

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

In the Matter of

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. COMMENTS ON ROLKA LOUBE
PAYMENT FORMULAS AND FUNDING REQUIREMENTS**

Sorenson Communications, Inc. (“Sorenson”) and its affiliate CaptionCall, LLC (“CaptionCall”) submit these comments on the Commission’s May 9, 2016, Public Notice addressing, among other things, Internet protocol captioned telephone service (“IP CTS”) provider compensation rates proposed by Rolka Loube Associates LLC (“Rolka”), the telecommunications relay service (“TRS”) Fund administrator.¹

CaptionCall does not dispute the mathematical results of Rolka’s application of the various TRS payment formulas. CaptionCall does, however, oppose any effort to adopt a cost-based rate methodology for IP CTS. Consistent with broader trends in the regulation of communications services, the Commission should continue moving from cost-based to market-based TRS rates, which will best encourage TRS providers to offer functionally equivalent service as efficiently as possible. Indeed, the Commission’s regulation of TRS rates has generally followed the broader trend, as the Commission has proposed migrating away from

¹ *Rolka Loube Associates LLC Submits Payment Formulas and Funding Requirement for the Interstate Telecommunications Relay Services Fund for the 2016-17 Fund Year*, Public Notice, DA 16-518, CG Docket Nos. 03-123 & 10-51 (rel. May 9, 2016) (“TRS Rate PN”).

unpredictable, destructive cost-based VRS rates in favor of a stable market-based rate set through an auction process.² Until that process is complete, IP CTS, for which the MARS methodology sets rates using the results of competitive bids for the provision of CTS in multiple states, remains the only IP-based TRS service that utilizes market-based rates. Under no circumstances should the Commission reverse the current trend and adopt an “allowable cost” methodology for IP CTS rates.

It is thus highly alarming that the Commission seeks comment on Rolka’s recommendation to consider a rule modification to calculate the IP CTS compensation rate “based on IP CTS costs reported by providers.” The “allowable cost” approach has had detrimental effects on IP Relay and VRS, and it would serve only to dampen competition, diminish consumer choice, work irreparable harm to the IP CTS industry, and undermine pursuit of the functional equivalence mandate.

Should the Commission nevertheless adopt an “allowable cost” based methodology, it should adopt Rolka’s alternative proposal based on the highest-reported provider costs. As the Commission should realize from its experience with IP Relay, sudden and dramatic rate reductions based on “average” costs will ensure that the highest-cost providers will immediately be unable to continue providing IP CTS, and, because of the inherent flaws in cost-based rates in a labor-intensive industry, even the more efficient providers will struggle to maintain their quality of service. By basing a cost-based rate on the highest reported provider costs, the Commission will maintain consumer choice in IP CTS, while allowing more efficient providers to continue investing in improvements to service quality.

² *Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03-123 & 10-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-82, 28 FCC Rcd. 8618, ¶ 217 (2013) (“2013 VRS Order”).

I. THE COMMISSION SHOULD APPLY THE MARS RATE FOR IP CTS.

Until the Commission completes its reform of VRS rates, IP CTS remains the only IP-based relay service that does not incorporate the deeply flawed “allowable-cost” concept into its rate-setting methodology. It must remain that way. CaptionCall (along with its affiliate, Sorenson) has consistently maintained that adopting market-based rates is the best mechanism for the Commission to ensure that TRS providers fulfill the ADA’s mandate that all deaf and hard-of-hearing Americans gain access to functionally equivalent telephone services.³ Market-based rates ensure that providers, who must constantly adapt to competitive pressures, operate their services in the most efficient manner possible, without eliminating costs necessary for providers to offer essential elements of TRS. Though the MARS methodology may not be perfect, it is a market-based rate that, unlike cost-based rates, does not curtail providers’ ability to offer functionally equivalent service.

CaptionCall therefore opposes any departure from the market-based MARS approach.⁴ Indeed, as other providers have noted, the chief benefit of MARS is that it “relies on the competitive market, rather than prescriptive regulation and proxies.”⁵ The MARS rate of \$1.9058 for 2016-17, “a modest \$0.0163 increase from the 2015 – 2016 rate of 1.8895 or

³ *See, e.g.*, Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 13-24 & 03-123, at 11-14 (filed Nov. 4, 2013); Reply Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 13-24 & 03-123, at 3-10 (filed Dec. 4, 2013).

⁴ Although CaptionCall proposed an alternative to the MARS calculation, it has since withdrawn that proposal. *See* Letter from John T. Nakahata, Counsel to CaptionCall, LLC, to Marlene H. Dortch, CG Docket Nos. 13-24 & 03-123 (Jan. 27, 2016).

⁵ *See* Comments of Hamilton Relay, Inc., CG Docket Nos. 13-24 & 03-123, at 2 (filed Nov. 4, 2013); *see also* Comments of Purple Communications, Inc., CG Docket Nos. 13-24 & 03-123, at 3 (filed Nov. 4, 2013) (noting that MARS has been robust and effective because it is a competitive market-based rate).

approximately 0.8%,”⁶ is an appropriate, market-based rate that will further the mandate of functional equivalency.

II. THE COMMISSION SHOULD NOT CONSIDER AN “ALLOWABLE COST” BASED RATE-OF-RETURN METHODOLOGY FOR IP CTS.

Rolka, however, proposes as an alternative to the market-based MARS rate a cost-based rate calculation for IP CTS. The Commission has already determined that calculating rates in this manner is an ill fit for much of the telecommunications industry, and the Commission’s experience with such an approach in other TRS contexts makes clear that it should not make the same mistake with IP CTS. Reflecting the lessons learned from these experiences, the industry is united in its opposition to a cost-based rate-of-return methodology for setting IP CTS rates.⁷

The Commission has largely abandoned rate-of-return,⁸ which rewards inefficiency, discourages innovation, and incentivizes overbuilt capital and increased accounting costs, while punishing innovation and efficiency by lowering profits when the rate base shrinks. In addition,

⁶ See Rolka Loube Associates LLC, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, CG Docket Nos. 03-123 & 10-51, at 19 (filed May 4, 2016) (“Rolka Estimate”).

⁷ See Comments of Hamilton Relay, Inc., CG Docket Nos. 03-123 & 10-51, at 7-9 (filed June 4, 2015); Comments of Sprint Corporation, CG Docket Nos. 03-123 & 10-51, at 1-2 (filed June 4, 2015); Sorenson Communications, Inc. and CaptionCall, LLC Comments on Rolka Loube Payment Formulas and Funding Requirements, CG Docket Nos. 03-123, 10-51 & 13-24, at 6-8 (filed June 4, 2015).

⁸ See, e.g., *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, FCC 90-314, 5 FCC Rcd. 6786 (1990) (“*Second R&O on Rates for Dominant Carriers*”) (abandoning rate-of-return regulation for large incumbent local telephone companies); *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd. 8961 (1995) (affirming a commitment to the policy objectives that led the Commission to adopt price cap regulation); *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) (“*USF/ICC Transformation Order*”) (functionally ending rate-of-return for small telephone companies by adopting interstate terminating access rates and revenues based on formulas no longer tied to current costs or revenue requirements).

CaptionCall and Sorenson have repeatedly explained that rate-of-return ratemaking is fundamentally ill-suited to TRS, all forms of which are uniformly labor—not capital—intensive, because it requires a labor-intensive firm to have almost no profit margin.⁹

As with other forms of TRS, IP CTS relies on Communications Assistants (“CAs”) to manage voice-recognition and transcription software. Salaries and benefits for CAs—and not capital investments—are providers’ greatest costs. To improve key service-quality metrics, such as speed-of-answer and captioning latency, IP CTS providers do not incur increased capital expense—for items such as additional rights of way or facilities—but rather increased operating expense, for items such as additional staffing and training. And with recent and anticipated changes to minimum wage and overtime requirements,¹⁰ those costs are rising rapidly nationwide. Under rate-of-return, the rate merely reimburses those operating expenses without yielding additional returns. As a result, reducing operating costs will simply cause corresponding rate reductions—removing all incentives for providers to operate more efficiently.

⁹ See, e.g., Comments of Sorenson Communications, Inc. & CaptionCall, LLC, CG Docket Nos. 13-24, 10-51 & 03-123, at 5-7 (June 4, 2015); Sorenson Communications, Inc. and CaptionCall, LLC Reply Comments on Rolka Loube Associates LLC Payment Formulas and Funding Requirements, CG Docket Nos. 13-24, 10-51 & 03-123, at 10 (June 11, 2015); Comments of Sorenson Communications, Inc., CG Docket Nos. 10-51 & 03-123, at 37-45 (Mar. 9, 2012) (“Sorenson VRS Rate Methodology Comments”); Reply Comments of Sorenson Communications, Inc., CG Docket Nos. 10-51 & 03-123, at 39-41 (Mar. 30, 2012) (“Sorenson VRS Rate Methodology Reply Comments”); Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 10-51 & 03-123, at 59-60 (Aug. 19, 2013) (“Sorenson VRS Auction Comments”).

¹⁰ See, e.g., Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541); Jesse McKinley & Vivian Lee, *New York Budget Deal with Higher Minimum Wage is Reached*, N.Y. Times, Mar. 31, 2016, available at http://www.nytimes.com/2016/04/01/nyregion/new-york-budget-deal-with-higher-minimum-wage-is-reached.html?_r=0; Paul Davidson, *California Reaches Deal on \$15 Minimum Wage*, USA Today, Mar. 29, 2016, available at <http://www.usatoday.com/story/money/2016/03/28/california-raises-minimum-wage-15-hour/82348622/>.

At the same time, because TRS requires very little capital, providers cannot meaningfully boost their margins by making additional capital investments, as they can buy only so many desks and carpets. Moreover, the Commission has historically excluded real, nondiscretionary costs—such as equipment, research and development, and taxes—from the “allowable cost” formula. Without a rational delineation between what costs are “allowable” and not “allowable,” providers face constant uncertainty about future rates. Indeed, the Commission has acknowledged that cost-based rates have “fluctuated significantly over time, with frequent recalculation of rates as cost or demand levels change or as new evidence about cost and demand levels come to light.”¹¹

Rolka’s proposed “allowable cost” calculation, if applied to IP CTS, reflects all of the fundamental flaws with rate-of-return in the TRS context.¹² Rolka’s calculation allows for returns only on capital investment,¹³ which consistently yields profit margins of less than 1%. Providers cannot operate under such paltry margins, even if the rate accounted for all costs of providing service. But Rolka’s calculation does not account for research and development, equipment, working capital, or tax expenses¹⁴—all of which are real costs that are essential for the provision of high-quality IP CTS. Though the Rolka calculation does account for outreach costs,¹⁵ the Commission has already removed outreach from the VRS and IP Relay rate bases

¹¹ 2013 VRS Order, ¶ 217.

¹² Comments of Sorenson Communications, Inc. and CaptionCall, LLC, CG Docket Nos. 13-24, 10-51 & 03-123, at 7 (June 4, 2015).

¹³ Rolka Estimate, Appendix G at 12.

¹⁴ *Id.*

¹⁵ *Id.*

and is considering the same for IP CTS,¹⁶ which would cause an immediate reduction in cost-based IP CTS rates, and which underscores the uncertainty inherent in the cost-based approach.

The Commission has seen the results of pursuing rate-of-return-style regulation, based on “allowable costs,” in other forms of TRS. For example, in 2007, the Commission established a price cap for IP Relay,¹⁷ and the Commission reauthorized the price cap in 2010.¹⁸ But in 2013, the Commission reset the IP Relay base rate based on an “allowable cost” calculation,¹⁹ which was artificially lowered because of the largest IP Relay provider’s decision to “offshore” the majority of its communications assistants. The Commission compounded that problem by establishing an X-factor based on historical declines in “allowable costs,” which reflected the same offshoring. As a result, the IP Relay rate dropped nearly 20% in a single year, with rules mandating further annual 6% reductions. Prior to these rate changes, there were six IP Relay providers. Afterward, there was only one remaining provider, and that provider required an IP Relay rate increase to continue offering the service. Indeed, Sorenson itself was forced to exit the market solely on account of these rate changes. Furthermore, in VRS, the Commission has allowed steep rate cuts, based on flawed “allowable cost” calculations, to continue squeezing the capabilities of all providers, not just the very smallest and least efficient VRS providers.

¹⁶ See *Misuse of Internet Protocol (IP) Captioned Telephone Service*, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-118, 28 FCC Rcd. 13,420, ¶ 122 (2013) (“2013 IP CTS Order”).

¹⁷ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, FCC 07-186, 22 FCC Rcd. 20,140, ¶ 43 (2007).

¹⁸ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, FCC 10-115, 25 FCC Rcd. 8689, ¶¶ 25-26 (2010).

¹⁹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, DA 13-1483, 28 FCC Rcd. 9219, ¶ 12 (Consumer & Gov’t Aff. Bur. 2013).

The core mandate of the ADA is access to functionally equivalent service—which cannot exist if there is not a real-world economic model to provide the service. Should the Commission adopt such an “allowable cost” approach, it would result in setting rates below viable levels, leading to the inevitable outcome: providers exiting the service, which will reduce competition and diminish customer choice. At present there are four primary IP CTS providers; the loss of any one of them would further concentrate the market and harm consumers.²⁰ The Commission should thus take seriously the lessons of its past mistakes with “allowable cost” rate-of-return rate-setting and not repeat them with IP CTS.

Nevertheless, if the Commission decides that it must adopt a cost-based IP CTS rate, it should adopt Rolka’s proposal of a \$1.76 per minute rate, which is based on the highest-reported provider costs.²¹ Consumer choice is essential to achieving the ADA’s functional equivalence mandate. Though IP CTS providers do not compete on rates, they do compete vigorously on other metrics of service quality, such as speed of answer, captioning accuracy, and captioning latency. If the Commission, as it is currently considering,²² adopts rules that require providers to improve accuracy, latency, or both, providers will need capital in order to take the measures necessary to comply.

As was the case with IP Relay, if the Commission implements a sudden and dramatic rate reduction based on “average” costs, it will cause the higher-cost providers to immediately cease

²⁰ For instance, the Department of Justice considers a market with four competitors to be highly concentrated. Indeed, it has stated that its merger review process “starts from the presumption that in highly concentrated markets, consumers can be significantly harmed when the number of strong competitors declines from four to three.” *Ex parte* Submission of the United States Department of Justice, GN Docket No. 09-51, at 15 (filed Jan. 4, 2010).

²¹ Rolka Estimate at 21.

²² *2013 IP CTS Order*, ¶¶ 141-143.

service, to the detriment of consumers. By contrast, a rate based on the highest-reported provider costs, though still a 7% reduction from the MARS rate, has a greater potential to preserve consumer choice. Moreover, such a rate would allow more efficient providers to cover costs that the “allowable cost” method excludes—such as actual taxes paid and essential R&D—while also leaving some margin, however paltry, to continue investing in improvements to service quality.

III. CONCLUSION

For the reasons stated above, the Commission should adopt the market-based MARS rate for IP CTS for 2016-2017, and under no circumstances should it consider an “allowable cost” based rate-of-return methodology for IP CTS rates. If the Commission nevertheless does decide to adopt a cost-based rate, it should base the rate on the highest-reported provide costs.

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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