaffirmation and clarification that Ultratec *must* license its IP CTS-related patents to CaptionCall, the District Court could imminently enjoin CaptionCall from providing IP CTS. If the Commission does not act, it cedes to Ultratec the authority to determine who can provide IP CTS relay services.

We appreciate your consideration of this letter, and we would be happy to discuss the matter with you further at your convenience.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael B. DeSanctis", with a long horizontal flourish extending to the right.

Michael B. DeSanctis  
*Counsel for CaptionCall, LLC and Sorenson Communications, Inc.*

cc (via e-mail):      Greg Hlibok  
                             Robert Aldrich  
                             Eliot Greenwald  
                             Caitlin Vogus