

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

In the Matter of	)	
	)	
Misuse of Internet Protocol (IP) Captioned	)	CG Docket No. 13-24
Telephone Service	)	
	)	
Telecommunications Relay Services and	)	CG Docket No. 03-123
Speech-to-Speech Services for	)	
Individuals with Hearing and Speech	)	
Disabilities	)	

To: The Commission

***COMMENTS ON NOTICE OF PROPOSED RULEMAKING***

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## **Summary**

Miracom USA, Inc. supports the Commission's interim actions to address abuse of the Internet Protocol Captioned Relay Service ("IPCTS") and urges that they be made permanent as well as strengthened. The Commission more than eight years ago prohibited financial incentives to register for or use relay. Fees for referring customers to an IPCTS provider are plainly prohibited by prior Commission rulings. Miracom urges prompt enforcement action against any provider engaging in such marketing programs. Likewise, because IPCTS equipment is capable of being used by persons without significant hearing loss, Miracom agrees with the Commission that IPCTS equipment must be configured to default to "captions off." Furthermore, Miracom supports both a requirement to register to use IPCTS and a requirement that users submit a certification from a hearing professional to use the service. Finally, Miracom supports a labeling requirement for IPCTS equipment so that hearing persons would be on notice that captioning is allowable only for persons with hearing loss needing to use the service.

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To: The Commission

***COMMENTS ON NOTICE OF PROPOSED RULEMAKING***

Miracom USA, Inc.,<sup>1</sup> by counsel and pursuant to FCC Rule Section 1.415 submits its comments on the Commission’s January 26, 2013, *Order and Notice of Proposed Rulemaking*, FCC 13-13, and shows the following.

**I. Background.**

In the *Order and Notice of Proposed Rulemaking* (also referred to as the “*Order*” or “*NPRM*”) the Commission took several interim steps to address certain abusive practices related to the provision and marketing of Internet Protocol Captioned Telephone Service (“IPCTS”) that threatened to exhaust the Interstate Telecommunications Relay Service Fund (“TRS Fund”).

Specifically, the *Order* temporarily (1) prohibited all referral fees for rewards programs and any other form of direct or indirect inducements for consumers to subscribe to, use, or encourage subscription or use of, IPCTS; (2) required each IPCTS provider (i) to register each

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<sup>1</sup> Miracom is an applicant for certification to provide Internet Protocol Captioned Telephone Service, having filed its application in November of 2011. As such, it has a vital interest in the rules governing IPCTS and in protecting the service from abuse.

new IPCTS user, (ii) to obtain from each new user a self-certification that the user has a hearing loss that necessitates IPCTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users, and (iii) where the consumer accepts IPCTS equipment at a price below \$75 from any source other than a governmental program, to also obtain from the user certification of hearing loss from an independent, third party professional; and (3) requiring IPCTS providers to ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call, so that the consumer must take an affirmative step to turn captions on each time the consumer wishes to use IPCTS. *Order* at 1-2. In addition, the *Order* clarified that the TRS Fund administrator is not required to pay any request for compensation until it has been established as compensable.<sup>2</sup> *Id.* at 2.

The *NPRM* seeks comment on whether to make the interim rules permanent. In addition, the *NPRM* seeks comment on several other issues. They are: (1) the likely reasons IPCTS has been experiencing unprecedented and unusually rapid growth; (2) whether to prohibit all provider programs that give away or loan equipment to potential or existing IPCTS users at no cost or below some specified cost level; (3) whether to require each IPCTS provider, as a condition of continuing to offer service to existing users who have not yet registered for service,

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<sup>2</sup> The Commission stated that its interim rules would be effect in three stages. First, the prohibition on referrals for rewards became effective upon publication in the Federal Register. Second, the rules requiring a default setting of captions off at the beginning of each call will become effective 30 days after publication in the Federal Register. Third, the rules on registration and certification will become effective upon publication in the Federal Register of a notice announcing the approval of such requirements by the Office of Management and Budget under the Paperwork Reduction Act of 1995. The *Order* provided that these interim rules will sunset on the earlier of (1) 180 days after the effective date of the interim rules on registration and certification or (2) the effective date of final rules on these issues. *Id.* at 2.

(a) to register each such user with the provider and (b) as part of the registration process, to obtain from each user certification that the user has a hearing loss that necessitates IPCTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users; and (4) whether to adopt any requirements for IPCTS equipment to have labels informing consumers that IPCTS may be used only by persons with hearing disabilities.

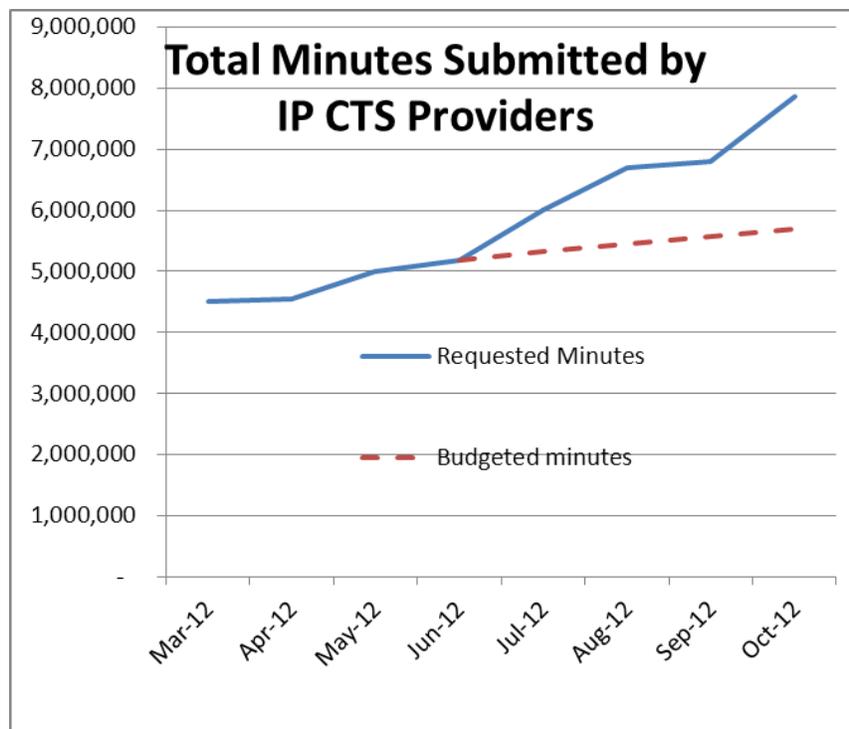
*See Id.* at 2.

As we show below, the unethical conduct of one provider has necessitated the FCC to adopt these interim measures to protect the TRS service and the deaf and hard of hearing persons TRS serves. This conduct already runs afoul of Commission interpretations of its rules and merits immediate investigation and sanction in an enforcement proceeding. In light of this abuse of the service, it is incumbent on the Commission to adopt strong measures to safeguard the TRS fund and the relay service. Thus, the Commission should make the interim rules permanent and strengthen them to ensure that persons actually needing IPCTS have access to the service and that providers not market the service to persons who do not need the service to communicate over the telephone system in a functionally equivalent manner.

Captioned telephone service allows a person with substantial hearing loss, but who is able to speak intelligibly, to use the telephone service in a manner functionally equivalent to hearing persons by providing users with visual captions of the other party's communication. However, captioned telephone service may be abused if it is marketed to persons with no substantial hearing loss. Unlike services such as VRS, which requires knowledge of sign language to communicate, captioned phones provide both sound and captions. Thus, a person without substantial hearing loss can use a captioned telephone with no loss of utility. This fact requires the FCC to adopt rules to prevent the use of captioned telephone service by persons not needing

the service. Likewise, Commission action is necessary to prohibit providers from offering captioned telephone service to such persons and thereby endangering the viability of the TRS Fund, which pays for IPCTS.

The *NPRM* reports that IPCTS has experienced unusually rapid growth, increasing by an average of 11 percent per month from June to October 2012.<sup>3</sup> In October 2012, reported minutes exceeded the minutes budgeted for IPCTS by the Fund Administrator by 38 percent, and as a consequence, the total requested payout exceeded the budgeted amount by some \$4 million.<sup>4</sup> The *NPRM* provides a graph plotting the increase in IPCTS minutes from March to October of 2012, reprinted below.<sup>5</sup>



<sup>3</sup> Compiled from TRS service provider documentation supporting monthly requests for reimbursement from the TRS Fund. *NPRM* at 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 5.

The NPRM states that the Commission has “reason to believe that this growth is being caused by the offering of incentives for referrals to use this service, as well as usage of this service by people without a hearing loss that necessitates the use of IP CTS to communicate in a functionally equivalent manner, and that, if unchecked, this growth threatens in the very near term to overwhelm the Fund.”<sup>6</sup> Because all interstate TRS is paid from the Fund, the *NPRM* states that “all forms of TRS in jeopardy and threatens to deprive people who are deaf or hard of hearing of the benefits of the program.”<sup>7</sup>

## **II. Reasons for unusual growth in the IPCTS usage.**

Miracom believes the *NPRM* is on point. Four inter-related factors are responsible for the unusual growth of IPCTS minutes. First is the offering of financial referral incentives by one IPCTS provider. Those referral fees themselves are of questionable legality in light of previous FCC interpretations of its rules.<sup>8</sup> They serve to encourage the marketing of IPCTS service to persons not needing the service so that the referrer or a third party may receive the referral fee. Second is the practice of that very same provider to install at no charge captioned telephones set to default to “captions on,” and which phones are, to say the least, not easily defaulted to “captions off.” This appears to be an intentional scheme to ensure that no matter who the user may be, virtually all calls from that telephone will result in billable captioned minutes. Third is

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Telecommunications Relay Services*, 20 FCC Rcd 1466, 1469 (2005) (“2005 Financial Incentives Declaratory Ruling”). See also *Federal Communications Commission Clarifies that Certain Telecommunications Relay Services (TRS) Marketing and Call Handling Practices are Improper and Reminds that Video Relay Service (VRS) May Not be Used as a Video Remote Interpreting Service*, 20 FCC Rcd 1471 (CGB 2005).

the lack of any meaningful screening of prospective users to ensure that they actually need to use captioning to communicate in a functionally equivalent manner to hearing persons. Current rules merely require that the user self-certify. Although such a minimal requirement may work well in a service such as VRS, which requires the user to know sign language, we suggest it is too lax a standard for a service such as captioned telephone service. After all, virtually everyone over the age of 21 suffers some degree of hearing loss. IPCTS is designed for persons who have a substantial degree of hearing loss necessitating captioning use to use the telephone system. Fourth is the lack of any notice on a captioned telephone that captioning is only to be used by persons with a hearing loss necessitating captioning. In the absence of such a notice, persons using a captioned telephone may be unaware that the service is limited to persons actually needing the service.

### **III. Financial Incentives have been prohibited for eight years.**

In light of the compelling need to protect the relay service and the TRS Fund, the Commission's interim actions are fully justified; and in Miracom's view, additional action is warranted.

It should not be a surprise to any relay provider that financial incentives to register or use a TRS service are inappropriate. The Commission made this clear some eight years ago. In the *2005 Financial Incentives Declaratory Ruling*, the Bureau held that any program that offers any kind of financial incentive or reward for a consumer to place a TRS call violates Section 225 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 225.

Despite the 2005 pronouncement, the Commission was forced to reiterate the ban on financial incentives in November of 2007. There the Commission said:

Notwithstanding the *2005 Financial Incentives Declaratory Ruling* and the *2005 TRS Marketing Practices PN*, we continue to discover that TRS providers – particularly VRS and IP Relay providers – offer financial and other incentives for consumers to use their service to make relay calls.... Such incentives include ... offering financial incentives or rewards to register with the provider, add the provider to the consumer’s speed dial list, or to become a provider’s “VIP” customer.

...

We emphasize that a financial incentive program is not permissible even in circumstances where the benefit goes to a third party, rather than the consumer making the call, or the program is tied to the consumer giving the provider feedback about the quality of the call. Even when the benefit goes to a third party, the program has the intent and the effect of rewarding consumers for making relay calls, as well as giving consumers an incentive to make relay calls that they might not otherwise make.

...

In sum, because the obligation placed on TRS providers is to be available to handle calls consumers choose to make, when they choose to make them, *i.e.*, to be the “dial tone” for a consumer that uses relay to call to a voice telephone user, and because consumers do not pay for this service but rather providers are compensated pursuant to Title IV of the ADA, providers may not offer relay users financial and similar incentives, directly or indirectly, to use their service. ... Providers offering such programs or otherwise taking action that has the effect of providing consumers incentives to make relay calls, or misusing customer information, will be ineligible for compensation from the Fund.

*Telecommunications Relay Service*, 22 FCC Rcd 20140, 20175-76 (2007).

In a footnote, the Commission stated that:

Section 225 defines TRS as ‘telephone transmission services’ provided to an individual who has a hearing or speech disability ‘in a manner that is functionally equivalent’ to those services offered to persons without such disabilities. 47 U.S.C. § 225(a)(3). Because we have determined that financial incentive programs violate the functional equivalency requirement, providers engaging in these programs are no longer providing TRS within the meaning of the statute. Therefore, because it would be technically impossible to separate a providers’ legitimate relay calls from those made merely as the result of an impermissible incentive, we conclude that providers offering such programs will be ineligible for any compensation from the Fund.

22 FCC Rcd at 20176 n. 246.

In Miracom's view, providers have been on full notice that financial incentives to register for TRS are prohibited. Any provider that has disregarded this prohibition should at a minimum be denied any payment requests covering such periods when those financial incentives were being offered. Moreover, in Miracom's view, the willful and repeated offering of prohibited financial incentives constitutes grounds for revocation of certification to provide TRS services.

Thus, while Miracom fully supports the Commission's reiteration of its prohibition of financial incentives, this is now the third time the Commission has done so without having taken any action against violators. If the Commission's rules are to be respected, it has to back up those rules with decisive enforcement. In Miracom's view, with respect to the issue of financial incentives, that has not happened.

#### **IV. The Commission should require professional certification of hearing loss.**

On an interim basis, the *Order* imposed upon IPCTS providers a requirement to register each new IP CTS user and to obtain from each new user a self-certification that the user has a hearing loss that necessitates using IPCTS to communicate over the telephone system. In addition, where the consumer accepts IPCTS equipment at a price below \$75 from any source other than a governmental program, the Commission is requiring the new user to provide certification of hearing loss from an independent, third party professional of the need to use IPCTS. *Order* at 14-18.

As far as it goes, Miracom supports the requirement to register and the requirement of certification of hearing loss as a condition to use of IPCTS. However, because hearing persons as well as persons suffering from substantial hearing loss can use a captioned telephone, Miracom suggests a stronger certification requirement is necessary. Thus, we support making

the interim requirement permanent and requiring all IPCTS users to provide professional certification of hearing loss.

We do not think the interim threshold the Commission adopted, requiring a professional certification only if the consumer accepts a phone from a non-governmental source for less than a \$75 payment, is sufficient over the long term. For example, Miracom would not provide equipment to the consumer, but proposes to provide a free Smartphone captioning application. We understand other providers provide such applications. Moreover, we foresee other application based IPCTS modalities, such as with PCs or tablets, which would essentially allow any person to use the service if not policed with a professional certification requirement.

In Miracom's pending certification application, it proposed to require all users to provide certification of hearing loss from a hearing professional of at least greater than 40 db in the good ear, or having had cochlear implants as a condition of using its service. Miracom used this standard based on consultation with Dr. Ingrid MacBride of Arizona State University. Miracom submitted to the Commission a declaration from Dr. MacBride providing support for that standard. In her declaration, she makes clear it is the ability to hear or understand speech unaided by visual cues that is the key issue. She suggests that anyone suffering such a degree of hearing loss is likely to also have a degree of speech discrimination deficit that would make using the telephone without visual cues problematic. In Miracom's view the exact standard the Commission adopts is not crucial, but that any standard based on hearing loss should not exceed the 40 db in the good ear criteria, the definition of moderate hearing loss. We do believe that hearing professionals being asked to provide a certification should have some reasonably definite standard on which to base their certification. Dr. McBride's suggested standard is certainly reasonable.

We fully understand that the certification requirement imposes costs in time and fees on consumers who legitimately need the service. However, we think those costs are relatively minor compared with the threat to the TRS Fund and the relay program from an exceedingly lax screening standard.

In terms of the interim requirement only applying to new users of the service, that is closing the barn door after the horse has escaped. It is reasonable to believe that the unusual growth in IPCTS has resulted from at least one provider's efforts to place its captioned phones in as many homes and businesses as possible without serious regard for whether users actually needed the service. Besides the obvious enforcement investigation that this should engender, it is incumbent on the Commission to take remedial action to ensure that service to those persons actually needing the service is protected. Accordingly, the Commission needs to adopt a requirement that existing users of the service submit documentation of hearing loss to their providers, in the form of a professional certification, as stated above. Consumers should have at least 90 days after final rules are published in the Federal Register to provide that documentation. In the absence of such documentation, additional service to those consumers should be denied.<sup>9</sup>

Providers should be required to report to the Commission within 120 days after final rules are published in the Federal Register on the percentage of users providing evidence of hearing loss. Such report should include a listing of the categories of evidence provided. To the extent consumers fail to provide such evidence and providers cannot otherwise demonstrate that these users were qualified to use IPCTS, 75 percent of calls captioned for those consumers should be denied compensation and providers should be required to make applicable refunds to the TRS

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<sup>9</sup> Provider collection of that documentation should be subject to random audit to ensure compliance.

Fund.<sup>10</sup> Requiring a refund in this circumstance is not unjust. Providers have had an obligation to ensure that users of TRS service are qualified to do so. If TRS providers have failed to fulfill their obligation to ensure that only qualified persons used their service, they have no justifiable complaint with compensation being denied for calls made by such persons.

**V. IPCTS equipment and applications should be required to default to “captions off.”**

In Miracom’s view, a substantial cause of the explosion in IPCTS minutes has been the practice of at least one provider to distribute phones only usable with its service defaulted to “captions on.” Moreover, it is Miracom’s understanding that defaulting this provider’s phones to “captions off” is not easily accomplished. Miracom thus supports the Commission’s decision to require IPCTS phones to default to captions off.<sup>11</sup> We note that the *NPRM* addresses Purple’s proposal to allow consumers to enable a default of “captions on” if the consumer provides a heightened certification under penalty of perjury, to the effect that: (a) they understand that the captioning service is provided free of charge by a live CA dedicated to each of their captioned calls, and reimbursed by the TRS Fund, (b) their device is not accessed by or easily accessible to ineligible users, and (c) they will not permit the use of captions on their device by any ineligible users. We would oppose this provision in terms of a residential setting, but would not object to it to the extent it would be applicable to a business setting or a mobile setting. Both of these latter settings are less likely to see ineligible persons using the captioned telephone than in a residential setting.

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<sup>10</sup> We suggest the 75 percent figure instead of 100 percent of calls recognizing that a certain percentage of consumers who rightly qualify to use IPCTS service might decline to provide documentation or might decide to switch to another provider. It would be unjust to penalize a provider by requiring a full refund to the TRS Fund in those circumstances.

<sup>11</sup> Miracom’s certification application notes that its captioning application defaults to “captions off.”

**VI. The Commission should prohibit free distribution of captioned phones usable only on one provider's service.**

As we have seen in the case of video relay service, the distribution of free captioned phones by providers is problematic, especially where those phones are only practicably usable on the distributing providers service. *See generally Telecommunications Relay 21 FCC Rcd 5442 (2006)*. This practice has contributed to a host of marketing and competitive abuses which are injurious to consumers' interest in a competitive marketplace and the Commission's interest in ensuring the absence of waste, fraud and abuse in the TRS program. The Commission is currently looking at this issue with respect to VRS where it has been a practice for some 10 years and where significant market distortions have resulted. *See generally CG Docket 10-51*. To avoid similar market distortions arising with IPCTS, the Commission should prohibit the practice of provider distribution of free or subsidized cost equipment unless such phones are capable of being used to place or receive calls through other IPCTS providers without loss of features. Moreover, as the *NPRM* notes (at 23), equipment giveaways may encourage persons not needing to use IPCTS in order to communicate in a functionally equivalent manner to hearing persons over the telephone network to nevertheless use the service. As a consequence, the cost of TRS to the public is increased and consumers actually needing the service may not be able to use it because of congestion or exhaustion of the TRS Fund. For these reasons, Miracom urges the Commission to halt provider giveaways of IPCTS phones.

**VII. The Commission should require a notice on all IPCTS equipment distributed by providers advising that IPCTS is intended only for persons with hearing loss.**

The *NPRM* (at 29) seek comment on whether to further prevent casual or inadvertent use of IPCTS, each piece of new IPCTS equipment should have a label on its face in a conspicuous location specifying that FCC regulations require that captions may be used only by people with

hearing loss who require captions to fully understand telephone conversations. The *NPRM* further seeks comment on whether to require CTS providers to send consumers labels for equipment that is already in the hands of the public. *Id.* Miracom supports these requirements. The inconvenience and cost to providers and consumers is low and the return in turn of protection to the TRS Fund should be substantial. Miracom questions, however, whether requiring that same message to be provided on the caption screen when the equipment is turned on and in “captions-off” mode or immediately after captions are enabled is necessary or practical. We are concerned that with respect to mobile phones using a captioning application that such a message may interfere with an incoming call or may delay an outgoing call, which could be particularly problematic if the outgoing call is a 911 call. For these reasons we urge the Commission not to adopt such a requirement.

#### **VIII. Conclusion.**

Captioned telephone service is vital to the many members of the public who have suffered hearing loss, either from aging, aural trauma, or disease, but who can use their voices to communicate over the telephone. Unfortunately, unethical and abusive practices of at least one provider threaten this valuable service. The Commission is to be commended for addressing this issue. We urge the Commission to resolve this proceeding expeditiously and aggressively in order to protect this service and the consumers who need it.

