

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

Telecommunications Relay Services and
Speech-to Speech Services for Individuals
with Hearing and Speech Disabilities

CC Docket No. 03-123
(DA 05-2961)

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES
COMMISSION AND THE PEOPLE OF THE
STATE OF CALIFORNIA**

The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these comments in response to the Public Notice released June 26, 2009.¹ The Public Notice set forth a schedule for filing of comments on the Supplement to Petition to Mandate Captioned Telephone Relay Service² (Supplement) filed June 10, 2009.³ The Supplement, and the original 2005 Petition, were both filed by groups of advocacy organizations and professional organizations (hereafter, collectively, “petitioners” or “filing parties”).⁴ In the Supplement, Petitioners “update the

¹ *Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Petition to Mandate Captioned Telephone Relay Service (CTS)*, DA 09-1436 in CG Docket No. 03-123, Released: June 26, 2009.

² Captioned Telephone Relay Service is more commonly called Captioned Telephone Service, or CTS.

³ The Supplement augments the initial Petition for Rulemaking to Mandate Captioned Telephone Relay Service and Approve IP Captioned Telephone Relay Service filed by many of the same parties on October 31, 2005.

⁴ The parties appearing as signatories to the Petition were as follows: Self Help for Hard of Hearing People (SHHH), the Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell), the American Academy of Audiology (AAA), the American Association of People with Disabilities (AAPD), the American Speech-Language-Hearing Association (ASHA), the Association of Late-Deafened Adults (ALDA), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the League for the Hard of Hearing (LHH), the National Association of the Deaf (NAD), the National Cued Speech Association (NCSA), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), the California Association of the Deaf (CAD), and the California Coalition of Agencies Serving the Deaf and Hard of

Commission on the state of CTS [Captioned Telephone Service] and the ongoing and pressing need for an immediate mandate of this service”.⁵ The Supplement does, indeed, provide considerable new information to the FCC about how CTS is being deployed around the country, and includes considerable criticism of state efforts to provide CTS to their residents.

The CPUC submitted both Comments and Reply Comments in response to the 2005 Petition for Rulemaking. Here, the CPUC responds to some of the new information and specifically, to characterizations of California’s CTS program. Silence on any other issue(s) does not connote either agreement or disagreement with petitioners’ representations or positions on those issues.

I. INTRODUCTION

The CPUC stands by the statements and recommendations contained in its two sets of comments on the Petition.⁶ Specifically, California opposes a federal mandate to provide CTS *unless* the FCC intends also to ensure full federal payment of all CTS costs the states will incur. In other words, California strongly opposes another federal mandate which likely would require California to raise its surcharge on end-user billings in a time of great fiscal crisis for this state. We say this against the backdrop of California being a national leader in deploying CTS equipment to users, and as the CPUC is moving

Hearing (CCASDHH).

The signatories to the Supplement are as follows: Hearing Loss Association of America (HLAA) (formerly SHHH), AG Bell, AAA, ASHA, ALDA, DHHCAN, NAD, TDI, CAD, CCASDHH, and an additional group that was not a party to the Petition, Alliance for Public Technology.

⁵ Supplement, p. 2.

⁶ See Comments of the California Public Utilities Commission and the People of the State of California, filed December 29, 2005, and Reply Comment of the California Public Utilities Commission and the People of the State of California, filed January 17, 2006.

towards making CTS a permanent offering. At the same time, the national news has been filled with stories of the \$26-plus billion dollar shortfall in California's state budget. The State Legislature has cut more than \$15 billion in expenses from the state budget and the in-state assessment is that every California resident will feel the impact of the cuts, to a greater or lesser degree. In the midst of this fiscal pain, the CPUC must oppose a mandate that would require ratcheting up the costs to California ratepayers to provide this service on a mandatory basis.

Notwithstanding that opposition, California fully intends to continue to provide CTS at the pace we have set for deploying the service. Currently, the CPUC distributes up to 200 CTS devices per month, and has no waiting list for this equipment. Initially, California set a cap of 100 pieces of CTS equipment per month. Notwithstanding the fact that the outside vendor who administers the California's specialized equipment program, and relay service program, which includes CTS, does, indeed, promote the availability of CTS, the "take rate" generally falls far short of the current cap of 200 CTS devices per month. Further, we note that almost one-third of the CTS devices that have been assigned to California CTS users are inactive. Nonetheless, the CPUC has decided to transition the CTS "trial" to a permanent offering of CTS as part of our Deaf and Disabled Telecommunications Program (DDTP). In conjunction with that effort, the CPUC has put out a Request for Proposal (RFP) seeking bids from prospective vendors to offer the California Relay Service with CTS as a component.⁷ We have held a bidders' conference, received bids, and are in the process of evaluating those submissions. We

⁷ This is the RFP to which Petitioners refer in the Supplement for the specific provision pertaining to California's privacy statutes. The "privacy" issue is addressed later in this pleading.

anticipate that our new relay service contract, including the CTS component, will begin in 2010.

II. A FEDERAL MANDATE REMAINS PROBLEMATIC FOR SEVERAL REASONS

A. Sole Source Provision of CTS Remains Risky

In both our Comments and Reply Comments on the Petition, the CPUC expressed grave concerns about the fact that CTS is offered under a limited license.⁸ Today, two companies offer the service – Sprint and Hamilton. Both subcontract 100% of the CTS relay services from CTI, a closely-related Ultratec affiliate. As such, both Sprint and Hamilton act as contracted sales agents of CTI/Ultratec’s relay service, “CapTel”. As a consequence, neither any state commission nor the FCC has the authority to constrain CTI/Ultratec’s pricing practices. Any state offering CTS as a mandated service would be completely at the mercy of whatever potentially exorbitant price CTI/Ultratec demands of the carriers offering the service under license to Ultratec.⁹

We note Petitioners claim that “Ultratec has continued to offer a license of its captioned telephone technologies at reasonable rates”.¹⁰ This statement is particularly interesting given that CTI/Ultratec offers the technology not at a tariffed “rate”, but under contract. Since the contracts are between private entities, they are not subject to any requirement for public disclosure.¹¹ It is unclear how Petitioners concluded that CTI/Ultratec’s contract charges for its technology are “reasonable”, since no independent

⁸ CPUC’s Comments, pp. 10-11; CPUC’s Reply Comments, pp. 3-6.

⁹ Indeed, the axiom made famous by the railroad “robber barons” in California at the turn of the 20th century, to wit, “charge whatever the market will bear” would be inapposite as there is no “market” for the provision of the CTS technology. Rather, it is a technology provided on a monopoly basis, with neither competition nor regulation constraining prices.

¹⁰ Supplement, p. 6, Fn. 10.

¹¹ In contrast, the contracts the CPUC enters into for provision of relay service or administration of the DDTP, by law, must be available for public inspection, once executed. The existing contract with Sprint does not contain information about what Sprint pays Ultratec for the technology to support provision of CTS.

entity has examined the CTI/Ultratec cost structure and determined that its charges are “reasonable”.

For this reason also, the CPUC continues to oppose a CTS mandate as such a mandate would virtually guarantee that all U.S. ratepayers would pay unmonitored and unchecked prices for a specialized service of great value to a segment of the population in need.

B. Fiscal Concerns Are Paramount, and Should Not Be Dismissed

Petitioners suggest that the only obstacle to funding CTS is the absence of a federal mandate.

Without a mandate, [state relay administrators] have no authority to go to their legislatures to secure the necessary funding and are forced to impose restrictions on and sometimes completely deny telephone access to their residents.

* * *

With a mandate in place, state administrators would be guaranteed the funding and support they need to make CTS available to their residents both now and in the future.¹²

Would that it were so simple.

California cannot speak for other states, but is itself in the grip of the greatest financial crisis since the Great Depression. The CPUC funds the DDTP through a surcharge on all end-user billings for intrastate telecommunications services. The CPUC requires all providers of wireless and traditional wireline services to assess the surcharge against their customers’ billings – both business and residential. The surcharge is capped *by statute*, at “one-half of 1 percent”.¹³ CPUC staff long ago estimated that a federal mandate for CTS would likely force the DDTP budget upward significantly, pushing up

¹² Supplement, p. 4.

¹³ California Public Utilities Code § 2881(d).

against and ultimately exceeding the statutory cap on the surcharge. The CPUC then would have to seek sponsorship for a legislative bill to raise the cap. Certainly, the federal mandate would *help* us to persuade the Legislature that the cap should be raised. But in these extraordinary financial times, the Legislature may prefer the risk of a federal challenge to forcing ratepayers to pay more for telecommunications service pursuant to an unfunded federal mandate.

C. California’s Restriction on CTS to Intrastate Calls Is Reasonable

Petitioners object to restrictions they assert states have imposed on use of CTS equipment to make interstate calls.

Although phones acquired in New York and Texas *may* be used in another state so long as that state accepts “guest users,” California does not even allow this; none of its captioned telephone devices will work if taken out of the state.¹⁴

The purpose of the restriction on out-of-state use of CTS equipment is simple. The CPUC’s policy is for California ratepayers to pay for services provided in the state of California. If Bob or Amy take a piece of CTS equipment to Idaho, and call Montana, then the per-minute cost of that call is picked up by the federal TRS fund. The same would be true if Bob or Amy called Montana from California using CTS. If, however, Bob or Amy go to Idaho and place intrastate calls *in* Idaho, the calls should not be paid for by California ratepayers. Arguably, it might make more sense for Idaho ratepayers to fund those calls, as the service providers would be transporting intrastate traffic subject to surcharges on intrastate calls, as well as state taxes and fees, but that is not for California to decide.

¹⁴ Supplement, p. 20.

At the same time, it is not immediately clear to the CPUC why Petitioners think it reasonable for California to pay for intrastate CTS calls in Idaho, other than the notion that California seems the logical choice since the equipment was provided by and is registered in California. This does not seem to be a valid reason for requiring California ratepayers to fund intrastate CTS calls in other states. If a California resident moved to Idaho and placed interstate calls back to California, our ratepayers should not be charged for the expense of those interstate calls, as Petitioners' proposal for an unrestrained CTS traveling approval would allow. Further, we do not see how imposing a federal mandate for provision of CTS would make a requirement that California pay for intrastate calls in other states either more rational or more palatable.

D. California's Cap Restriction on Direct Sales Does Is Reasonable and Not A Restriction on Entry

California provides free CTS equipment and service to eligible Californians who are certified to receive services from our DDTP. A second CTS unit is provided free for CTS users in California who work for employers with fewer than 15 employees.¹⁵ Other CTS participants can purchase a second CTS device from Ultratec at the cost California pays for its equipment purchases through the DDTP. Despite these limits, the DDTP has not experienced an increase in the "take rate" for CTS, nor has the cap on the number of devices been reached.

¹⁵ Our rationale for this limit is that employers with a higher employee base can purchase the equipment directly, and the ratepayers should not be subsidizing private business for this expense.

III. THE CALIFORNIA PRIVACY ISSUE

Petitioners devote a section of the Supplement to criticism of a provision in the CPUC's recent RFP for a new relay service contract.¹⁶ Specifically, Petitioners complain of a requirement in the RFP that would require "all CTS providers to inform all parties to a CTS call, by text and voice messages, about the 'participation' of a CTS CA on every call that includes a California-based participant."¹⁷

Petitioners then characterize the CPUC's action as follows:

The basis for this restrictive provision, according to the California Public Utilities Commission (CPUC), is California's privacy protections, including prohibitions against the wiretapping, eavesdropping, monitoring, and recording of conversations without the consent of individuals to a conversation. [Fn omitted.] However, a careful reading of these state laws reveals that their intent is to curb illegal activities intentionally designed to invade the privacy of unsuspecting telephone callers, and that these provisions, in fact, have no relevance to CTS calls.¹⁸

First, we note that Petitioners attribute to the CPUC a position without citing to any written document. In fact, the CPUC has not set forth in writing, other than in the RFP, any opinion pertaining to the statutes at issue. Nor will we do so here. The CPUC is not empowered by the California Constitution or the Public Utilities Code to render an legal interpretation of any provisions of California law other than those contained in the Public Utilities Code.

The statutes at issue are provisions of the California Penal Code contained in a portion of the code with the heading "Invasion of Privacy".¹⁹ Specifically, the CPUC has

¹⁶ Supplement, pp. 22-26, "Intrusive and Unfair State Policies".

¹⁷ *Id.*, p. 22.

¹⁸ *Id.*, pp. 22-23.

¹⁹ See California Penal Code §§ 630-638, which can be accessed at this link:

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=630-638>

reviewed and is relying on section 632 of the California Penal Code. Section 632(a) states in relevant part as follows:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

As noted, the CPUC has no authority to determine that the words “[e]very person” exclude a CTS Communications Assistant. Although the California Penal Code contains an exception for “hearing aids” or “similar devices”, the law contains no exception for any type of telecommunications relay service. Because the CPUC is constrained by state law and has no ability to render an opinion that would permit an alternative reading, the CPUC has sought an opinion from the Office of the California Attorney General (AG). We are awaiting that opinion, and once we receive it, the CPUC will update the FCC accordingly.²⁰

Petitioners also challenge the CPUC on the grounds that it is invoking the California privacy statutes only in regard to CTS, and not applying the same restriction to traditional TRS. “Most disturbing is that the invasive requirement is being proposed *only* for CTS users, and not users of [California’s] other relay services.”²¹ The CPUC has not considered traditional relay service to pose the same sort of potential to violate the privacy of the hearing person on a TRS call because the nature of the service is much

²⁰ Should the CPUC receive the California AG’s opinion before the due date for Reply Comments, we will apprise the FCC in our Reply. Should the opinion be provided at some later date, we will supplement our comments to apprise the FCC at that time.

²¹ Supplement, p. 23.

slower. The presence of a CA on a traditional TRS call is obvious because the CA speaks directly to the hearing person and types audibly (to the hearing person) the words the hearing participant speaks for the deaf or hard-of-hearing person to read. Consequently, California does allow a TRS user to instruct the CA not to announce that the call is a TRS call for the simple reason that the participation of the TRS CA is utterly obvious to the hearing participant.

IV. CONCLUSION

The CPUC continues to oppose the mandating of CTS for fiscal reasons, and because the technology is available from a sole provider. Should the FCC decide to mandate CTS, it should not impose the costs on the states, and should explore the means to constrain prices charged by a sole provider of a desirable technology.

Respectfully submitted,

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