WILTSHIRE & GRANNIS LLP

January 7, 2013

Ex Parte

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

Re: *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51; *Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123

Dear Ms. Dortch:

On January 3, 2013, on behalf of the CaptionCall, LLC subsidiary of Sorenson Communications, Inc., Christopher Wright and I met with Jonathan Chambers, Acting Chief of the Office of Strategic Planning and Policy Analysis, Deputy General Counsel Suzanne Tetrault, Karen Peltz Strauss, Deputy Chief of the Consumer and Governmental Affairs Bureau, and Robert Aldrich, Legal Advisor to the Bureau Chief, regarding the above-referenced proceeding. We made a presentation relating to the item currently pending before the Commission regarding the permissibility of the payment of referral fees for the identification of persons who would benefit from using captioned telephones. I spoke to Nicolas Degani about the same issue on January 4, 2013.

Specifically, we suggested that there are differences between the payment of referral fees to hearing specialists such as audiologists, hearing instrument specialists, and assistive listening device distributors, on the one hand, and payments to non-experts such as friends (or payments to charities chosen by users), on the other hand. One difference is that it is conceivable that a person might choose to obtain a captioned telephone in order to direct a referral fee to a friend or charity, but not realistic to think that a person would do so in order to direct a referral fee to a hearing specialist. (However, none of these payments are predicated on usage, so referral fees do not by themselves result in payments from the Telecommunications Relay Fund.) Another difference is that a hearing specialist is in an especially good position to determine who would benefit from the use of a captioned telephone and would be unlikely to commit fraud in order to obtain a relatively small referral fee.

Furthermore, the FCC in other contexts has not prohibited commissions to sales agents for subsidized telephone services (such as for low income consumers), even where that service is provided at no charge to the end user and where the compensation derived by the sales agent substantially exceeds the compensation that CaptionCall provides for the referral leads that it receives. The FCC would be departing from its own precedent if it were to adopt a rule barring

providers from paying commissions or referral fees to those who locate new customers who enroll in publicly funded services. In the Lifeline context, for example, the Commission has recognized that Eligible Telecommunications Carriers ("ETCs") may rely on outside agents or contractors for purposes of identifying and signing up new customers, *see Lifeline & Link Up Reform & Modernization*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6709 ¶ 110 (2012), and it has not imposed any limitations on the manner in which ETCs may compensate them for doing so even though Lifeline services are compensated from the Universal Service Fund. Similarly, in the High Cost context carriers routinely pay commissions to distributors like Best Buy and Target that locate wireless customers for carriers who receive high-cost support for the customers' lines. Because the Commission has condoned the use of outside agents in the Lifeline and High Cost contexts without any limitation on compensation arrangements, it cannot make a "substantive change" to that approach in the analogous TRS context without first engaging in notice-and-comment rulemaking and justifying the departure. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

In our view, the Commission should not declare the payment of referral fees to friends (or payments directed to charities) to be impermissible—especially if the Commission establishes a clear rule respecting who is eligible to use captioned telephone service (such as a standard requiring a user to have a hearing aid or a cochlear implant), since a standard would ensure that only persons who would benefit from captioned telephone service use it. Nevertheless, CaptionCall would not challenge an interim rule limited only to prohibiting referral payments to friends (or payments directed charities) if the Commission sought comment before adopting any rule regarding the payment of referral fees to hearing specialists. Before prohibiting payments to hearing specialists, the Commission should provide notice and obtain comment—including comment from hearing specialists, who are likely to be offended by the implication that they are fraudulently recommending the use of captioned telephones by persons who ought not be eligible to use them.

Sincerely,

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