

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

In the Matter of

Misuse of Internet Protocol (IP) Captioned
Telephone Service

CG Docket No. 13-24

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

**SORENSEN COMMUNICATIONS, INC. AND CAPTIONCALL, LLC
REPLY COMMENTS ON ROLKA LOUBE ASSOCIATES LLC PAYMENT
FORMULAS AND FUNDING REQUIREMENTS**

John T. Nakahata
Christopher J. Wright
Walter E. Anderson
Stephen W. Miller
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., Eighth Floor
Washington, D.C. 20036
T: (202) 730-1300
jnakahata@hwglaw.com

*Counsel to Sorenson Communications,
Inc. and CaptionCall, LLC*

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INTRODUCTION

Sorenson Communications, Inc. (“Sorenson”) and its affiliate CaptionCall, LLC (“CaptionCall”) submit these reply comments on the Commission’s May 20, 2015 Public Notice addressing, among other things, the video relay service (“VRS”) and Internet protocol captioned telephone service (“IP CTS”) provider compensation rates proposed by Rolka Loube Associates LLC (“Rolka Loube”), the telecommunications relay service (“TRS”) Fund administrator.¹

In particular, the Commission should disregard IDT Telecom’s suggestion that Commission should begin jurisdictionalizing VRS and IP CTS traffic. The Commission has a firm mandate to ensure the availability of both interstate and intrastate TRS, and it has wide discretion as to how it fulfills this mandate. Because state TRS programs are often unpredictable and underfunded, and because of the impracticality of forcing VRS and IP CTS providers to jurisdictionalize their traffic, the Commission has reasonably exercised its discretion to treat VRS and IP CTS as purely interstate services. IDT Telecom cites no valid arguments to the contrary.

In addition, the record is clear that under no circumstances should the Commission consider an allowable-cost based/rate-of-return methodology for setting IP CTS rates. However, though some commenters urge the Commission to continue using the MARS methodology to set IP CTS rates, those commenters ignore the reality that, because of the divergence in the traditional CTS and IP CTS markets, MARS no longer yields a reasonable proxy for a market-based IP CTS rate. Instead of allowing the IP CTS rate to put continued upward pressure on the TRS contribution factor, the Commission should adopt CaptionCall’s price-cap proposal, which

¹ *Rolka Loube Associates LLC Submits Payment Formulas and Funding Requirement for the Interstate Telecommunications Relay Services Fund for the 2015-16 Fund Year*, Public Notice, DA 15-612, CG Docket Nos. 03-123, 10-51 (rel. May 20, 2015) (“TRS Rate PN”).

will yield immediate Fund savings, and will give IP CTS providers long-term incentives to innovate and improve efficiency.

I. THE COMMISSION SHOULD NOT JURISIDCTIONALIZE VRS OR IP CTS TRAFFIC.

IDT Telecom argues incorrectly that the Commission must reject the proposed TRS budget and contribution factor because it proposes to continue to fund intrastate Internet-based TRS (“iTRS”) from the interstate TRS Fund.² The Commission in fact has discretion on how to fund TRS both pursuant to statute and under the standard jurisdictional analysis under Section 2(b) of the Communications Act. Further, contrary to IDT Telecom’s proposal, there is no need for an NPRM at this time.³ The Commission has explained several times that it has chosen to exercise its discretion to fund all iTRS from the interstate TRS Fund because doing so enables the Commission to carry out its mandate under the Americans with Disabilities Act (“ADA”) to ensure the availability of functionally equivalent telecommunications services to deaf and hard-of-hearing individuals. IDT gives no valid reason to revisit this decision now.

A. The Commission Has Reasonably Exercised its Discretion in the Proposed Budget.

Title IV of the ADA mandates that the Commission “shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.”⁴ This is the fundamental starting point for any discussion on how the Commission ensures the availability of interstate *and* intrastate TRS.

² Comments of IDT Telecom, Inc. at 3, CG Docket Nos. 03-123, 10-51 (posted June 5, 2015) (“IDT Telecom Comments”).

³ *Id.*

⁴ 47 U.S.C. § 225(b)(1).

IDT Telecom would have the Commission curtail its obligation to ensure the availability of TRS to deaf and hard-of-hearing consumers. When it passed Title IV of the ADA, Congress sought to remedy a state-by-state system that had failed to meet the needs of deaf and hard-of-hearing consumers.⁵ Thus, Congress envisioned, and required the FCC to implement, a nationwide system of TRS providers. Title IV expressly requires the creation of a “seamless interstate *and* intrastate relay system . . . that will allow a communications-impaired caller to communicate with anyone who has a telephone, anywhere in the country.”⁶ And the ADA obligates the Commission to ensure the availability of relay services. Over the last fifteen years, the Commission has permissibly chosen to carry out this mandate by permitting recovery of costs associated with both intrastate and interstate iTRS calls from the interstate TRS Fund. Despite IDT Telecom’s arguments to the contrary, it would be impractical and harmful to fund iTRS any other way.

1. 47 U.S.C. § 225(d)(3) Confers Discretion on the Commission to Fund All TRS from the Interstate TRS Fund.

As IDT Telecom recognizes, 47 U.S.C. § 225(d)(3) states that the Commission’s regulations “shall *generally* provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.”⁷ By using the term “generally,” the statute does not mandate that costs always be segregated—rather, it expressly gives the Commission flexibility to modify this general cost structure where the Commission’s other mandates might so require.

⁵ H.R. Rep. No. 101-485(IV) at 27-28 (1990).

⁶ *Id.* at 28 (emphasis added).

⁷ 47 U.S.C. § 225(d)(3) (emphasis added).

The Commission did exactly this in 2000 when it decided to “permit recovery of costs associated with both intrastate and interstate [VRS] calls from the interstate TRS Fund.”⁸ The Commission made this decision for several reasons, primary among them that VRS “is necessary to provide many people with disabilities relay service that is functionally equivalent to voice communications.”⁹ In 2007 the Commission reached a similar decision with regard to IP CTS, reasoning that “this arrangement will be an incentive for multiple providers to offer this service on a nationwide basis, generating competition that will enhance consumer choice, service quality, and available features.”¹⁰ Thus the Commission has exercised its statutory discretion to fund all iTRS from the interstate TRS Fund in order to carry out its mandate to ensure functionally equivalent TRS is available to all deaf and hard-of-hearing Americans.

IDT Telecom unfairly criticizes the Commission for not revisiting these decisions,¹¹ as the Commission’s decision to compensate all iTRS from the TRS Fund continues to be warranted. When the Commission sought comment in 2013 on whether to transfer responsibility for IP CTS to the states (including whether states should pay for intrastate calls while the TRS Fund pays for interstate calls),¹² consumer groups explained the dangers of, among other things, separating intrastate iTRS funding from the interstate TRS Fund and explained that such a

⁸ *Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, Report and Order, 15 FCC Rcd. 5140, ¶ 24 (2000).

⁹ *Id.* ¶ 26.

¹⁰ *Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities; Internet Based Captioned Telephone Service*, Declaratory Ruling, 22 FCC Rcd. 379, ¶ 25 (rel. Jan. 11, 2007).

¹¹ IDT Telecom Comments at 10-11.

¹² *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 13420, ¶ 137 (rel. Aug. 26, 2013) (“2013 NPRM”).

decision would cut against the Commission’s mandate to ensure the availability of TRS to deaf and hard-of-hearing consumers.¹³ For instance, the consumer groups told the Commission that state TRS programs are “chronically underfunded and are subject to the uncertainties of state appropriations processes.”¹⁴ These comments showed that the Commission should think twice before revisiting any jurisdictional separation decision. And states themselves told the Commission that such a move would likely limit competition and consumer choice,¹⁵ both of which would cut against the Commission’s mandate to provide functionally equivalent TRS.

Finally, IDT Telecom also incorrectly argues that “the Commission has conceded that its authority to authorize the recovery of intrastate services from the [TRS] Fund is limited in scope and time.”¹⁶ However, the Commission’s intent to revisit iTRS funding at some undefined future time does not undermine the Commission’s authority to adopt and continue its current funding methodology, and IDT Telecom points to no authority purporting to limit the Commission’s discretion. While the Commission has stated that the “Act envisions that the funding support for TRS should be separated between the states and the federal government,”¹⁷ this statement does not serve to diminish the Commission’s statutory discretion.

¹³ See Petition for Stay of Telecommunications for the Deaf and Hard of Hearing, Inc., Association of Late-Deafened Adults, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, Hearing Loss Association of America, National Association of the Deaf, American Association of the Deaf-Blind, Cerebral Palsy and Deaf Organization at 5, CG Dockets No. 13-24 & 03-123 (filed Sept. 30, 2013).

¹⁴ *Id.* at 5; see also Comments of Hearing Loss Association of America at 8, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013).

¹⁵ See, e.g., Comments of the Kentucky Public Service Commission at 3-4, CG Docket Nos. 13-24 & 03-123 (filed Oct. 18, 2013).

¹⁶ IDT Telecom Comments at 8.

¹⁷ 2013 NPRM ¶ 137.

2. *The Commission Has Jurisdiction over Intrastate Internet-based TRS under a Standard Section 2(b) Analysis.*

Even if § 225(d)(3) did not directly give the Commission discretion and flexibility regarding its funding of iTRS, the Commission has discretion to make this jurisdictional decision under a standard Section 2(b) end-to-end jurisdictional analysis.¹⁸

In the absence of a specific statutory jurisdictional statement the Commission traditionally applies the so-called “end-to-end analysis,” which is based on the physical end points of the communication, to determine whether a service is intrastate or interstate. The Commission considers “the continuous path of communications”: where the end points of a communication are within the boundaries of a single state the service is deemed purely intrastate; where the service’s end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate or international service.¹⁹ Services that are capable of both intrastate and interstate communications are deemed jurisdictionally mixed. In these cases, the Commission may exercise its authority to treat jurisdictionally mixed services as entirely interstate where (1) it is impossible or impractical to separate the service’s intrastate from interstate components, and (2) state regulation of the intrastate component would interfere with valid federal rules or policies. Such is the case with iTRS.²⁰

iTRS is a jurisdictionally mixed service because it permits both intrastate and interstate communications. While it may not be *absolutely* impossible for VRS and IP CTS providers to segregate interstate and intrastate iTRS minutes, it certainly is impractical, as discussed in more

¹⁸ See *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000); *Vonage Holdings Corp.*, Memorandum Opinion & Order, 19 FCC Rcd. 22404, 22413 ¶¶ 16-18 (rel. Nov.12, 2004) (“*Vonage Order*”).

¹⁹ See *id.*; 47 U.S.C. §§ 152(b)(1) & 153(22).

²⁰ See, e.g., *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986).

detail below. Moreover, there is no service- or engineering-driven reason why VRS or IP CTS providers would need to know their users' actual locations at the time they place or receive a call, and even less reason to know the location of the other party to the call. Requiring VRS and IP CTS providers to devote resources to engineering such capabilities rather than improving service is not a wise or legitimate policy goal. Coupling that with the serious risk that separating funding for intrastate iTRS from interstate iTRS would seriously undermine the Commission's ability to fulfill its availability mandate leads to the conclusion that the Commission reasonably treats VRS and IP CTS as entirely interstate services.

VRS can be both a nomadic or mobile telecommunications service in that it can be used anywhere the user can access a broadband Internet connection and configure his device. In a traditional VRS call, the VRS user who makes a call contacts a VRS interpreter ("VI"), who is a qualified sign language interpreter, through specialized IP-compatible customer premises equipment ("CPE") over a broadband Internet connection. The VRS user and the VI communicate via this Internet-enabled video connection, and the VI then places a telephone call to the party the VRS user wishes to call. While VRS providers are required to keep records of their users' Registered Location,²¹ VRS providers do not necessarily know precisely where their users are using their device on any given call. And while VRS providers know the telephone number their users wish to call (or the number calling the VRS subscriber), they do not necessarily know the location of the non-VRS subscriber. Indeed, there is no business or engineering basis to know it because VRS providers like Sorenson are not, for instance, wireless carriers who could at least know the cell site to which the caller was located. VRS providers

²¹ See 47 C.F.R. § 64.611.

seek to provide VRS seamlessly throughout the nation to give their users functional equivalence no matter where they and the other party happen to be located.

IP CTS operates somewhat differently from VRS, but still relies on a broadband connection in order for the technology to work. In a standard IP CTS call,²² the traditional voice part of the call is connected to the other party over the PSTN and to an IP CTS communications assistant (“CA”) over a broadband Internet connection using specialized IP-compatible CPE. IP CTS providers therefore are not part of the call flow between the caller and receiver and are thus not in the same position to know the actual location of both ends of a call as, for instance, an underlying wireless or wireline carrier may be. And like VRS, given the prevalence of wireless phone numbers and abbreviated dialing sequences, simply knowing the phone numbers at each end of the call is not sufficient to know the location of either endpoint. Also like VRS, there is no service-driven reason why an IP CTS provider would need to know, or would improve its IP CTS service by knowing, the callers’ actual locations.

Indeed, a Section 2(b) analysis of these iTRS technologies yields a similar result to the Commission’s decisions in the VoIP context.²³ In its 2004 *Vonage Order*, the Commission applied a Section 2(b) analysis and ruled that telephone calls using broadband Internet connections that could be used from multiple locations would fall solely under interstate jurisdiction even where the technology allowed for intrastate calling.²⁴ The Commission acknowledged that certain characteristics of IP-enabled telecommunications services like VoIP

²² CaptionCall has recently introduced a mobile IP CTS application that relies on an integrated, over-the-top voice over Internet protocol (“VoIP”) service to transmit the calls. The Commission has already ruled that VoIP, a mixed jurisdictional service, is subject to federal jurisdiction only. *See Vonage Order* ¶ 32. IP CTS utilizing integrated VoIP should be afforded similar treatment.

²³ *See Vonage Order* ¶ 32.

²⁴ *See id.* ¶ 22 & n.85.

weigh in favor of purely interstate jurisdiction. These include among others “a requirement for a broadband connection from the user’s location [and] a need for IP-compatible CPE.” As discussed above, VRS and IP CTS require a broadband connection and specialized, IP-compatible CPE in order to function; VRS can be moved from one geographic location to another; and iTRS can be mobile or nomadic when the end user’s underlying service is mobile or nomadic—a fact not known to the IP CTS provider which does not distinguish between fixed, nomadic and mobile underlying services as chosen by the end user. It only makes sense for the Commission to consider VRS and IP CTS as technologies similar to VoIP for a jurisdictional analysis.

The Commission also noted that there was no service-driven reason for VoIP providers to attempt to reengineer their technology to be able to locate both end points of a VoIP call.²⁵ Similar to the VoIP context, requiring iTRS providers “to attempt to incorporate geographic ‘end-point’ identification capabilities into [their] service solely to facilitate the use of an end-to-end approach would serve no legitimate policy purpose. Rather than encouraging and promoting the development of innovative, competitive advanced service offerings, [the Commission] would be taking the opposite course, molding this new service into the same old familiar shape.”²⁶

IDT Telecom’s Comments do not even attempt to wrestle with this history or analysis, and for good reason. It is impractical for iTRS providers to segregate intrastate from interstate iTRS calling minutes, and there is no good policy reason to force them to do so in light of the harm it would do to the Commission’s ability to execute its mandate to ensure access to functionally equivalent telecommunications service.

²⁵ *Id.* ¶ 25.

²⁶ *Id.*

II. THE COMMISSION SHOULD NOT CONSIDER AN “ALLOWABLE COST” BASED METHODOLOGY FOR IP CTS RATES AND SHOULD ADOPT CAPTIONCALL’S PRICE CAP PROPOSAL.

All IP CTS providers oppose a cost-based rate-of-return methodology for setting IP CTS rates.²⁷ Indeed, there is no record support for an “allowable cost” methodology for IP CTS rates, and the Commission is now well aware of the problems such a methodology has created for IP Relay and for VRS. The Commission should not repeat the same mistakes with IP CTS.

However, it is not sufficient for the Commission simply to leave the MARS methodology in place, as Sprint and Hamilton suggest.²⁸ As this most recent round of comments reflects, telecommunications providers are already beginning to question the rise in the TRS contribution factor.²⁹ While the proposed contribution factor increase (from 1.219% to 1.635%) is modest and, for the most part, necessary for the Commission to fulfill the ADA’s functional equivalence mandate, there is no reason to allow IP CTS rates to put continued unnecessary upward pressure on the contribution factor.

At one time, MARS did serve as a “reasonable proxy” for market-based IP CTS rates.³⁰ The MARS rate is based on the results of competitive bids for provision of intrastate analog CTS. CTS and IP CTS, which both rely on communications assistants to re-voice one side of a conversation and manage transcription software, have similar cost structures. And several years ago, demand for the two services was similar. For example, in 2011, demand for intrastate CTS

²⁷ See Comments of Hamilton Relay, Inc. at 7-9, CG Docket Nos. 03-123 & 10-51 (filed Jun. 4, 2015) (“Hamilton”); Comments of Sprint Corporation at 1-2, CG Docket Nos. 03-123 & 10-51 (filed Jun. 4, 2015) (“Sprint”); Comments of Sorenson Communications, Inc. and CaptionCall, LLC at 6-8, CG Docket Nos. 03-123 & 10-51 & 13-24 (filed Jun. 4, 2015) (“CaptionCall”).

²⁸ See Sprint at 2; Hamilton at 3-5.

²⁹ See Comments of COMPTTEL at 2-3, CG Docket Nos. 03-123 & 10-51 (filed Jun. 4, 2015).

³⁰ See Hamilton at 10.

was just over 30 million minutes,³¹ and demand for IP CTS was just over 28 million minutes.³² Under those circumstances, it made sense for the Commission to use the market-based CTS rate as a proxy for IP CTS rates.

That proxy, however, no longer works as well because, as Hamilton and Sprint fail to recognize, CTS and IP CTS have become apples and oranges. From 2011 to 2014, intrastate CTS demand has declined to just over 26 million minutes,³³ while IP CTS demand has grown to more than 137 million minutes.³⁴ As a result, given the potential for efficiencies within a market that is more than five times larger than the other, it no longer makes sense to use CTS rates as a proxy for IP CTS rates. And as CTS demand continues to decline, efficiencies will continue to evaporate, causing continued upward pressure on the MARS-based rate.

CaptionCall's proposal seeks to alleviate this pressure by returning the IP CTS rate to the average of the MARS-based rates in the years before CTS became such an insignificant portion of captioning minutes. CaptionCall's proposed rate of \$1.6766 represents a rate that was established when intrastate CTS bids represented an accurate proxy for competitively established IP CTS rates, and it is a rate that encouraged multiple providers, including CaptionCall, to enter the IP CTS market. Because there is currently no competitive bidding process for IP CTS services, and because the CTS bidding process no longer yields true market-based IP CTS rates, a price cap methodology with a 0.5% inflation-adjusted X-factor, and adjusted for exogenous

³¹ See RLSA, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate at 12, CG Docket No. 03-123 (filed May 1, 2012).

³² See *id.* at Ex. 1-4.

³³ See Rolka Loube Assocs., Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate at 17, CG Docket No. 03-123 (filed Apr. 24, 2015).

³⁴ See *id.* at Ex. 1-4.

costs, is the best possible way for the Commission to simulate the effects of competition on IP CTS rates.

Contrary to Hamilton's assertions,³⁵ the Commission can adopt a price cap methodology for IP CTS without making the same mistakes that it made with IP Relay. The catastrophic consequences of the 2013 IP Relay rate reduction reflect fundamental flaws in "allowable cost" methodologies that underlay the selection of the rate at which to initialize the price cap and the selection of the X factor, not price cap methodologies themselves. In 2007, the Commission established a price cap for IP Relay,³⁶ and the Commission reauthorized the price cap in 2010.³⁷ But in 2013, the Commission reset the IP Relay base rate based on an "allowable cost" calculation,³⁸ which was artificially lowered because of the largest IP Relay provider's decision to "offshore" the majority of its communications assistants. As a result, the IP Relay rate dropped nearly 20% in a single year, and Sorenson was forced to exit the market. Such drastic and immediate rate declines are precisely the problem with a reliance on "allowable costs" to calculate rates. Had the Commission simply once again reauthorized the price-cap methodology with a 0.5% X-factor, the IP Relay story may have been different. But after interference with the proper functioning of a price cap through an "allowable cost" based adjustment, only a single provider continues to offer IP Relay. And that provider has remained in the market only after the

³⁵ See Hamilton at 11-12.

³⁶ *Telecommunications Relay Services and Speech-to-Speech for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, 22 FCC Rcd. 20140, ¶ 43 (rel. Nov. 19, 2007)

³⁷ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 25 FCC Rcd. 8689, 8700, ¶¶ 25-26 (rel. June 28, 2010)

³⁸ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 28 FCC Rcd. 9219, 9222 ¶ 12 (rel. July 1, 2013)

Commission implemented an emergency rate *increase* to levels that are significant higher than those in place before the Commission slashed the IP Relay rate in 2013.³⁹

That scenario should not deter implementing a price cap for IP CTS rates—it should deter the “allowable cost” approach. If the Commission adopts a price cap methodology and allows it to operate properly, the Commission will immediately save the TRS Fund money, while giving providers certainty and encouraging long-term investments in innovation and efficiency.

III. CONCLUSION

For the reasons stated above, the Commission should continue treating VRS and IP CTS as purely interstate services, and it should adopt CaptionCall’s proposal to establish a price-cap for IP CTS rates.

Respectfully submitted,



John T. Nakahata
Christopher J. Wright
Walter E. Anderson
Stephen W. Miller
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., Eighth Floor
Washington, D.C. 20036
T: (202) 730-1300
jnakahata@hwglaw.com

*Counsel to Sorenson Communications, Inc.
and CaptionCall, LLC*

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³⁹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 29 FCC Rcd. 16273, 16277-78 ¶ 12 (rel. Dec. 29, 2014) (increasing the IP Relay to \$1.37 per minute, and \$1.67 for all monthly minutes in excess of 300,000).