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February 26, 2013

REDACTED FOR PUBLIC INSPECTION

VIA HAND-FILING AND ECFS
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Request for Confidential Treatment Pursuant to 47 C.F.R. §§ 0.457 and 0.459

Dear Ms. Dortch:

Sorenson Communications, Inc. and its wholly owned subsidiary, CaptionCall, LLC (collectively "CaptionCall") file this comment in response to the Commission's January 25, 2013 *Order and Notice of Proposed Rulemaking* addressing the provisioning and marketing of Internet Protocol Captioned Telephone Service. CaptionCall is filing a confidential and publicly available version of its comments.

CaptionCall requests pursuant to Sections 0.457 and 0.459 of the Commission's rules, 47 C.F.R. §§ 0.457, 0.459, that the Commission withhold from any future public inspection and accord confidential treatment to the sensitive business information it is providing—all of which has been redacted from the publically available version of the CaptionCall's comments. The redacted data constitutes sensitive commercial information that falls within Exemption 4 of the Freedom of Information Act ("FOIA"). Exemption 4 of FOIA provides that the public disclosure requirement of the statute "does not apply to matters that are ... (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Because CaptionCall is providing commercial information "of a kind that would not customarily be released to the public" in response to a request from FCC staff, this information is "confidential" under Exemption 4 of FOIA. *See Critical Mass Energy Project* v. *NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

In support of this request and pursuant to Section 0.459(b) of the Commission's rules, CaptionCall hereby states as follows:

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1. Identification of the Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))

CaptionCall seeks confidential treatment of detailed information regarding customer acquisition, customer information, costs, and strategic decisions—all of which has been redacted from the publically available version of CaptionCall's comments.

2. Description of the Circumstances Giving Rise to the Submission (Section 0.459(b)(2))

CaptionCall is submitting this information pursuant to the Commission's request for comments in docket CG 03-123.

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))

The information described above is protected from disclosure because it constitutes highly sensitive information about CaptionCall's customer acquisition, customer information, costs, and strategic decisions. This constitutes sensitive commercial information "which would customarily be guarded from competitors." 47 C.F.R. § 0.457.

4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))

The IP Captioned Telephone Service ("IP CTS") market is highly competitive throughout the United States.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))

Disclosure of this information would provide CaptionCall's competitors with sensitive insights related to CaptionCall's operations, costs, and strategic decisions—all of which would work to CaptionCall's severe competitive disadvantage.

6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6))

CaptionCall does not make this information publicly available.

7. Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))

CaptionCall does not make this information publicly available.

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Please contact me if you have any questions.

Sincerely,

John T. Nakahata

Counsel to CaptionCall.

Attachments

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

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

COMMENTS OF SORENSON COMMUNICATIONS, INC. AND CAPTIONCALL, LLC

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February 26, 2013

SUMMARY

IP CTS allows hard-of-hearing consumers to use the telephone while viewing captions of what the other party is saying. This service not only transforms the lives of hard-of-hearing individuals, but also advances the Americans with Disabilities Act ("ADA")-mandated goals of making functionally equivalent communications services available, in the most efficient manner, using advanced technologies. Waste, fraud, and abuse would obviously undermine this vital technology, and CaptionCall applauds the Commission's effort to ensure the integrity of compensation paid to IP CTS providers. The Commission has proposed a number of sensible safeguards that are consistent with the types of obligations placed on users of other TRS services, such as self-certification that the subscriber has hearing loss that necessitates use of the service and providing labels or other reminders that captioning is only for use by those with hearing loss that need it. CaptionCall supports these proposals without reservation.

The Commission, however, has also proposed a number of rules that risk undermining the ADA's mandates of functional equivalence, availability, efficiency, and advancement of technology. There, the Commission departs from sensible safeguards and, instead, seeks to address a problem that does not exist.

Indeed, a number of the Commission's proposals rest on an unsupported assumption that recent IP CTS growth has resulted from an increase in the amount of ineligible usage. The reality is just the opposite. IP CTS is a relatively new form of telecommunications relay service ("TRS"), which did not receive FCC approval until 2007. Initially, there were few IP CTS providers, and outreach practices were in their infancy, leaving the hard-of-hearing population largely unaware of, and underserved by, a potentially life-changing technology. In addition, the hard-of-hearing population, which IP CTS is intended to serve, is much larger than the deaf

population, which VRS is intended to serve. Given that new technologies generally follow an "s"–shaped adoption curve, it is not surprising that IP CTS subscription accelerated as that curve would predict, just as it will not be surprising when it levels off. For a nascent technology to rapidly increase subscribership is not a badge of fraud, but a totally expected phase in the adoption of a useful and successful accessibility accommodation.

CaptionCall has continually honed its outreach, distribution, and customer-service models to more effectively reach and serve hard-of-hearing consumers. Over time, CaptionCall has addressed a number of barriers that have prevented consumers from learning about and using IP CTS. At the same time, CaptionCall has diligently ensured that only eligible consumers use the service. Indeed, even before the Commission adopted a certification requirement for IP CTS, all potential CaptionCall customers needed to certify that they were hard of hearing, and the service's end-user agreement requires that users must have a "medically recognized hearing disability" necessitating the use of captioning service for telephone calls. In short, CaptionCall's practices have made a functionally equivalent technology available to hard-of-hearing consumers in a highly efficient manner, using state-of-the-art technology, just as the ADA requires.

Yet the Commission, despite no record evidence of any actual misuse, has taken steps to curb the expansion of this life-changing technology based on wholly imagined harms. Instead of safeguarding the integrity of the TRS Fund, the Commission's proposed rules will impede the advancement of the ADA's mandates, in a number of ways.

First, the Commission has proposed rules that would eliminate the most efficient outreach methods available to providers. In CaptionCall's experience, payment of a modest referral fee to audiologists and hearing-instrument specialists is significantly less expensive than any other form of outreach. In addition, audiologists and hearing-instrument specialists are most

likely to have contact with and the trust of the consumers most likely to need IP CTS. By banning even modest referral fees, the Commission would force providers to spend more on outreach and jeopardize consumers' ability to learn about the service, in violation of the ADA's availability and efficiency mandates—all without any evidence that referral fees have led to any misuse.

Moreover, the Commission has promulgated rule language that, though apparently intended to ensure the independence of professionals who provide third-party certifications, could be read to prohibit virtually every form of outreach, including advertising and ordinary wholesale-distributor relationships. The Commission has asked whether it should proscribe all forms of "direct or indirect inducements … to subscribe to or use or encourage subscription to or use of any IP CTS."[1] Read literally, all forms of outreach, including television advertising, product placement, retail displays, and wholesaler-distributor agreements, could be considered "inducements" to "encourage subscription" to IP CTS, but these transactions implicate no fraud and abuse concerns, especially when customers must pay a fee for equipment or have an independent professional certify their need for IP CTS. The Commission cannot possibly have intended to ban *all* forms of outreach, which would flatly violate the ADA. Thus, even if it adopts a ban on referral fees, it should clarify the narrow scope of the prohibition.

Second, the Commission has proposed equipment-distribution rules that are unnecessary and inconsistent with the ADA. In the past, CaptionCall has distributed its captioning telephones free of charge, consistent with the ADA's availability mandate and the Twenty-First Century Communications and Video Accessibility Act's ("CVAA") goal of making advanced services available to persons with disabilities without having to incur non-*de minimis* costs. The

[1] *Order and NPRM*, Appendix D, Proposed Amendment to Rule §64.604(c)(8).

Commission, however, without citing any evidence of misuse, has proposed prohibiting programs that distribute captioning telephones at no cost or at *de minimis* cost. The Commission does not explain how this prohibition promotes functional equivalence, as wireless providers routinely subsidize equipment. Moreover, this would move in exactly the opposite direction from the CVAA, which requires advanced communications service providers and manufacturers, if they do not build in accessibility, to permit the use of peripherals available at or below a nominal cost when achievable. Accordingly, a ban on no-cost or *de minimis*-cost equipment would violate statutory mandates and make it more difficult for consumers to benefit from IP CTS.

Third, the Commission has proposed third-party certification requirements that would impose costly and unnecessary burdens on potential IP CTS users. As discussed above, CaptionCall fully supports efforts to limit IP CTS use to eligible consumers, and CaptionCall accordingly already requires its customers to self-certify that they are hard-of-hearing. CaptionCall's success at ensuring only eligible consumers subscribe demonstrates that users themselves are the best judge of whether they can hear on the phone, making self-certification highly effective. Therefore, CaptionCall supports enhancements to the process, such as requiring customers to make certifications subject to penalty of perjury. On the other hand, third-party certification requirements would place a significant burden on the demographic most likely to use IP CTS. A substantial number of elderly persons will not have been to an audiologist in years, and it will be no easy task for them to find an audiologist, schedule the appointment, get to the appointment, pay for the appointment, and get the results to CaptionCall. Of course, the Commission has proposed waiving this requirement if the user pays $75 for the captioning telephone, but this fee could create a significant impediment to elderly persons' ability to acquire

the service. Because third-party certifications would provide little to no additional assurance of exclusively eligible usage, the burdens far outweigh the benefits. If the Commission nevertheless adopts a third-party certification requirement, it should not require professionals to certify under penalty of perjury, as doing so will likely deter them from certifying even eligible users. Nor should the Commission make the requirement retroactive, as current customers have come to depend on this service. Forcing them to bear the burden of obtaining a third-party certification would be decidedly against the public interest and in violation of the ADA.

Fourth, the Commission should not adopt any quantitative thresholds for IP CTS eligibility. This requirement would also require an audiologist visit, subject to the significant and wholly unjustified burdens described above, in likely violation of the Paperwork Reduction Act ("PRA")—especially considering that no equivalent requirement exists for IP Relay, which, unlike IP CTS, actually has been beset by instances of fraud. More significantly, though, numerical thresholds would not be effective in determining IP CTS eligibility. The hearing process is incredibly complex, and there are many factors beyond the simple "decibels of gain" score that impact a person's ability to hear on the phone. Even individuals who appear to be normal on the decibel scale may yet be unable to use an ordinary phone because of poor speech discrimination ability. As a result, even the expert report on which the Commission has relied has acknowledged that any objective standard must be supplemented with an alternative subjective standard based on the individual's ability to communicate in a functionally equivalent manner—and the most effective subjective standard is an individual's certification that he or she is hard of hearing and requires IP CTS to engage in functionally equivalent communications.

Moreover, CaptionCall's customer data confirms the lack of need for a numerical threshold, as virtually all of its subscribers have either at least one hearing aid or a cochlear

implant, neither of which is prescribed for mild hearing loss. Notably, though, hearing aids do not obviate the need for IP CTS. Rather, hearing aids can under—or over—amplify certain signals, and many hearing aids lack tele-coils, which assist in the usage of telephones by hearing-aid users. Thus, even users with hearing aids are still likely to require IP CTS to engage in functionally equivalent communications.

If the FCC insists on a numerical threshold, despite the clear shortcomings of that approach, CaptionCall supports the expert proposal on the record to set the threshold at 40 dB of hearing loss, and the users who do not meet that threshold should be able to obtain an audiologist's endorsement. The Commission should not, however, require any existing IP CTS user to certify his or her hearing-loss score.

Fifth, the Commission should lift the interim rule requiring that captions be set to "off" as a default, or at least permit users to configure them to "default on." Until recently, CaptionCall provided a button that toggled captions on and off. In its experience, however, CaptionCall found that customers frequently turned captions off by mistake, then complained that the service was not working properly. In response, CaptionCall modified is firmware so that, for each call, captions would be on until turned off. As a result, hard-of-hearing users, like fully hearing persons, were able to use the service without engaging in any additional configuration. As CaptionCall has demonstrated, this change did not lead to any ineligible usage from hearing persons inadvertently using captions—in fact, minutes of use increased more *slowly* in households where both hard-of-hearing and hearing persons were present. Though the Commission dismissed this evidence, a central fact is apparent: default-on captions did not cause ineligible usage to increase. Nevertheless, if the Commission continues to oppose default-on captions, it should allow providers to ship the phones with default-off captions, but allow the

user to switch them to default-on. This would allow more functionally equivalent communications, as users would have the ability to configure their equipment so that they don't have to physically turn on captioning every time they use the telephone.

In addition, CaptionCall supports using a warning notification stating who may use captioning, instead of mandatory default-off captions. If mandatory default-off becomes the rule, then there will be no need for warning, as users must affirmatively turn captions on. Providers should have the option of how to give the notification, whether it is on a sticker or displayed on the screen at the beginning of each call, and providers should be able to use language that adapts to available space on the phone.

Sixth, the Commission should clarify that the ban on compensation from the IP CTS fund applies only to minutes resulting from proscribed outreach. Currently, the Commission's proposed rules could be read to prohibit *all* IP CTS compensation for a *single* violation of the proposed outreach prohibitions. As discussed above, the phrase "direct and indirect inducements" is vague, enhancing the risk of inadvertent rule violations, even with the vigorous efforts CaptionCall will make to comply with whatever rules the Commission adopts. To avoid due process issues, the Commission should make clear that compensation will be withheld only for minutes tainted by prohibited outreach efforts.

CaptionCall supports the Commission's fundamental goal of combating waste, fraud, and abuse in the IP CTS program. CaptionCall, however, urges the Commission to tailor its proposed rules more narrowly to encourage vigorous outreach and full functional equivalence for eligible users and potential users of IP CTS.

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

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

COMMENTS OF SORENSON COMMUNICATIONS, INC. AND CAPTIONCALL, LLC

Sorenson Communications, Inc. and its wholly owned subsidiary, CaptionCall, LLC (collectively "CaptionCall") submit these comments in response to the Commission's recent *Order and Notice of Proposed Rulemaking* addressing the provisioning and marketing of Internet Protocol Captioned Telephone Service ("IP CTS").[2]

I. Introduction

CaptionCall shares the Commission's fundamental goal of combating waste, fraud, and abuse in the IP CTS program (and in all TRS programs), and it is committed to a culture of regulatory compliance. Moreover, CaptionCall believes that a number of the interim rules adopted by the Commission in the *Order and NPRM* will help to combat waste, fraud, and abuse and endorses those rules without reservation. At the same time, however, CaptionCall remains committed to providing a functionally equivalent captioning service that meets the needs of individuals who can speak but have difficulty hearing over the telephone. CaptionCall is

[2] *See Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order and Notice of Proposed Rulemaking, FCC 13-13, CG Docket Nos. 13-24 & 03-123 (rel. Jan. 25, 2013) ("*Order and NPRM*").

concerned that some of the rules that the Commission has adopted will interfere with the provision of such a functionally equivalent IP CTS service, and will thereby impede the Commission's implementation of the ADA.

As the Commission is aware, the ADA contains several TRS-related mandates. First, the Commission must "ensure" that deaf, hard-of-hearing, and deaf-blind individuals have the ability to utilize telecommunications services "in a manner that is functionally equivalent to the ability of a hearing individual …."[3] Second, the Commission must ensure that relay services "are available, to the extent possible … to hearing-impaired … individuals in the United States."[4] Third, the Commission must ensure that relay services "are available … in the most efficient manner …."[5] Fourth, and finally, the Commission must ensure that its rules "do not discourage or impair the development of improved technology."[6] The Commission has the authority to regulate eligibility requirements and marketing practices, but it must do so against this statutory backdrop.

Aspects of the *Order and NPRM* are inconsistent with all of these statutory directives. Most significantly, the ADA instructs that the Commission *cannot* curtail the availability of IP CTS simply to avoid increased legitimate costs to the TRS Fund, and that it *must* ensure that IP CTS providers are able to conduct vigorous outreach. But the *Order and NPRM*'s interim and proposed rules addressing marketing and outreach appear overbroad, threatening to undermine IP CTS providers' ability to extend the service "in the most efficient manner" to the millions of eligible, hard-of-hearing Americans who could benefit from the service but remain unserved.

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[3] 47 U.S.C. §§ 225(a)(3), (b)(1).

[4] *Id*. § 225(b)(1).

[5] *Id*.

[6] *Id*. § 225(d)(2).

Accordingly, the Commission should clarify its rules to narrowly target the specific problems it wishes to address while allowing—and indeed encouraging—vigorous outreach. Similarly, the Commission's proposed rules addressing certification and verification also conflict with the ADA's availability and efficiency mandates. Rather than imposing burdensome and unrealistic third-party certification requirements on the particularly vulnerable demographic that can benefit from IP CTS, CaptionCall urges the Commission to focus on appropriate self-certification requirements—as a practical matter, the particular individual affected by hearing loss is the person best able to determine whether he or she will benefit from potentially life-changing IP CTS. Finally, the *Order and NPRM*'s proposed equipment mandates are also inconsistent with the ADA. The statute does not say anything about extending TRS to eligible users *only* if they want it badly enough to pay some arbitrary amount for it. And the Commission's proposed "default off" rule for captioning undercuts the functional equivalence of IP CTS, particularly given that the relevant demographic is far less "tech savvy" than the general population.

In short, the *Order and NPRM* threatens to deny hard-of-hearing individuals access to services and technologies necessary to achieve functional equivalence, impede efforts to educate hard-of-hearing individuals about IP CTS, force providers to utilize grossly inefficient outreach methods, and stunt the development of new technologies.

II. Background on CaptionCall and IP CTS Growth

The Commission defines IP CTS as a service "that permits an individual who can speak but who has difficulty hearing over the telephone to use a telephone and an Internet Protocol-enabled device via the Internet to simultaneously listen to the other party and read captions of what the other party is saying."[7] As the *Order and NPRM* states, an IP CTS "user's phone is

[7] 47 C.F.R. § 64.601(a)(12).

automatically connected to a captioned telephone communications assistant ("CA") at the same time she or he reaches the called party," and the CA provides captions that are "transmitted directly to the user and are displayed … on the display of a captioned telephone device, a computer or a smartphone."[8] Providing accurate captions is not, however, as simple as "re-voic[ing] everything the called party says and us[ing] voice recognition technology to automatically transcribe those words into captions."[9] The FCC's rules properly require IP CTS captions to capture the hearing (*i.e.*, non-IP CTS) end user's speech verbatim, without any paraphrasing or revisions[10]; as a practical matter, this requires highly trained CAs employing a combination of voice-recognition technologies and real-time typed corrections. Notably, CaptionCall's CAs hear only the hearing user's side of the conversation—not the IP CTS subscriber's voice—which helps prevent confusion as to whose voice to caption and also provides a certain measure of confidentiality since the CA does not need to hear both sides of the conversation to do the job.

The *Order and NPRM* emphasizes that, in recent months, the number of IP CTS minutes of use has substantially "exceeded the minutes budgeted for this service by the Fund Administrator" of the TRS Fund.[11] In making this observation, the Commission's underlying assumption appears to be that this growth reflects an increasing number of IP CTS customers who, in fact, do not require the service. That supposition is incorrect and based entirely on

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[8] *Order and NPRM* ¶ 4. While this description is generally true, reality can be a little more complicated. For example, if the IP CTS subscriber has multiple phones in the home, only one of which is captioned, then a call can be started on the non-captioned phone and be midstream before the captioning phone is engaged in the call and captioning begins. The same can be true when calls are received and completed first on a non-captioned phone.

[9] *Id.*

[10] *See* 47 CFR § (a)(2)(ii).

[11] *Id.* ¶ 6.

speculation. As CaptionCall has previously observed, "[i]n the United States, hard-of-hearing individuals outnumber deaf individuals."[12] Indeed, the Hearing Loss Association of America estimates that approximately 17% of all adults and one out of three individuals ages 65 or older suffer from hearing loss.[13] In the past, however, TRS marketing efforts have tended to focus on the deaf community, leaving the hard-of-hearing community largely underserved by potentially life-changing technologies, even though the ADA's requirements expressly extend to them.[14] This has changed in the last few years as IP CTS providers, including CaptionCall, have launched outreach campaigns to inform potential customers about the service. CaptionCall, began working directly with audiologists and hearing-instrument specialists to educate them about the benefits of IP CTS for their patients who have difficulty hearing on the telephone. The hard-of-hearing demographic is generally much older and less "tech savvy" than the general population, and these individuals may not, on their own, consider technological solutions to problems hearing on the phone. And as word about IP CTS service has spread among consumers and specialists, the number of subscriptions among those who need assistance to use the phone fully has increased. It is now a truly life-altering innovation for many Americans, just as the ADA intended.

In expanding the reach of IP CTS, CaptionCall has carefully targeted customers with a strong need for such service. For example, CaptionCall requires all of its customers to certify that they are hard-of-hearing, and the service's end-user agreement requires that users must have

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[12] Letter from Christopher J. Wright, Counsel, Sorenson Communications, Inc. and CaptionCall LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 4, CG Docket No. 03-123. (filed Dec. 19, 2013) ("CaptionCall 12/19/12 Letter").

[13] *See Basic Facts About Hearing Loss*, Hearing Loss Association of America, available at http://hearingloss.org/content/basic-facts-about-hearing-loss (last accessed Feb. 22, 2013).

[14] *See* CaptionCall 12/19/12 Letter at 4.

a "medically recognized hearing disability" necessitating the use of captioning service for telephone calls.[15] As a practical matter, ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** of CaptionCall customers are more than 80 years old, and ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** are over 70. The median age (*i.e.*, the age at which half of the customers are older and half are younger) is ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL *****. Moreover, as CaptionCall has previously informed the Commission,[16] all or nearly all of its customers have a cochlear implant, two hearings aids, or one hearing aid. Of those for whom CaptionCall has data (which is more than 80% of all CaptionCall subscribers), 83% have a cochlear implant or two hearing aids, and 17% have a single hearing aid. (Of course, some consumers who may need two hearing aids have only one, either for reasons of affordability, need, or comfort.) The experience of CaptionCall's installation field staff suggests that the profile is similar for CaptionCall users for whom the company does not yet have data. In short, while the *Order and NPRM* appears to imply that IP CTS customers do not actually need the service, CaptionCall's real-world experiences and demographic data demonstrate precisely the contrary.

The Commission also states that the recent growth in IP CTS minutes reflected in the chart on page five of the *Order and NPRM* is "unprecedented and unusual[]," and "threatens to deprive people who are deaf or hard of hearing of the benefits of the program."[17] Again, the

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[15] *See* CaptionCall End User License Agreement *available at* https://www.captioncall.com/CaptionCall/CCImprove/media/CaptionCallAdditionalResources/EULA.pdf (last accessed Feb. 20, 2013). CaptionCall also requires an applicant to certify to having hearing loss on its application form, separate and apart from acceptance of the End User License Agreement. *See* Attachment 1. This self-certification has been in place since CaptionCall began offering service.

[16] *See* CaptionCall 12/19/12 Letter at 3.

[17] *Order and NPRM* ¶ 6.

opposite is true: the "s" curve of technology adoption is a well-known phenomenon and not unexpected or unusual.[18] In particular, the comparison to the "budgeted" minutes is not illuminating: it simply shows that the slope of RLSA's assumed growth path was not correct. Growth in IP CTS has, in fact, largely paralleled early growth in VRS minutes of use. With respect to VRS, ZVRS's predecessor CSD claims to have been the "first to launch commercial …VRS" in 2000, creating a highly competitive industry by 2002.[19] But early growth in VRS was extremely slow; by the time Sorenson released its innovative VP-100® videophone in 2002, annual usage still languished at 530,000 minutes.[20] Sorenson's new equipment, superior interpreters, and innovative distribution, however, revolutionized VRS and greatly expanded its reach. In 2003, VRS users consumed over 2.8 million minutes of VRS, a year-over-year growth rate of 437%. The following year, 2004, VRS use approximately quadrupled, to 11.1 million minutes, and 2005 saw growth of 144%. Since then, VRS use has slowed and leveled off, with annual growth in minutes of use of only about 2% in 2010.

Similarly, growth in IP CTS usage was slow after its initial approval by the Commission in 2007. As of 2008, there were only 677,658 minutes of use for the year. In 2009, that number increased to 2,413,506 minutes of use for the year, approximately quadrupling, as had VRS minutes during the "S" curve of early growth. In 2010, total IP CTS minutes increased to

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[18] *See, e.g.*, *In the Matter of Intl. Comparison Requirements Pursuant to the Broadband Data Improvement Act*, 26 FCC Rcd. 7378, 7393 ¶ 45 (2011) ("When new and innovative technologies are introduced, they typically are not adopted immediately by all potential consumers. Rather consumers vary in their awareness of any new technologies and when they choose to adopt that technology. As a result, we have generally seen gradual adoption or diffusion of new technologies, which tends to follow an S-shaped adoption curve.")

[19] *See History & Innovation*, CSD, *available at* http://www.c-s-d.org/company/history-innovation (last accessed Feb. 25, 2013).

[20] *See* NECA, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, at Exhibit 3-7, CG Docket Nos. 03-123 and 10-51 (filed April 29, 2011).

10,237,522 million, a growth rate of 324%. For 2012, IP CTS growth approximately doubled.[21] So while there are far *more* hard-of-hearing individuals in the U.S. who would benefit from IP CTS than there are deaf individuals who can benefit from VRS, as is predictable and consistent with well-established "S" curve experiences, IP CTS growth has been slowing, and that growth rate will continue to decline and level off, just as it has for VRS. Accordingly, it is likely that current levels of IP CTS usage reflect early stage adoption by a much larger potential group of users and a historical failure to extend functionally equivalent telecommunications service to underserved hard-of-hearing Americans as directed by the ADA, which is only now being rectified—not the excessive delivery of services suggested by the *Order and NPRM*.

In sum, the growth in IP CTS minutes noted by the *Order and NPRM* is the result of legitimate users making use of the service *as Congress intended under the ADA*, not the result of fraud or misuse. CaptionCall's improvements in outreach activities and the service itself have resulted in a growing base of eligible users who are making increased use of the service as it becomes more functionally equivalent to the telephone experience of a persons without significant hearing loss. And CaptionCall intends to continue to bring improvements in both technology and service to bear on the mandate of the ADA to deliver the most functionally equivalent experience possible to all eligible IP CTS users—a mandate that today remains far from fully effectuated.

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[21] *See* Rolka Loube Saltzer Associates, Interstate TRS Fund Performance Status Report, January 2013, available at http://www.r-l-s-a.com/TRS/reports/2013-01TRSStatus.pdf (last accessed Feb. 26, 2013); Rolka Loube Saltzer Associates, Interstate TRS Fund Performance Status Report, January 2013, available at http://www.r-l-s-a.com/TRS/reports/2012-10TRSStatus.pdf (last accessed Feb. 26, 2013).

III. Discussion

A. The Commission Must Permit—and, Indeed, Encourage—IP CTS Providers to Conduct Outreach to Fulfill the Mandates of the ADA.

The ADA requires the Commission to ensure that IP CTS is made available to the extent possible, and the statute is a "remedial" one that "must be broadly construed to effectuate its purposes."[22] Yet as discussed above, millions of Americans who would benefit from IP CTS currently remain unserved. The Commission may not lawfully permit this state of affairs to continue—again, the FCC is statutorily obligated to ensure that all hard-of-hearing Americans have access to functionally equivalent telecommunications services. It follows that the Commission *cannot* curtail the availability of IP CTS simply to avoid increased costs to the TRS Fund, and *must* ensure that IP CTS providers are able to conduct vigorous outreach.[23]

As CaptionCall has previously explained, its experience has been that providing modest referral incentives—$50 to a hearing-health professional for each qualified installation—is the

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[22] *Disabled in Action of Penn. v. Se. Penn. Transp. Auth.*, 539 F.3d 199, 208-09 (3d Cir. 2008) (internal citations omitted).

[23] *See* CaptionCall 12/19/12 Letter at 6-8. It bears emphasis that Section 225—the statutory provision governing TRS that was added to the Communications Act by the ADA—is fundamentally different from the general universal service provision, 47 U.S.C. § 254. Section 254 contains six principles that conflict in some cases, and another provision, Section 254(b)(7), that authorizes the Commission to adopt additional principles when "necessary and appropriate for the protection of the public interest." As the Commission recently explained to the Tenth Circuit, given the "breadth and variety of the principles listed in section 254(b)," the Commission has broad flexibility to determine the general universal service rules. Federal Respondents' Uncited Response to the Joint Preliminary Brief of the Petitioners, at 9, *In re FCC 11-161*, No. 11-9900 (filed Feb 6, 2013). Section 225 gives the Commission no authority to add principles to advance its determination of the public interest and no principles that conflict to any significant degree. Rather, as explained in CaptionCall's prior submissions, Section 225 commands the Commission to ensure the availability of functionally equivalent communications service for the deaf and hard-of-hearing to the extent possible. The Commission therefore has no authority to deprive hard-of-hearing individuals of their right to captioned telephone service simply because, for example, the Commission does not want to raise the TRS contribution factor.

most efficient means of outreach to hard-of-hearing consumers who require IP CTS.[24] But the *Order and NPRM* adopts an interim rule prohibiting such referral incentives to hearing-health professionals—the Commission speculates that such payments "may be promoting the use of IP CTS by individuals who do not need this service."[25] While CaptionCall continues to believe that the Commission's concerns—for which the *Order and NPRM* presents no evidence at all—are unfounded and its rule is misguided,[26] the critical issue going forward is how the Commission envisions that IP CTS providers *may* conduct outreach to fulfill the availability mandate of the ADA. Neither the *Order and NPRM* nor the text of Proposed Rule § 64.604(c)(8) provides appropriate guidance, but the Commission must do so—consistent with its obligations under the ADA to ensure availability—before any permanent rule is adopted.

1. The Costs of the *Order and NPRM*'s Rule Banning Referral Fees are Substantial.

Whatever permanent rules the Commission may ultimately adopt, it needs to "be aware that paying referral fees [to hearing health professionals] has proven to be a vastly more efficient manner of locating eligible subscribers who would benefit from IP CTS than [any] other form of outreach."[27] Banning referral payments, as the Commission has now done on an interim basis and proposes to do permanently, has two primary costs: 1) the quantifiable and greatly increased

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[24] *See* CaptionCall 12/19/12 Letter at 6-8; Letter from John T. Nakahata, Counsel, Sorenson Communications, Inc. and Caption Call LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 1-2, CG Docket No. 03-123 (filed Jan. 16, 2013) ("CaptionCall 1/16/13 Letter"). Further, analysis of the range of marketing programs shows that outreach through events-based methods is ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** as costly as modest referral programs.

[25] *Order and NPRM*, ¶ 15.

[26] *See* CaptionCall 1/16/13 Letter at 1-2.

[27] CaptionCall 1/16/13 Letter at 1.

outreach costs that providers have to bear; and 2) the less quantifiable cost of depriving people of the IP CTS service they want and need.

With respect to the first point, CaptionCall has already explained that the cost of locating new customers through means other than referral fees is far higher.[28] More specifically, CaptionCall's internal data indicates that locating eligible subscribers in other ways more than doubles the cost per customer acquisition. Traditional marketing, including advertising, direct mail, events, and online marketing, over the past year proved to be ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** as inefficient when compared with referrals. More specifically, advertising was ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** more inefficient, events ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** more inefficient, and direct mail ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** more inefficient than referral fees. In fact, use of more costly mass-marketing tools, such as targeted television advertising, was a staggering ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL ***** more inefficient. The reason for this disparity in customer acquisition costs is simple: CaptionCall's referrals come overwhelmingly from audiologists and other hearing-loss specialists—the very professionals who are most technically qualified to identify those who are eligible for, and therefore would benefit from, IP CTS. These hearing-loss specialists have the training and facilities to accurately identify individuals with hearing loss and to recommend the most effective means of remediation. By working with these professionals to identify individuals who will benefit from IP CTS, CaptionCall has *not* driven *ineligible* use upward—"to the contrary, twenty-two years after the ADA was signed,

[28] *See id.*

CaptionCall has developed an outreach model that efficiently delivers this ADA-mandated service to the very population for which it is intended."[29]

But—turning to the second point—the costs of a ban on referral fees to hearing-loss professionals include more than the literal expenses that result. Banning referral fees paid to audiologists and other hearing-loss specialists will also cause the effectiveness of outreach to decrease, with fewer qualified individuals ever learning about the service. Moreover, making the interim rules permanent without significant clarification would cause the effectiveness of outreach to plummet because, as explained below, they can (erroneously) be read to ban much more than the payment of referral fees. The *Order and NPRM*'s interim and proposed rules thus threaten to undermine the Commission's ability to carry out its responsibilities under the ADA to make IP CTS "available … in the most efficient manner" and "to the extent possible … to hearing-impaired … individuals in the United States."[30]

2. The Commission Must Narrowly Tailor its Rules to Target Specific Harms While Allowing Vigorous Outreach.

The problems discussed above are greatly exacerbated in the *Order and NPRM* by the fact that there is a mismatch between the specific harms imagined by the Commission and the potentially overbroad interpretations of the rules proposed to address them. To begin, however, it bears reemphasis that any harms from referral payments are, at this point, literally "imagined"—the Commission presents *no* evidence at all that any harm arises from, for example, referral fees paid to audiologists or hearing-instrument specialists. Indeed, in order for the kind of harm that the Commission envisions—use of IP CTS by "individuals who do not need the service"—to arise from such referrals, the Commission would have to believe that CaptionCall's

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[29] *Id.*

[30] 47 U.S.C. §§ 225(a)(3), (b)(1).

extremely modest referral payments to these health service providers (on the order of $100 per month on average[31]) are causing audiologists to behave unethically by referring patients who do not require the service. That seems highly implausible.

Putting aside the implausibility of the harms imagined by the Commission, however, the fundamental problem with the *Order and NPRM* is that the rule that it adopts as an interim measure and proposes to make permanent is not properly tailored to address these hypothetical harms. Specifically, the harms envisioned by the Commission would appear to relate to IP CTS providers either paying end users to sign up for IP CTS or paying referral fees to third parties to encourage end users who do not need the service to sign up for IP CTS. According to the FCC, such payments to individuals responsible for *certifying* that a particular customer requires IP CTS might result in new subscribers to IP CTS "whether or not [those subscribers] actually need the service to communicate."[32] But the Commission's proposed rule does not, in its express terms, simply ban direct payments to end users and referral fees paid to hearing-health professionals who may be certifying or recommending IP CTS to a patient; instead, it bars "any form of direct or indirect inducements, financial or otherwise, to subscribe to or use or encourage subscription to or use of IP CTS."[33]

The Commission could not possibly have intended the words "indirect inducements … to … encourage subscription to or use of IP CTS" to have the broadest reach of which they are capable. Read literally, the Commission's proposed rule could potentially bar *any* form of advertisement, since all advertisement involves a "direct or indirect inducement" (*e.g.*, a payment) to some "person or entity" (radio or television station, or to a newspaper, magazine, or

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[31] *See* CaptionCall 12/19/12 Letter at 4.

[32] *Order and NPRM* ¶¶ 13-15.

[33] *Id.*, Appendix E, Proposed Rule § 64.604(c)(8).

website) in order to "encourage subscription to or use of" IP CTS. But, of course, even setting aside the First Amendment implications, such a reading would make no sense—again, as discussed above, the Commission is required by statute to ensure the "availability" of IP CTS "to the extent possible … to hearing-impaired … individuals in the United States."[34] Similarly, read expansively, the anti-inducements rule could also bar an ordinary wholesaler or dealer relationship, in which the manufacturer sold products to a dealer at a wholesale price, which the dealer then resold at a higher retail price, because the retail mark-up "induced" the dealer to sell (*i.e.*, "encourage subscription to") IP CTS. Nothing in the Commission's interim Order indicates an intent to reach either advertising or ordinary wholesale and dealer arrangements, and the best interpretation in light of the Commission's purposes is that they do not. But the Commission should not leave the scope of these rules for divination: indeed, the concept of fair notice as reflected in the *Fox*[35] and *Trinity Broadcasting*[36] decisions mandate that the Commission must provide clarity as to the boundaries of its rules *before* it can seek to enforce them.

Thus, the Commission should therefore clarify that it meant to bar payments to IP CTS end users, charities, or to hearing health professionals responsible for certifying that particular end users require IP CTS. Although CaptionCall does not believe such a ban is necessary—

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[34] 47 U.S.C. § 225(b)(1).

[35] *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012) (invalidating Commission enforcement of "fleeting expletives and momentary nudity" rules because the Commission failed to give respondents fair notice of the rules' application before enforcing them).

[36] *See Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000) ("Before an agency can sanction a company for its failure to comply with regulatory requirements, the agency must have either put this language into the regulation itself, or at least referenced this language in the regulation…. General references to a regulation's policy will not do.") (internal citations, quotation marks, and brackets omitted).

because end users can be made to certify under penalty of perjury, and health professionals will not abandon their professional responsibilities for $50—paying certifiers to certify IP CTS eligibility could at least arguably raise plausible concerns because of the pecuniary benefit (albeit small) of improper certification that would flow to the certifiers. In all other cases of possible "inducement," however, certifiers who do *not* receive payment—or, alternatively, the requirement for the subscriber himself to pay at least $75 to obtain the necessary equipment—would act as an independent check on the eligibility of the individual for the service, and a ban would thus obviously serve no purpose. The inducement ban thus substantially duplicates the purpose of the Commission's certification requirements such that the inducement ban is unnecessary, except with respect to inducements paid to the hearing professional actually certifying a particular subscriber's need for IP CTS.

Beyond serving no purpose, however, failing to narrow the proposed rule to the meaning that the Commission presumably intended would also thoroughly undermine the ability of IP CTS providers to provide information about this potentially life-changing technology to individuals who desperately need it. Again, the literal language of the rule could potentially sweep in innocuous advertising channels used by service providers and manufacturers in a broad array of industries as a matter of course. When a car company pays a TV station to run automobile ads, for example, it is directly "induc[ing]" that broadcast entity to "encourage" the purchase of cars. When Apple pays a film production company to place an iPhone in a scene, it is inducing the movie company to encourage the use of iPhones. When a manufacturer pays a retail chain for more prominent display at retail locations, it is inducing those retailers to encourage purchase of its products. And these examples do not even attempt to illustrate the vast array of behaviors that might qualify as *indirect* inducements to encourage the use of particular

products. Surely, however, the Commission cannot intend that IP CTS providers must cease *all* advertising efforts under the proposed rule. That would not only flatly violate the Commission's responsibility under the ADA to ensure the availability of IP CTS "to the extent possible," but also contradict the *Order and NPRM* itself, which states that "providers may sponsor advertisements in mainstream and disability publications, participate in disability conferences and engage in other activities to inform professionals and the public about the benefits of [IP CTS]."[37]

In sum, the Commission can neither lawfully effectively bar outreach altogether nor make it difficult and costly for providers to seek to extend IP CTS service to all hard-of-hearing individuals who would benefit from it. Accordingly, CaptionCall submits that while the Commission's proposed rule—which, again, does not appear to have any evidentiary basis—is entirely unnecessary, it must at a minimum be tailored far more narrowly to address the particular harms hypothesized. Although it is difficult to determine precisely what those purported harms might be in the absence of *any* evidence of harm, it would appear—as set forth above—that a ban on either paying end users to sign up for IP CTS or paying referral fees to third-party certifiers to encourage end users to sign up for IP CTS should suffice to allay the Commission's conjectural concerns.

B. The Commission's Proposed Rules Regarding Equipment Distribution are Unnecessary and Inconsistent with the ADA.

The *Order and NPRM* expresses concern that supplying IP CTS equipment to end users at no or low cost "may be encouraging consumers to obtain and use the free equipment whether or not they actually need the service to communicate in a manner that is functionally equivalent

[37] *Order and NPRM* ¶ 17.

to communication by conventional voice telephone users."[38] Once again, however, the Commission cites no evidence demonstrating (or even suggesting) that the availability of free or *de minimis*-cost equipment is somehow driving improper usage.

The Commission posits, however, that "when a consumer is required to pay some amount of money for an IP CTS phone, that individual has the incentive to first consider whether he or she needs the service."[39] The Commission therefore "propose[s] to prohibit all provider programs that give away or loan equipment to potential or existing IP CTS users at no cost or at *de minimis* cost."[40] As discussed above, however, the ADA directs the Commission to ensure that functionally equivalent telecommunications are "available, to the extent possible,"[41] to *all* "hearing-impaired… individuals in the United States."[42] It does not say anything about extending TRS services to eligible users *only* if they want it badly enough to pay some arbitrary amount for it. And, of course, recent amendments to the Communications Act in the Twenty-First Century Communications and Video Accessibility Act ("CVAA") had as a core goal making communications accessible to persons with disabilities *without* having to incur non-*de minimis* costs. For example, under the CVAA, providers of advanced communications services must undertake otherwise achievable accommodations that can be achieved through third-party peripherals that are available, at most, for a nominal cost.[43] In a similar vein, the CVAA

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38 *Order and NPRM* ¶ 40.

39 *Id.*

40 *Id.* ¶ 41.

41 47 U.S.C. § 225(a)(3), (b)(1).

42 *Id.* § 225(b)(1).

43 *See* 47 U.S.C. § 617(a)(2)(B), (b)(2)(B) (if a manufacturer or service provider does not build in accessibility, it can alternatively provide accessibility through a peripheral that is available at no more than nominal cost). The Commission defined "nominal cost" to be "small enough

allocated up to $10 million from the Interstate TRS fund for distribution of specialized equipment to low-income vision- and hearing-impaired individuals to improve their access to telecommunications, the Internet, and advanced communications devices, and required advanced communications services providers and equipment manufacturers to make services and devices accessible without non-*de minimis* charges where feasible to do so.[44] The proposal of the *Order and NPRM* is thus a step backward, toward artificial barriers to the participation of individuals with hearing loss in the nation's economy, rather than forward, toward full access for all as Congress intended in the CVAA.

As a practical matter, CaptionCall is not aware of *any* evidence demonstrating (or even suggesting) that the availability of free or *de minimis*-cost IP CTS equipment is somehow driving improper usage. CaptionCall does believe, however—although we have no way of verifying—that offering free or *de minimis*-cost equipment does increase overall usage because some users might not be able to afford the phones if they were required to pay full price. In other words, it increases usage by making the service available to those who want and need the service, *as the ADA requires*. In contrast, eliminating low- or no-cost equipment offerings directly contravenes the Commission's responsibility to ensure widespread availability of IP CTS to individuals who can benefit from the service. And the practice of subsidizing the cost of captioning phones is analogous to the similar common practice of subsidizing the cost of wireless telephones, and a ban on offering free phones would therefore infringe on users' right to functionally equivalent communications service.

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so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires." 47 C.F.R. § 14.10(p).

[44] *See* 47 U.S.C. § 620(c).

C. CaptionCall Supports the Self-Certification Requirement of the *Order and NPRM*, but the Third-Party Certification Requirement Would Impose Costly and Unnecessary Burdens on Potential IP CTS Users.

Like the Commission's ban on referrals and free IP CTS equipment, the certification requirements of the *Order and NPRM* are transparently driven by a desire to limit IP CTS use. The Commission explains that because increased IP CTS use purportedly threatens to "exhaust monies currently available in the Fund … within the next few months," it is "necessary to adopt interim rules requiring certification of eligibility to use this service."[45] Against this backdrop, it bears emphasis once again that the ADA *requires* the Commission to provide funding sufficient for reasonably efficient providers to offer functionally equivalent IP CTS service—specifically, Section 225(b)(1) instructs the FCC to "ensure" that TRS is "available … to the extent possible."[46] The FCC thus cannot lawfully limit legitimate IP CTS use simply to save money.

1. Self-Certification

That said, CaptionCall wholeheartedly supports reasonable efforts to ensure that IP CTS use is, in fact, legitimate. As discussed *supra* in Section II, CaptionCall requires all of its customers to certify that they are hard-of-hearing, and the service's end-user agreement requires that users must have a "medically recognized hearing disability" necessitating the use of captioning service for telephone calls. On a going forward basis, CaptionCall therefore supports the Commission's proposal that IP CTS users should have to affirmatively state that they have hearing loss that necessitates IP CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users. CaptionCall also supports the additional self-certification requirements set forth in paragraph 43, including making customer

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[45] *Order and NPRM* ¶ 19.

[46] 47 U.S.C. § 225(b)(1).

self-certifications subject to penalty of perjury.[47] In the Lifeline context, this rule does not appear to have substantially deterred participation by eligible users. Finally, CaptionCall supports the Commission's proposal that any registration and certification information that the FCC does ultimately require should be kept confidential,[48] as well as the proposed requirement that IP CTS providers seeking certification by the FCC must explain how they are complying with the rules to prevent ineligible customers from signing up.[49]

CaptionCall further submits that appropriate self-certification requirements are the best way to limit IP CTS use to eligible users. As further discussed below at Section III.D., the best judge of whether a person can hear on the phone is the individual him- or herself, based on that person's experience in his or her own unique environment. Accordingly, instead of banning forms of outreach that have been demonstrated to best reach the demographic that can benefit from IP CTS, *see supra* at Section III.A.1, the Commission should focus on the proper scope and content of self-certifications.

CaptionCall does not, however, support extending such forward-looking self-certification requirements to existing users. In the past, providers would not have had any reason to seek certifications corresponding to any specific phrasing that the Commission may require going forward. As a result, imposing such requirements retroactively would create enormous burdens on current IP CTS users, as well as on providers. Many, if not all, existing IP CTS users have been hard-of-hearing for an extended period of time, and may not have been to see an audiologist or other hearing professional for years. Requiring these users to obtain a third-party certification will likely require them booking an appointment with a hearing professional, and possibly

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[47] *See Order and NPRM* ¶ 43.

[48] *See id.* ¶ 48.

[49] *See id.* ¶ 50.

undergoing a new audiogram if they do not have access to their old one. These are expensive steps to require in the absence of demonstrable need, and will be paid either by the consumer him- or herself, or by health insurers, contributing to rising health care premiums. Particularly given the nature of the IP CTS user demographic, providers would need to make a substantial investment in explaining the new requirements, explaining that service these users have come to rely on will be cut off unless they once again justify their need for it, and gathering the requisite certifications. Accordingly, for customers who had service before the new self-certification requirement takes effect (which depends on approval from the Office of Management and Budget), certification should be considered complete as long as the customer confirmed during registration that he or she suffers from hearing loss.

If the Commission insists on requiring more—notwithstanding that additional requirements are certain, ultimately, to deprive at least some elderly IP CTS users of the service upon which they have come to rely—providers should be given at least six months to gather the new information. As the *Order and NPRM* notes,[50] the Commission gave Lifeline subscribers much longer to get certification for Lifeline customers; there the rules were adopted in February 2012 and the recertification deadline was December 31, 2012. The Commission should not bar providers from reimbursing customers for costs of any examinations needed to obtain certifications, as the new examinations in order to obtain the certifications are not occurring because of the consumer's medical necessity, but solely because of a Commission mandate. Here, however, as discussed *infra* at Section III.C.2, the demographic involved is particularly vulnerable, and the burdens may be especially heavy depending on the precise rules the

[50] *See id.* ¶ 49.

Commission adopts—including the potential need for audiologist appointments, as discussed directly below.

2. Third-Party Certification

CaptionCall opposes the Commission's proposed third-party certification requirements because of the extraordinary burdens they would place on this vulnerable demographic. It bears reemphasis that the *median* age of IP CTS users for which CaptionCall has data is ***** BEGIN CONFIDENTIAL ***** [redacted] ***** END CONFIDENTIAL *****; many are, of course, much older. A substantial number of these elderly individuals surely have not been to an audiologist in years. For such IP CTS users, even *finding* an audiologist may well be a daunting or insurmountable task, to say nothing of scheduling an appointment, getting to the appointment, paying for the appointment if necessary, and ensuring that test results are supplied to CaptionCall. Moreover, the IP CTS users *most* likely to find these requirements overwhelming on account of age and infirmity are the very consumers who are *least* likely to be ineligible for the service. The proposal to require third-party certification will thus interpose costs and practical barriers on IP CTS use without having any impact on ineligible usage—to the extent that any such usage even exists, which again is entirely undocumented by the *Order and NPRM*.

Of course, the *Order and NPRM* does propose to allow IP CTS users to avoid the burdens of obtaining certification by shouldering a different cost—the $75 that the Commission deems sufficiently non-*de minimis* to obviate the need for third-party certification. Again, however, this same demographic containing individuals who would struggle to obtain audiologist certification also contains individuals for whom the $75 would be a substantial impediment to obtaining IP CTS service. And, again, neither of these costly impediments to service have any basis in the

ADA's requirement that the Commission ensure availability of TRS to *all* eligible individuals "to the extent possible and in the most efficient manner."[51]

As CaptionCall explained in comments submitted to the Office of Management and Budget and the FCC in connection with the emergency interim rules, the third-party certification requirement would generate an annual burden equivalent to $4 million—a sum that vastly outweighs any offsetting benefit.[52] And, as CaptionCall explained in those same comments, the Commission has not presented *any* evidence showing that ineligible consumers are currently signing up for service in the absence of this rule—meaning that there is nothing in the record suggesting that this rule would generate a benefit that even approaches the burden it imposes.

In sum, the answer to the Commission's question whether a third-party certification requirement would be helpful in ensuring that those who want and need service receive it, while those who are ineligible do not, is a resounding "no."[53] The requirement would certainly discourage new IP CTS users, but only because the process the Commission envisions is unjustifiably burdensome and inconsistent with the mandates of the ADA.

If the Commission insists on adopting a permanent third-party certification requirement, it should do so without imposing the further harmful burdens proposed by the *Order and NPRM*. In particular, it would be counterproductive to require professionals to make certifications under penalty of perjury.[54] That would serve only to deter some professionals from certifying even legitimate customers, as they may have outsized fears about exposing themselves to great liability. This in turn would deprive even more qualified customers of service, if they are unable

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[51] 47 U.S.C. § 225(b)(1).

[52] *See* Paperwork Reduction Act Comments of Sorenson Communications, Inc. and CaptionCall, LLC, at 2, CG Docket Nos. 13-24; 03-123 (filed Feb. 19, 2013).

[53] *See Order and NPRM* ¶ 42.

[54] *See id.*

to get their audiologists to provide certification for them. Moreover, as discussed above in connection with self-certification, *see supra* at Section III.C.1, the Commission should not impose any third-party requirement retroactively to existing customers. This would be an enormous burden for those who already have service—and again, IP CTS providers would face the difficult job of explaining to this vulnerable demographic that they have to take a variety of counterintuitive (and costly) steps, pursuant to government fiat, just to keep using a service they already have.

D. The Commission Should Reject Numerical Hearing-Loss Thresholds Because Implementation Would be Costly, Burdensome, and Ineffective.

The *Order and NPRM* seeks comment on whether to adopt "quantitative threshold requirements to be eligible to use IP CTS."[55] CaptionCall agrees with the Consumer Groups that any decibel-based criteria would be arbitrary and ineffective; equally important, it would also impose substantial burdens on IP CTS users for little or no benefit.

As emphasized above, the IP CTS user base is a substantially different demographic from the general population. Many IP CTS and potential users are in their late 70s, 80s, or 90s, and not all of these individuals can easily make a trip to an audiologist. But, like the Commission's third-party certification proposal discussed above, any rule adopting a quantitative threshold for IP CTS users would, as a practical matter, *require* these individuals to: find an audiologist, schedule an appointment, get to the appointment, pay for the appointment if necessary, and ensure that test results are supplied to CaptionCall. Some IP CTS customers could, of course, perform these tasks, albeit often at considerable expense, but others would find this process daunting or even impossible to achieve. As a result, particularly given the complete lack of

[55] *Order and NPRM* ¶ 44.

evidence that self-certification is not working or that IP CTS users are engaged in fraud, there is no justification for imposing these burdens; they will only result in the denial of IP CTS to the qualified individuals *most* in need of the service, directly contrary to the intent of the ADA.

Moreover, numerical hearing-loss thresholds ultimately would not be effective in distinguishing individuals who need IP CTS from those who do not. The best judge of whether a person can hear on the phone is that particular person, who has personal and practical experience in his or her own unique environment. There are simply too many factors unrelated to a person's "decibels of gain" score that impact his or her ability to use the telephone without captioning for any quantitative threshold to work. Indeed, even individuals with little or no hearing loss as measured on a decibel scale may be unable to use an ordinary phone because of poor speech discrimination ability—the need for IP CTS is driven by a variety of factors as complex as the hearing process itself. Accordingly, as even the expert upon which the *Order and NPRM* relies acknowledged, any "objective" standard would need to be "supplemented" with a more subjective alternative standard based on the individual's ability to communicate without IP CTS in a functionally equivalent manner. And, of course, as discussed in Section III.C.1., *supra*, the subjective standard that matters most is whether an individual will self-certify, under penalty of perjury, that he or she *cannot* communicate in a functionally equivalent manner without IP CTS. There are, in short, good reasons why the vast majority of states have *not* adopted "quantified hearing loss criteria for determining eligibility to receive assistive devices"[56]—such criteria are extremely burdensome, and they don't work.

[56] *Id.* ¶ 45.

In addition, as discussed *supra* at Section II, all or nearly all of CaptionCall's customers "have a cochlear implant, two hearing aids, or one hearing aid."[57] Neither hearing aids nor cochlear implants are generally prescribed for mild hearing loss, so it is evident that essentially all of CaptionCall's customers have suffered significant hearing loss. Any reasonable numerical hearing-loss threshold would thus only confirm what we already know—people who take the trouble to obtain IP CTS are people who have suffered sufficient hearing loss to benefit from the service. It would make no sense for the Commission to impose substantial burdens on IP CTS users and potential users merely to confirm what is already known.

Notably, the fact that many CaptionCall users have hearing aids does *not* mean that they do not require IP CTS. As CaptionCall has written previously,[58] even with a hearing aid, consumers can have difficulty using the telephone. Wide Dynamic Range Compression, the standard algorithmic "volume control" in nearly all hearing-aid fittings since 2003, has been proven to miss or under-amplify signals from both cell phones and land lines. In addition, phone conversations can be centered on frequency ranges that hearing aids cannot amplify or compress enough to deliver clear telephone signals. More specifically, "in-the-ear" hearing aids tend to block signals used in telephone conversations and can process only a limited range of sounds. On the other hand, "receiver-in-canal" hearing aids can result in difficulty hearing a telephone due to movement of the phone away from the ear canal. Finally, 40%-70% of all hearing aids lack a tele-coil, which responds to magnetic signals and generally assists usage of telephones by hearing-aid users. Thus, many hearing-aid users require captioning services to engage in functionally equivalent telecommunications.

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[57] CaptionCall 12/19/12 Letter at 3.

[58] *See id.* at 3-4.

Finally, a quantitative threshold would impose burdensome new paperwork-related requirements that, considering the flaws described above, should not pass muster under the Paperwork Reduction Act ("PRA").[59] As CaptionCall noted in its December letter to the Commission,[60] requiring elderly, hard-of-hearing consumers to make an appointment with an audiologist, travel to it, and then meet with the audiologist simply to obtain a piece of paper proving their hard-of-hearing status presents a significant and unreasonable burden. This burden is particularly unjustified given that the Commission has not imposed any comparable requirement for any other service, including IP Relay, which, unlike IP CTS, has been beset by instances of fraud. Thus, this requirement fails to minimize information collection burdens, while requiring collections that generate little practical utility or public benefit. Accordingly, rather than impose quantitative thresholds, the FCC should require only the self-certifications it has proposed.

If the FCC adopts a numerical hearing loss threshold despite the clear shortcomings to that approach, CaptionCall supports Dr. McBride's suggestion of a threshold set at 40 dB of hearing loss. The Commission should also adopt Dr. McBride's suggestion that even users who do not meet the 40 dB threshold be permitted to obtain an audiologist's endorsement. The Commission should not, however, under any circumstances require the existing user base to re-certify by providing audiograms demonstrating their dB HL score. Existing customers (*e.g.*, those who signed up before 2/5/13) should be deemed eligible if they have self-certified they suffer from hearing loss.

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[59] *See* 44 U.S.C. §§ 3501-21.

[60] *See* CaptionCall 12/19/12 Letter at 14.

E. The Commission Should Lift the Interim Rule Requiring that Captions be Set to "Off" as a Default.

As with many of the rules and proposals in the *Order and NPRM*, the Commission's interim rule requiring that IP CTS devices have a captions-off default takes insufficient account of the specific demographic that uses this service. Until recently, the CaptionCall device had a button on the captioning touchscreen that allowed customers to toggle captioning on and off. This type of on-screen control is, of course, common on smart phones and tablet computers. CaptionCall's real-world experience, however, was that this control generated substantial confusion among CaptionCall customers. Customers sometimes turned captioning off by mistake, and many then called customer service to report that their IP CTS device no longer worked properly. CaptionCall therefore implemented the "default on" feature in a firmware release on June 25, 2012.[61] This feature thus responds to a specific problem experienced by CaptionCall customers and moved CaptionCall's service toward the functional equivalence required by the ADA.

Rather than prohibiting "default on" in all cases, the Commission should take account of the needs of IP CTS customers. CaptionCall does not oppose requiring providers to ship or install devices with the captioning set to "default off," but they should be permitted to design their devices so that consumers may, if they wish, change the setting to "default on." This would allow individuals who might otherwise struggle with an on-off toggle to use their IP CTS phones just as easily as hearing individuals use a traditional phone, without having to manually set up preferences for each individual call. The Commission could require providers to include an

[61] *See* Letter from John T. Nakahata, *et al.*, Counsel, Sorenson Communications, Inc. and CaptionCall LLC, to Kris Monteith, Acting Bureau Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, at 2, (Jan. 8, 2013) ("CaptionCall 1/8/13 Letter").

appropriate notice to, and certification by, users who elect to set their individual captioning setting to "default on."

Once again, the *Order and NPRM* contains absolutely no evidence that CaptionCall's or any other IP CTS provider's "default on" feature increases ineligible use of IP CTS. To the contrary, as CaptionCall explained in its January 8 Letter to the Commission, the empirical evidence indicates that the feature is enabling more *eligible* usage, not more ineligible usage.[62] In particular, CaptionCall noted that the average minutes of use increased *more* in hard-of-hearing-only households than in mixed households after CaptionCall switched from a button requiring the selection of captions to a "default on" approach to captioning.[63] From this data, CaptionCall concluded that the increase in minutes "resulted … from eligible subscribers who, thanks to improved ease of use and greater functional equivalence, were no longer confused" by the caption on/off button.[64]

The Commission dismissed this evidence in the *Order and NPRM*, stating that the "lower total IP CTS minutes in mixed households could result from the non-hard-of-hearing residents making calls" on landlines or mobile phones "that would otherwise be made by the hard of hearing user," while "other calls by non-hard-of-hearing individuals *could* be made on the CaptionCall phone, with the captions still on."[65] But the Commission's critique completely misses the significance of CaptionCall's data. The point of the data is that if "default on" generally results in use of IP CTS captioning by non-hard-of-hearing users, then IP CTS minutes should have gone up *more* in mixed households as a result of the switch to "default on." It is

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[62] *See id.* at 4.

[63] *See id.*

[64] *Id.*

[65] *Order and NPRM* ¶ 32 (emphasis added).

true, as the Commission said, that in mixed households calls by non-hard-of-hearing users *might* sometimes displace calls by hard-of-hearing users—but that is irrelevant here, because it is true *regardless* of whether captioning is "default on" or not. The point here is that if the "default on" feature generates greater *ineligible* usage, as the Commission purports to suspect, then "one would expect the increase in average MOU to be greater in mixed households than in hard-of-hearing-only households."[66] The fact that empirical data shows the opposite unquestionably undermines the Commission's hypothesis that "default on" increases ineligible use. Prohibiting "default on" is therefore an attack on *eligible* use, which is impermissible under the ADA.[67]

In short, the core problems with a blanket "default off" rule are that it addresses a nonexistent problem and contravenes the functional equivalence mandate of the ADA. Unlike conventional voice customers, IP CTS users subject to a "default off" rule would have to adjust the settings on their phones before every single call they make. CaptionCall's proposed alternative would more closely reflect functional equivalence, and given the demographic of those who use CaptionCall, preserving ease of use is critical.

F. CaptionCall Supports Requiring a Warning Label Stating Who May Use Captioning.

The *Order and NPRM* also "seek[s] comment on whether [to] require that each piece of new IP CTS equipment have a label on its face in a conspicuous location specifying that FCC

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[66] CaptionCall 1/8/13 Letter at 4.

[67] The Commission also criticized CaptionCall for failing to "indicat[e] … how many consumers actually had problems" with the on/off button (*Order and NPRM* ¶ 30). Significantly, CaptionCall's data from June 2011 to January 2012 indicates that the percentage of *all* complaint calls to the company's customer support group regarding confusion or problems with the on-off design ranged from 10% to 24%. This shows that a significant number of consumers "actually had problems."

regulations require that captions may be used only by people with hearing loss who require captions to fully understand telephone conversations."[68]

CaptionCall supports requiring a warning stating in clear language the limitations on who may use captioning, as an alternative to mandatory "default off" without any opportunity for the consumer to choose "default on." If mandatory "default off" remains the rule, there is no reason for the warning, as the user must affirmatively turn on the captioning. In any event, rather than mandating a specific technology (a "label") to keep the cost of compliance reasonable as well as to improve effectiveness, however, CaptionCall believes that providers should have the option of installing stickers or permanent labels directly on the device, *or* of having the notification appear on the captioning screen at the start of every call, before billed captioning time begins when possible to do so (call set-up is part of session time, and is not billable until there are two parties joined to the call).[69] The cost of a software-based display on the screen would be comparatively modest, particularly with respect to phones that are already in the field, and it would allow for further changes in the future in the event the FCC adjusts the required statement. In the case of an on-screen display, however, providers should be provided flexibility to develop warning messages that will be effective within the limits of the screen size. CaptionCall believes that this alternative is required by the PRA. Moreover, the Commission should not mandate specific language, but should allow providers to adapt the language to available space on the device or screen, provided that the language adopted makes clear that people who do not need captioning to hear on the phone must not use it.

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[68] *Order and NPRM* ¶ 55.

[69] Under some circumstances, such as when the captioned phone joins a call already in progress (*i.e.*, serves as an extension phone), an on-screen notification may feasibly only occur as the captioning is starting. However, this will be relatively infrequent within the total universe of captioned call time.

G. The Commission Should Clarify that the Bar on Compensation from the IP CTS Fund Applies Only to Minutes Resulting from Proscribed Outreach.

Like the language of the ban on direct payments to IP CTS end users and certifying health professionals, the language of the *Order and NPRM*'s discussion of consequences for violating that ban is unclear. Specifically, the Commission states that "providers engaging" in "any referrals for rewards programs and any other form of direct or indirect inducements, financial or otherwise, to subscribe to, or use or encourage subscription to or use of IP CTS" will "not be eligible to receive compensation for IP CTS from the TRS Fund."[70] Once again, read literally, this statement is surely far broader than the Commission intends.

CaptionCall will, of course, make every effort to comply with the *Order and NPRM*. As discussed *supra* at Section III.G., however, the precise scope of the ban on "direct and indirect inducements" is uncertain. Again, since all advertising is a least an "indirect inducement" and wholesale pricing could similarly be considered an "inducement"—and CaptionCall is confident that the Commission did not intend to ban advertising or wholesaler or dealer arrangements generally—difficult line-drawing problems may arise, and the potential for an inadvertent violation of the rule is greatly heightened. An expansive disgorgement beyond any "tainted" certifications or subscriptions would also magnify the due process problems created by a vaguely-worded prohibition on inducements.[71]

It is therefore important for the Commission to clarify that providers found to have engaged in prohibited outreach will "not be eligible to receive compensation for IP CTS from the TRS Fund" *for minutes tainted by that outreach*.[72] As written, the Commission's statement

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[70] *Order and NPRM* ¶ 56.

[71] *See supra* notes 36, 37 (discussing *Fox* and *Trinity Broadcasting* decisions).

[72] *Order and NPRM* ¶ 56.

could be misread as barring *all* IP CTS compensation to a provider committing an inadvertent violation affecting even a single minute of use. Again, CaptionCall is confident that is not what the Commission intended, but it would be helpful to bring the language of this provision into line with the Commission's actual intent.

IV. Conclusion

CaptionCall supports the Commission's fundamental goal of combating waste, fraud, and abuse in the IP CTS program—and aspects of the *Order and NPRM* that will advance that goal. But, as discussed above, CaptionCall is concerned that some of the rules that the Commission has adopted or proposed will interfere with the broad availability of a functionally equivalent IP CTS service, and will thereby impede the Commission's implementation of the ADA. CaptionCall therefore urges the Commission to tailor its proposed rules more narrowly to encourage vigorous outreach and full functional equivalence for eligible users and potential users of IP CTS.

Respectfully submitted,

/s/

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February 26, 2013

Attachment 1

all/products/phone-usage-terms.aspx

Web Slice Gallery | Idea Bank - All Items

Username | Password | Log On | Forgot Password? | Subscribe To Newsletter

CaptionCall® Life is Calling

Search for: GO

WATCH VIDEO | REQUEST INFO | ORDER NOW

Product | Support | Promotions | Company | Newsletter

Purchase Process

1. Login/ Register ▸ 2. Agree to Terms ▸ 3. Contact List Setup ▸ 4. Shipping Info ▸ 5. Billing Info ▸ 6. Confirm Order

Step 2 - Agree to Terms

Requirements

Please confirm the following:

- ☐ User is hard of hearing Required! Details
- ☐ User has land-line phone Required! Details
- ☐ User has broadband internet connection Required! Details

By clicking "Continue" I acknowledge that I have read and accept the terms above.

Back | Continue

Product | Support | Promotions | Company | Newsletter

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Trusted site

The next step ensures the user meets the requirements to get a CaptionCall phone.

A user may not progress in the registration process without indicating they are (1) Hard of Hearing, (2) have land-line phone, and (3) have broadband Internet.