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ATTORNEYS AT LAW

January 16, 2013

By ECFS

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

Re: *Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123

Dear Ms. Dortch:

We write on behalf of Sorenson Communications, Inc. and its wholly-owned subsidiary CaptionCall, LLC (“CaptionCall”) to add three points to the record in connection to the emergency order on Internet Protocol Captioned Telephone Service (“IP CTS”) now in circulation before the Commission. CaptionCall is committed to providing service in full compliance with FCC rules and the mandates of the Americans with Disabilities Act (“ADA”), and it is therefore eager to work collaboratively with the Commission in refining the IP CTS regulatory framework to eliminate waste, fraud and abuse while preserving eligible consumers’ access to the service and their ability to use it without difficulty.

First, we understand that the Commission may address referral payments in the forthcoming order, perhaps on an emergency basis without any opportunity for public comment. Before it does so, however, the Commission should be aware that paying referral fees has proven to be a vastly more efficient manner of locating eligible subscribers who would benefit from IP CTS than other form of outreach. Indeed, new customer acquisition costs using traditional media like television can exceed \$14,000 per install. CaptionCall currently spends approximately double per install when using non-referral outreach (e.g., print advertising, television advertising, trade show appearances, community outreach, sponsorship arrangements, etc.) compared to new customer acquisition through the hearing healthcare provider channel.

This reflects the entirely unsurprising fact that the majority of CaptionCall’s referrals come from audiologists and other hearing-loss specialists—the very people, of course, who are uniquely qualified to identify those who are eligible for, and would benefit from, IP CTS. The company’s experience in bringing its service to market has proven that the audiologist/hearing-loss-specialist channel is the most effective way of ensuring that the service is delivered to the right people, bar none. CaptionCall is not growing by driving ineligible use; to the contrary, twenty-two years after the ADA was signed, CaptionCall has developed an outreach model that efficiently delivers this ADA-mandated service to the very population for which it is intended.

Adopting a rule that bars referral fee payments would lead to predictable results: the cost of outreach would skyrocket but its effectiveness would plummet, with many fewer qualified individuals ever learning about it. In short, such a rule would contravene clear mandates in the ADA that the Commission ensure that relay services “are available ... in the most efficient manner”¹ and that they “are available, to the extent possible ... to hearing-impaired ... individuals in the United States.”²

Second, as we have explained in the past, adopting a rule barring referral fee payments would constitute a sharp departure from past precedent—which requires a reasoned justification following public notice and comment (which has been notably absent in this circumstance).³ In other contexts, the FCC has not prohibited referral payments to sales agents or other distributors for subsidized telephone services (such as for low-income consumers), even when service is provided at no charge to the end user and where the commission paid to the sales agent substantially exceeds the referral payments CaptionCall makes. 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,⁴ 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 (“USF”). Similarly, in the High Cost context carriers routinely pay commissions to distributors like BestBuy and Target that locate wireless customers for carriers who receive high-cost USF 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.⁵

Third, as we have explained in more detail in previous filings, CaptionCall urges the Commission to employ an open notice-and-comment process with respect to the rule changes it is considering, as the Administrative Procedure Act (“APA”) requires.⁶ The current process—under which word of the emergency order began leaking to providers over a month ago, when it first went on circulation—is neither an appropriate emergency rulemaking nor an open notice-and-comment proceeding. Rather, during the approximately five weeks that the emergency order

¹ 47 U.S.C. § 225(b)(1).

² *Id.*

³ See Letter from John Nakahata to Marlene H. Dortch, CG Docket Nos. 10, 51 03-123 (Jan. 7, 2013).

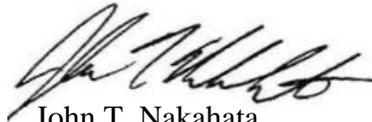
⁴ See *Lifeline & Link Up Reform & Modernization*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6709 ¶ 110 (2012).

⁵ See *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995).

⁶ See Letter from Christopher Wright to Marlene H. Dortch, CG Docket No. 03-123 (Dec. 19, 2012).

has been on circulation, commissioners and staff have solicited input from some parties, scheduled meetings with those same parties and some others, and received substantive written input from them as well. As a result, the process has evolved into an entirely non-transparent undertaking in which the Commission has been able to choreograph the development of the record by tapping certain parties to comment on particular issues. This approach, of course, results in a dramatically uneven playing field, with the Commission taking such a notably deliberate pace to adopt an “emergency” rule that select industry participants have been able to propose additional provisions that may find their way into the order without any meaningful notice-and-comment whatsoever.⁷ The Commission should decline to engage in backroom rulemaking of this kind and, as the APA requires, it should instead provide public notice of the rules it is considering and then develop a complete record by allowing all interested parties an opportunity to comment fully.

Sincerely,



John T. Nakahata
Christopher J. Wright
Charles Breckinridge
*Counsel to Sorenson Communications, Inc. and
CaptionCall, LLC*

⁷ See, e.g., Letter from David O’Connor, Counsel for Hamilton Relay, Inc., to Marlene H. Dortch, CG Docket No. 03-123 (Jan. 10, 2013) (proposing a bifurcated system depending on whether the end user pays for the IP CTS device); Letter from Michael Fingerhut, Counsel for Sprint Nextel, to Marlene H. Dortch, CG Docket No. 03-123 (Jan. 14, 2013) (supporting Hamilton’s proposal).