

**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
	)	

**REPLY COMMENTS OF SORENSON COMMUNICATIONS, INC.  
AND CAPTIONCALL, LLC**

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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”).<sup>1</sup>

**I. Introduction and Summary**

*Background.* CaptionCall fully agrees that the Commission must take steps to ensure that Telecommunications Relay Services (“TRS”) programs, including IP CTS, are free from waste, fraud, and abuse. To this end, CaptionCall has, from the start, required its users to self-certify that they are hard of hearing, even though the Commission had not yet extended that requirement to IP CTS. CaptionCall’s parent, Sorenson Communications, has a long history of working to avoid TRS fraud, including taking voluntary measures that other providers did not take. And CaptionCall recently filed a petition to move IP CTS rates from the Multistate Average Rate

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<sup>1</sup> 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, 28 FCC Rcd. 703 (2013) (“*Order and NPRM*”).

Structure (“MARS”) methodology, under which IP CTS rates have escalated every year, to a price cap that would roll rates back to their average 2008-2010 levels and then reduce IP CTS rates every year, while at the same time providing a more stable, pro-innovation business environment that would deliver better services to consumers more efficiently.<sup>2</sup>

However, the Commission adopted interim rules and proposed permanent rules in this proceeding on an emergency basis without providing notice or obtaining comment, and without any real evidence that the measures adopted were necessary to combat actually occurring waste, fraud, and abuse. This Commission has made a point that its decisions should be “data-driven,” and IP CTS is no exception. The record, in fact, refutes the Commission’s apparent reasoning that because IP CTS usage is growing faster than its Administrator had predicted, this must be due to ineligible use. Rather, as commenters such as the Hearing Loss Association of America (“HLAA”) and the Rehabilitation Engineering Research Center on Telecommunications Access (“RERC-TA”) illustrate, the increased use of IP CTS has resulted from the increased need of an aging population for the assistance provided by captioning service—exactly what Congress envisioned when it adopted 47 U.S.C. § 225 as part of the Americans with Disabilities Act (“ADA”) in 1990. These commenters also demonstrate that the Commission’s usage predictions were faulty because, at various points in the bottom of an S-shaped adoption curve, they continually assumed linear growth that lagged actual growth.

Another basis advanced by the Commission for acting without following the normal procedures was its concern that the TRS Fund would run out of funds. But that is a failure in fund administration, not a sign of waste, fraud, and abuse. Moreover, as CaptionCall explained

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<sup>2</sup> The Commission has issued a Public Notice seeking comment on CaptionCall’s petition. *See Request for Comment on Petition for Rulemaking Filed by Sorenson Communications, Inc. Regarding Cost Recovery Methodology for Internet Protocol Captioned Telephone Service*, Public Notice, CG Docket Nos. 13-24 & 03-123, DA 13-369 (rel. Mar. 8, 2013).

in its opening comments, that concern is completely unfounded because any shortfall resulting from the Commission’s erroneous predictions can be remedied by a relatively modest increase in the contribution factor implemented mid-year, as the Commission has done in the past. Section 225 requires the Commission to ensure the availability of IP CTS to hard-of-hearing individuals. As CaptionCall explained—and no one has challenged—the Commission lacks authority to cap or limit the availability of IP CTS in order to avoid an increase in the contribution factor.<sup>3</sup>

The United States Telecom Association (“USTA”) nevertheless parrots the Commission’s concerns about non-existent (or certainly avoidable) Anti-Deficiency Act violations and supports efforts to limit the availability of IP CTS, while still claiming “a long history of supporting communications access for people with disabilities that reaches back to the very foundations of our industry.”<sup>4</sup> However, Congress enacted Section 225 because it concluded that USTA’s members had *discriminated* against deaf and hard-of-hearing Americans by failing to accommodate their needs.<sup>5</sup> The Commission has nevertheless permitted USTA’s members (primarily local exchange carriers such as AT&T and Verizon) to nearly abandon the field, even though Section 225(c) requires every “common carrier providing telephone voice transmission” to “provide ... telecommunications relay services.” As a result, companies *other*

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<sup>3</sup> Nevertheless, as explained *infra* at 12, CaptionCall has proposed a *reduction* in the per-minute compensation rate for IP CTS that would have the effect of limiting increases to the contribution factor.

<sup>4</sup> Comments of the United States Telecom Association at 1, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (“USTA Comments”).

<sup>5</sup> See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 04-137, 19 FCC Rcd. 12,475, 12,543 ¶ 179 (2004) (Section 225 is “an accommodation ... for persons with disabilities.” ... [It] “places the obligation on carriers providing voice telephone services to *also* offer TRS to, in effect, remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities,” so that “the costs of providing TRS are really just another cost of doing business generally, *i.e.*, of providing voice telephone service.”)

than USTA members have developed and now provide the cutting-edge services—IP CTS and Video Relay Service—that have transformed communications service for deaf and hard-of-hearing Americans. In short, the Commission should understand that USTA’s intent is not to advance the goals of Section 225 but to limit the contributions of USTA members to the TRS Fund. However, under Section 225, the Commission lacks authority to favor the interests of contributors to the Fund over the needs of hard-of-hearing individuals.

HLAA’s comments remind the Commission that “[t]he ADA is *our* civil rights law”—*i.e.*, a law ensuring “that all people with disabilities have the opportunities afforded to all on an equal basis.”<sup>6</sup> HLAA also explains that the recent growth in IP CTS means that “[f]inally people with hearing loss are getting access to the phones they need.”<sup>7</sup> And HLAA urges the Commission not to “search[] for ways to limit how many consumers can get access to IP CTS”<sup>8</sup>—which seems to be the Commission’s goal. HLAA is right on all counts.

*The proposals at issue.* Nothing in the record shows that any of the interim rules or the proposed permanent rules are necessary to prevent waste, fraud, or abuse. Both sets of rules will, however, surely discourage subscription and use by eligible consumers who need the accommodation provided. Thus, the Commission should revisit its proposals with an open mind and ask whether there is any evidence in the record showing that the proposed rules will eliminate ineligible use. In particular, the Commission should make this reexamination with respect to the mass-market wireline service and equipment an older demographic is most likely to use, rather than the more specialized enterprise environments that some providers target.

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<sup>6</sup> Comments of the Hearing Loss Association of America at 3, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (“HLAA Comments”).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 3.

Adopting rules that are understandable and implementable by sophisticated users with IP desk phones, lap-top computers, or smartphones can still render IP CTS services unusable by older Americans who predominantly rely on a traditional wired telephone at home. As CaptionCall has explained, its typical user is a 74-year-old person with two hearing aids. Requirements that might be minor hurdles for younger people are likely to be major barriers for those who need IP CTS. In short, the Commission should be very skeptical of claims—such as those made by USTA in support of the Commission’s three-part certification proposal for existing, as well as new, users along with claims by enterprise-focused IP CTS providers—that complex new requirements will “not place an undue burden on legitimate IP CTS users.”<sup>9</sup>

Any rules the Commission retains must be simple, implementable, clear, and not dependent upon the interpretation of vaguely worded standards. In the first instance, this level of clarity is required by *Fox* and *Trinity Broadcasting*. The Commission adopted its interim rules as mandatory minimum requirements. As a result, the Commission can deny compensation for any IP CTS minute that it deems non-compliant. But because the Commission will make such determinations long after services have been provided, unclear rules will deprive providers of compensation for services actually provided without clear advance notice that would have allowed a provider to alter its procedures or to deny service at the outset.

Many of the interim rules, as well as proposals from commenters, flunk the test of simple, implementable, and clear. For example, some commenters argue that if the Commission adopts a rule that essentially permits self-certification by paying for a phone in lieu of an independent hearing professional certification, it should exempt individuals with income below 400% of the Federal Poverty Guidelines from anything other than self-certification. But the income-based

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<sup>9</sup> USTA Comments at 4-5.

exemption simply layers on more complexity. Others argue that equipment distribution for less than a “*de minimis* price” should be banned, without specifying the price. But providers cannot be expected to guess at what constitutes a *de minimis* price; if the Commission decides that payment of a non-*de minimis* price for a phone constitutes self-certification, the Commission should establish a specific number, such as a specific dollar threshold no greater than the cost of an ordinary phone for hearing users. Any permitted trial period should be no longer than a specified number of days.

Simple, implementable, and clear must also apply to provider outreach efforts. As CaptionCall has previously established, modest referral fees are the most efficient form of outreach. There is no evidence that such payments have led to fraud, and the payments were so small (on average \$100 per month)<sup>10</sup> it is hard to believe they were sufficient to cause audiologists to unethically refer patients who did not require IP CTS service. Nevertheless, a rule prohibiting only direct payment of monetary compensation in exchange for a referral would at least have the virtue of clarity. That is in contrast to the Commission’s actual proposal to require certifications by “independent” specialists, which would apparently exclude “anyone with a TRS-related business agreement with the provider.”<sup>11</sup> This is the sort of unclear rule that has the potential to interfere with efforts to reach individuals who would benefit from IP CTS. In particular, a ban on any “TRS-related business agreement” at least potentially sweeps in arrangements that are highly desirable, such as cooperative marketing and arrangements that do not involve the exchange of money. We assume the Commission’s concern is that professionals might be corrupted by payments and other benefits that are not labeled as referral fees but are

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<sup>10</sup> See CaptionCall Comments at 12-13.

<sup>11</sup> Proposed 47 C.F.R. § 64.604(c)(9)(v) (referring to “independent, third-party professional”); see also *Order and NPRM*, 28 FCC Rcd. at 716 n. 72 (“independent, third-party professional” excludes “anyone with a TRS-related business agreement with the provider”).

disguised as some sort of consultative service or the like. If so, perhaps the rule should bar the provision of other things of value by providers to specialists, such as tickets to sporting events, in addition to money. Although CaptionCall does not think such rules are necessary, clear rules of this sort would not unduly interfere with efforts to reach hard-of-hearing individuals.

Likewise, the Commission’s prohibition on “direct or indirect inducements ... to ... encourage subscription to or use of any IP CTS” service, read literally, could apply to almost any form of provider outreach. The Commission cannot possibly have intended to prohibit activities such as advertising and direct mail campaigns, but each of those is a form of “direct inducement” to “encourage subscription.”

Accordingly, the Commission needs to examine its proposed provider-outreach rules in light of its goals and tailor the rules to the achievement of those goals. The rules as proposed seem designed largely to discourage efforts to identify persons who would benefit from IP CTS, rather than to combat fraud or abuse.

Finally, the Commission needs to revisit its “default-off” proposal with an open mind and an eye to the needs of IP CTS users. Indeed, CaptionCall’s survey data reveals that 75% of CaptionCall’s customers prefer “default-on” captions. Thus, as CaptionCall’s petition for waiver explains, implementation of the interim “default-off” rule has caused substantial confusion and frustration among IP CTS users.<sup>12</sup> In addition, no benefit has been shown to result from such a requirement. But the costs are clear—IP CTS users will experience some unnecessary delay in obtaining captions. They will very likely have to begin their answers to incoming calls by saying something like, “I’m sorry, but I missed who you are and why you’re calling.” Before the

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<sup>12</sup> See CaptionCall Emergency Petition for Waiver at 7-8; Attachment 1 at ¶¶ 7, 8, CG Docket Nos. 13-24 & 03-123, (filed Mar. 7, 2013) (explaining confusion and frustration that customers experienced when CaptionCall loaded new firmware with the default-off feature onto their phones).

Commission applauds itself for reducing average minutes of use by adopting a default-off rule, it should recognize that the reduction is caused by making IP CTS *less* functionally equivalent to ordinary telephone service.

In sum, as these reply comments demonstrate, the record contains no evidence that IP CTS growth is anything but the result of typical S-curve growth that results from more eligible users learning about and enjoying a service that accommodates their disability. The Commission should support this growth in a life-changing service by (1) avoiding vague rules that inhibit outreach by IP CTS providers, (2) rejecting complex or burdensome certification systems that discourage consumers from obtaining IP CTS, and (3) adopting captioning rules that respond to the needs and desires of the consumer.

**II. The Commission’s Supposition that Recent Growth in IP CTS Minutes Reflects Misuse of the Service by People Who do not Require it is Unfounded and Incorrect.**

In CaptionCall’s opening comments, it pointed out that the “Commission’s underlying assumption” in the *Order and NPRM*—the notion that the growth of IP CTS in recent months reflects misuse of the service—“is incorrect and based entirely on speculation.”<sup>13</sup> Multiple comments echo CaptionCall’s fundamental point that the Commission should not base its regulation of this critical service on mere conjecture, and certainly should not undermine the functional equivalence and widespread availability of the service required by the ADA<sup>14</sup> based only on such speculation.

The HLAA explains that “[c]aptioned telephone service is the only relay service that offers a truly functionally equivalent option for people with hearing loss who use their voice and

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<sup>13</sup> CaptionCall Comments at 4-5.

<sup>14</sup> See 47 U.S.C. §§ 225(a)(3), (b)(1).

residual hearing for phone conversations.”<sup>15</sup> Accordingly, as CaptionCall stated in its comments, IP CTS is “now a truly life-altering innovation for many Americans, just as the ADA intended.”<sup>16</sup> HLAA correctly concludes that “[i]nstead of ... searching for ways to limit how many consumers can get access to IP CTS,” the Commission should “gather data” to help understand whether specific problems with usage truly exist and target solutions to “exactly [what] should be done in response to the specific problems identified.”<sup>17</sup>

The comments of HLAA and others support CaptionCall’s core point in its opening comments<sup>18</sup> that the Commission has—based on an incomplete understanding of the data relating to IP CTS growth rates—simply imagined an ineligible use problem that does not exist. Specifically, the *Order and NPRM* is predicated on the mistaken view that *because* IP CTS minutes of use in recent months have substantially “exceeded the minutes budgeted for this service by the Fund Administrator,”<sup>19</sup> it must be that this “excess” growth *necessarily* reflects an increasing number of IP CTS customers who, in fact, do not require the service. There might be some basis for such an assumption if IP CTS were a mature industry, but it is not. As HLAA explains, “[t]he available data do not support the existence of a large deviation (i.e., a ‘spike’) from IP CTS’s historical growth patterns.”<sup>20</sup> To the contrary, “on a year-to-year basis using cumulative annual call minutes, the percentage rate of growth has been declining since 2010, with the peak occurring in 2010.”<sup>21</sup>

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<sup>15</sup> HLAA Comments at 1.

<sup>16</sup> CaptionCall Comments at 5.

<sup>17</sup> HLAA Comments at 3.

<sup>18</sup> CaptionCall Comments at 12-15.

<sup>19</sup> *Order and NPRM* at 706 ¶ 6.

<sup>20</sup> HLAA Comments at 2.

<sup>21</sup> *Id.*

The comments of the RERC-TA flesh out this point with additional data. It writes that the *NPRM and Order*'s "focus on short-term data" gives the mistaken "impression ... that the growth of IP CTS minutes is largely linear and that there is a recent sharp uptick of the slope."<sup>22</sup> In fact, however, IP CTS growth has been *slowing* since 2010, and the "apparent uptick" reflected in the *NPRM and Order* is really nothing more than a "growing discrepancy between a linear growth trajectory"—of the sort assumed by the *Order and NPRM* and RLSA's projection methodology—and the "exponential growth trajectory" that actually fits the longer-term data on IP CTS growth.<sup>23</sup> RERC-TA further observes that the "overall shape [of the growth curves] of the first five years for VRS and IP CTS" are similar—both "display[] the characteristics of an S-curve, which is a common growth pattern for new technology."<sup>24</sup> In short, as CaptionCall argued in its opening comments, the *NPRM and Order*'s comparison of actual IP CTS growth to the minutes "budgeted" by RLSA "is not illuminating: it simply shows that the slope of RLSA's assumed growth path was not correct."<sup>25</sup>

HLAA also correctly explains *why* the absolute number of IP CTS minutes continues to increase rapidly, notwithstanding a slowing rate of growth. The bottom line is that "[f]inally people with hearing loss are getting access to the phones they need."<sup>26</sup> In other words, "[w]hat's new" in the IP CTS marketplace is not the demand for this service, but the "increased

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<sup>22</sup> Comments of the Rehabilitation Engineering Research Center on Telecommunications Access at 2-3, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) ("RERC-TA Comments").

<sup>23</sup> *Id.* at 5; *see also* Comments of Sprint Nextel Corporation at 3, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) ("Sprint Comments") (growth in IP CTS has not been "unprecedented" or "unusually rapid" but rather "has been consistent with Sprint's historical growth patterns").

<sup>24</sup> RERC-TA Comments at 9.

<sup>25</sup> CaptionCall Comments at 7.

<sup>26</sup> HLAA Comments at 2.

understanding by relay service providers of how to market to the people who can benefit from” it.<sup>27</sup> As HLAA writes:

Estimates of the number of Americans with hearing loss are as high as 48 million and growing.... Many of those people would benefit from IP CTS services. [But] [t]he only way that people will use IP CTS or any relay service is [if] they know about it.... It’s our understanding that recently service providers have been... reaching out to retirement villages, non-profit organizations, audiologists and hearing aid dispensers. They are demystifying the phone for seniors and even installing the equipment, making it a product people feel comfortable using.... [And] [w]hen consumers with hearing loss find a functionally equivalent way to use [IP CTS] they will use it more often.<sup>28</sup>

These are exactly the points that CaptionCall made in its opening comments—in recent years, “IP CTS providers, including CaptionCall, have launched outreach campaigns to inform potential customers about the service,” including by “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.”<sup>29</sup> The result is that “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,” and “[i]t is now a truly life-altering innovation for many Americans, just as the ADA intended.”<sup>30</sup>

IP CTS has grown because more consumers are finding and using it, and the Commission should not try to solve problems that do not exist. If the Commission truly wishes to slow the growth of TRS Fund payments, it should start by doing so *without* impeding access to or the quality of IP CTS services. CaptionCall recently filed a Petition for Rulemaking that proposes a

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 4-5.

<sup>29</sup> CaptionCall Comments at 5.

<sup>30</sup> *Id.*

shift from the MARS rate methodology to a price cap methodology.<sup>31</sup> MARS is based on the intrastate CTS rates that are set through competitive bidding in the states. Presumably, the Commission expected rates to decline over time, but they did not, and MARS has produced six years of successive rate increases.<sup>32</sup> A price cap methodology, however, will incentivize providers to offer more efficient service and exert downward pressure on the IP CTS rate. Indeed, CaptionCall has proposed initializing the rate at \$1.6766 per minute, which is a full ten cents per minute lower than the 2012 rate.<sup>33</sup> Thus, by reducing the per-minute compensation rate using a methodology that has become standard for many regulated telecommunications service carriers, the Commission can immediately reduce IP CTS expenditures and ensure future rate reductions, while encouraging efficiency and foregoing restrictions that do little more than make the service harder to find, harder to obtain, and harder to use.

**III. The Commission *Must* Allow IP CTS Providers to Engage in the Continued Outreach Necessary to Fulfill the ADA’s Mandates, and the *Order and NPRM* Lacks Clarity as to how Providers May Do So.**

In its opening comments, CaptionCall argued that the Commission cannot—consistent with the ADA’s mandates to ensure that functionally equivalent telecommunications services are available to the extent possible—curtail the availability of IP CTS simply to avoid increased legitimate costs to the TRS Fund.<sup>34</sup> To the contrary, Congress imposed on the Commission the responsibility to ensure that IP CTS providers are able to conduct vigorous outreach in order to extend the service “in the most efficient manner” to the millions of eligible, hard-of-hearing

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<sup>31</sup> See CaptionCall Petition for Rulemaking, CG Docket No. 03-123 (filed Feb. 20, 2013).

<sup>32</sup> See *id.* at 3-4.

<sup>33</sup> See *id.*

<sup>34</sup> See 47 U.S.C. §§ 225(a)(3), (b)(1).

Americans who could benefit from the service but remain unserved.<sup>35</sup> CaptionCall therefore urged the Commission to “clarify its rules to narrowly target the specific problems it wishes to address,” so that providers will know what they may and may not do as they continue to “seek to extend IP CTS service to all hard-of-hearing individuals who would benefit from it.”<sup>36</sup>

Miracom USA, Inc.—which has applied to the Commission for permission to compete with CaptionCall—makes the argument that the FCC “made clear some eight years ago” that providers are not permitted to offer “financial incentives” to “register” new users.<sup>37</sup> But that claim is unequivocally wrong as to fees not directed to the direct or indirect benefit of the new user. The *2005 Financial Incentives Declaratory Ruling*<sup>38</sup> and the *2007 TRS Cost Recovery Declaratory Ruling*<sup>39</sup> to which Miracom refers only prohibit TRS providers from “offer[ing] consumers financial or other tangible incentives, either directly or indirectly, to make relay calls” using their service.<sup>40</sup> There is a critical difference between providing incentives to a subscriber to *use* IP CTS—potentially resulting in unnecessary minutes of use—and incentives for third parties to recommend eligible individuals for IP CTS.<sup>41</sup> Encouraging third parties to “spread the

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<sup>35</sup> *Id.* at § 225(b)(1).

<sup>36</sup> CaptionCall Comments at 3, 16.

<sup>37</sup> Comments of Miracom USA, Inc. at 6, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (“Miracom Comments”).

<sup>38</sup> *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, DA 05-140, 20 FCC Rcd. 1466 (2005) (“*2005 Financial Incentives Declaratory Ruling*”).

<sup>39</sup> *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Declaratory Ruling, FCC 07-186, 22 FCC Rcd. 20,140, 20,172-76 ¶¶ 89-96 (2007) (“*2007 TRS Cost Recovery Declaratory Ruling*”).

<sup>40</sup> *Id.* at 20,175 ¶ 92.

<sup>41</sup> The referral fees that CaptionCall paid thus were also not analogous to the “broadband credits” and other promotions to which Miracom alludes, because in that case, the benefit

word” obviously should be encouraged. On the other hand, encouraging unnecessary *minutes of use* is exactly the sort of minute-pumping schemes that Sorenson and CaptionCall have always vigorously opposed.

The Consumer Groups also oppose referral fees, but on the ground that they could encourage registration of ineligible users—purportedly, “these programs and inducements have the potential to indirectly encourage consumers” to sign up for IP CTS “regardless of whether they actually need the service to communicate in a functionally equivalent manner.”<sup>42</sup> Purple similarly claims that referral fees “may encourage people to sign up for service, even if they do not need IP CTS for effective communications.”<sup>43</sup> As CaptionCall argued in its opening comments, however, there is no need to ban *all* referral fees to prevent ineligible users from registering for IP CTS: “The inducement ban ... substantially duplicates the purpose of the

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went to the subscriber for signing up for (and thereafter presumably using) TRS, whereas under CaptionCall’s program the benefit went to the third-party referrer for the effort of making the referral. *See 2005 Financial Incentives Declaratory Ruling*, 20 FCC Rcd. at 1467 ¶ 4 (prohibiting “any program that offers any kind of financial incentive or reward *for a consumer to place a TRS call...*”) (emphasis added); *2007 TRS Cost Recovery Declaratory Ruling*, 22 FCC Rcd. at 20,175 ¶ 92 (“[P]roviders seeking compensation from the Fund may not offer *consumers* financial or other tangible incentives, either directly or indirectly, *to make relay calls*”) (emphasis added). Payments to these hearing industry participants (whether hearing professionals or assisted listening device distributors) do not plausibly have “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.” *Id.* at 20,175 ¶ 93. To the extent that the Commission was concerned that payments of referral fees to friends or charities might provide an incentive for an ineligible person to falsely certify that they were hard of hearing and needed the service, CaptionCall previously made clear that it did not object to a rule banning referral payment under those circumstances. *See* Letter from John T. Nakahata, Counsel, CaptionCall, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, CG Docket Nos. 10-51 & 03-123 (filed Jan. 7, 2013).

<sup>42</sup> Comments of Telecommunications for the Deaf and Hard of Hearing, et al. at 4-5, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (“Consumer Groups Comments”).

<sup>43</sup> Comments of Purple Communications, Inc. at 5, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013).

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.”<sup>44</sup> In all other cases, either the requirement of certification by a certifier who did *not* receive payment or 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 on referrals would serve no purpose.

Significantly, most of the parties who oppose referral fees simply ignore the thorny issues of how to define *permissible* relationships between providers and potential partners in advertising or other outreach. As CaptionCall observed in its comments, the Commission surely did not intend to bar all advertising by IP CTS providers, but “the literal language of the [interim and proposed] rule[s] could potentially sweep in innocuous advertising channels used by service providers and manufacturers in a broad array of industries as a matter of course.”<sup>45</sup>

Significantly, Hamilton identifies the same concern in its comments. Like CaptionCall, Hamilton states that it “believes that the Commission, in adopting this interim rule, did not intend to restrict all wholesale/retail business arrangements.”<sup>46</sup> For example, while “[c]learly there is a financial benefit for a third party to contract with an IP CTS equipment distributor to buy IP CTS equipment at wholesale and sell that equipment for a profit at a retail price of \$75 or more,” presumably “such arrangements do not constitute a ‘direct or indirect inducement[, financial or otherwise’ for purposes of the interim rule.”<sup>47</sup> Hamilton argues that

“wholesale/retail arrangements are ... benign because ... [t]here is no benefit (financial or

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<sup>44</sup> CaptionCall Comments at 15.

<sup>45</sup> *Id.*

<sup>46</sup> Comments of Hamilton Relay, Inc. at 2, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (“Hamilton Comments”).

<sup>47</sup> *Id.* at 2.

otherwise) to an IP CTS user.” Similarly, Hamilton points out that if an audiologist sells a phone (and makes a profit on it) but “is not issuing eligibility certifications” to purchasers, “then there does not appear to be ... a policy concern that the audiologist is being improperly compensated by the provider.”<sup>48</sup> Hamilton thus appears to make the same basic argument as CaptionCall—the ban on “direct or indirect inducements” is only necessary if the benefit goes directly to the end user or to the certifying entity. Again, in all other situations, the certification requirement or the \$75 payment by the end user for the equipment will prevent users who do not need IP CTS from signing up.

It is important to emphasize that many, many more situations that the Commission surely did *not* intend to prohibit might also fall within the literal language of the rule (“direct or indirect inducements ... to ... encourage subscription to or use of IP CTS”). Indeed, any form of cooperative marketing, like any form of advertising, could arguably represent an “indirect inducement” to a third party to encourage subscription to IP CTS—but presumably the Commission did *not* intend to ban such outreach efforts, either through its referral fee ban or its ban on “business agreements” with a certifying hearing professional. For example, an IP CTS provider might enter into an arrangement with a retailer or a hearing professional to split the cost of a direct-mail campaign to target individuals likely to benefit from IP CTS. Or an IP CTS provider might wish to share with a third party the costs of a booth at an event targeting individuals likely to benefit from IP CTS. In either case, under the Commission’s proposed rules, targeted individuals would still need to either pay a non-*de minimis* amount for IP CTS equipment or obtain certification to obtain IP CTS, so it is hard to see why the Commission would wish to ban merely *informing* them of the availability of IP CTS.

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<sup>48</sup> *Id.* at 3.

The core problem, though—as Hamilton suggests—is not whether any particular arrangement is permissible, but rather that the line between permissible and impermissible outreach efforts is simply not clear under either the interim or proposed rules. CaptionCall agrees with Hamilton that the best way to clarify would be to narrow the language of the rules so that they are focused specifically on the “policy concern[s]” the Commission has in mind. Failing that, however, the Commission should at a minimum establish a rapid, streamlined process (*e.g.*, within 30 days) for providers to request and receive guidance on whether particular advertising or marketing initiatives are permissible. Such a process would need to be public and transparent so that providers would be able to verify that all competitors are receiving the same guidance. The Commission should not—and indeed lawfully cannot—leave the scope of these rules for divination; the concept of fair notice as reflected in the *Fox*<sup>49</sup> and *Trinity Broadcasting*<sup>50</sup> decisions mandate that the Commission must provide clarity as to the boundaries of its rules *before* it can seek to enforce them. That is particularly true given that the *Order and NPRM* indicates 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.”<sup>51</sup>

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<sup>49</sup> 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).

<sup>50</sup> 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).

<sup>51</sup> *Order and NPRM* at 732 ¶ 56.

#### **IV. The Commission Must Ensure that Certification Requirements Comply with Statutory Mandates**

CaptionCall joins the Commission in its desire to ensure certification of the eligibility of IP CTS customers. To maintain the integrity of the TRS Fund, providers should receive compensation only for the minutes of eligible subscribers. Any certification system, however, must comply with the ADA's mandate that the Commission's rules ensure the availability of functionally equivalent communications services. As CaptionCall stated in its opening comments, self-certification is the most effective and efficient way for the Commission to achieve its objectives and comply with statutory mandates.<sup>52</sup> Nevertheless, if the Commission adopts additional requirements beyond self-certification, it must follow a set of guiding principles that ensure compliance with statutory mandates, which will require the Commission to disregard proposals made by several commenters.

First, the Commission should allow the distribution of free equipment to consumers who receive a valid independent certification that they are hard of hearing and need IP CTS to engage in functionally equivalent communications. The Commission's goal is to ensure that only eligible consumers use IP CTS. An independent certification achieves that goal. Therefore, it is redundant to ban free equipment simply to promote eligible IP CTS usage.

Moreover, banning free equipment undermines ADA and CVAA mandates. IP CTS users must purchase broadband service to use captioned phones, and the IP CTS demographic is least likely to already have—or want—broadband service. In addition, new IP CTS customers will likely already have traditional wireline telephone service and equipment installed in their homes—the captioned phone is an extra piece of equipment that they need only because they are hard of hearing. Hearing consumers do not have to incur these extra costs just to use the

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<sup>52</sup> See CaptionCall Comments at 20.

telephone, and the costs may dissuade usage by eligible users. Thus, banning free equipment undermines both functional equivalence and availability to the extent possible. It also undermines the CVAA requirement that providers undertake achievable accommodations through third-party peripherals that are available, at most, for a nominal cost.<sup>53</sup> Accordingly, the Commission should reject all proposals that include banning the distribution of free equipment.<sup>54</sup>

Second, if the Commission waives the independent-certification requirement for users who purchase their IP CTS equipment, the Commission should choose a definitive price—as opposed to a vague “non-*de minimis*” standard. In addition, if the Commission selects \$75 as the minimum price, it should recognize that persons who are not hard of hearing pay far less than that for an ordinary telephone and that wireless carriers typically subsidize the cost of handsets so that consumers are not required to make a substantial up-front payment—in other words, the Commission should acknowledge that a price considerably less than \$75 would be a functionally equivalent price. As HLAA notes, as compared to traditional telephones even with advanced features, a \$75 threshold would require hard-of-hearing users to pay at least double what hearing users pay. Rather than require consumers to pay any minimum price for a phone to avoid the burden and expense of obtaining certification from a hearing specialist, it would be more straightforward for the Commission to simply require a payment of \$75 to self-certify.

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<sup>53</sup> See 47 U.S.C. § 617(a)(2)(B), (b)(2)(B).

<sup>54</sup> See Consumer Groups Comments at 6; Comments of CTIA—The Wireless Association at 6-7, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013); USTA Comments at 7; Comments of the Telecommunications Equipment Distribution Program Association at 2, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (filed under “James Forstall” on ECFS) (“TEDPA Comments”); Comments of the National Association of State Relay Administration at 2, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013) (filed under “Connie Phelps” on ECFS) (“NASRA Comments”); HLAA Comments at 4.

If the Commission nevertheless requires a minimum payment for a phone, it should allow for a trial period. And the Commission should establish a specific length of time for the trial period, such as 90 days, rather than establishing a vague standard that will unnecessarily lead to disputes.

Third, CaptionCall does not object in principle to commenters' proposals to waive equipment-pricing requirements for low-income individuals. Such a system, however, would require providers, RLSA, and the Commission alike to develop an extensive income-verification infrastructure that would provide little to no benefit for the Fund or its contributors. Such a system would also add a hurdle for consumers, as they would have to provide proof of income before obtaining their equipment. A self-certification or third-party certification system would be a significantly more effective means of certifying IP CTS users and would allow eligible low-income consumers an affordable way to obtain IP CTS equipment without having to prove their low-income status, and without forcing the industry, the Commission, and RLSA to add another costly layer of bureaucracy to the provision of IP CTS service.

Fourth, the Commission should reject complicated and un-administrable certification systems that some commenters have suggested. For example, one proposal would require a user to self-certify and pay \$75, or get a certification of eligibility from an independent certifier.<sup>55</sup> But users would not have to pay \$75 or get an independent certification if their income falls below 400% of the poverty line.<sup>56</sup> Even if such users do get an independent certification, they would still have to pay an undefined non-*de minimis* amount for their equipment, unless, again, their income is below 400% of the poverty line.<sup>57</sup> This byzantine proposal is difficult even to

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<sup>55</sup> See Consumer Groups Comments at 7-8.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.* at 6.

follow and would be virtually impossible to administer; it highlights the need for clarity and simplicity, especially for a demographic that skews strongly toward the elderly.

Fifth, commenters overwhelmingly oppose a quantitative minimum-dB hearing-loss threshold.<sup>58</sup> The record now clearly reflects that such a threshold simply does not serve as an adequate eligibility threshold, and the Commission should reject any proposal that includes one. The Commission can define eligibility by requiring professionals to state that, using their professional judgment, the hard-of-hearing person being certified needs IP CTS to obtain functionally equivalent telecommunications service. No more is needed.

Whatever certification system the Commission adopts, it should apply only prospectively, as some consumer-oriented commenters have suggested.<sup>59</sup> Consumers who have self-certified their eligibility and are currently using IP CTS service should be allowed to continue to do so without obtaining an independent certification or paying a fee. With no evidence of fraud within the existing customer base, there is no need to implement these prophylactic requirements retrospectively. It would be an unreasonable burden to threaten eligible consumers with the loss of a service on which they have come to depend if they do not get a certification or pay a new fee.

If, however, the Commission does make the requirements retroactive, it should compensate providers for minutes of use generated up to the deadline for obtaining certifications for existing users.<sup>60</sup> A provider cannot and should not ever be required to provide service to a

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<sup>58</sup> See Consumer Groups Comments at 10; RERC-TA Comments at 10; Hamilton Comments at 6; HLAA Comments at 13; TEDPA Comments at 3; NASRA Comments at 3.

<sup>59</sup> See Consumer Groups Comments at 12; HLAA Comments at 10.

<sup>60</sup> See Hamilton Comments at 5-6 (proposing that providers have 180 days to obtain certifications from existing IP CTS users); Miracom Comments at 10 (suggesting that providers have 90 days to obtain certifications from existing users); Comments of the Adult Loss of Hearing Association at 5-6, CG Docket Nos. 13-24 & 03-123 (filed Feb. 26, 2013)

user for whom the provider cannot be compensated. Thus, after the deadline, providers should be permitted to discontinue service for customers who have not provided the requisite certification. Otherwise, providers would be providing service to a potentially large number of customers for no compensation.

In addition, the Commission should not adopt the Consumer Groups' proposal that providers be required to certify 50% of subscribers within 90 days, 75% by within 180 days, and 100% within 270 days.<sup>61</sup> There is no way to make such a system administrable: for example, if a provider has only certified 48% of its subscribers by the first deadline, it has two choices: figure out how to drop enough of its subscribers to reach the 50% threshold or forego compensation for all of its IP CTS minutes. In addition, a provider can undertake diligent good-faith efforts to obtain certifications from customers, but a provider cannot make a customer schedule an appointment with a certifier, go to the appointment, or submit the paperwork to the provider. Nor can the provider control the time at which the customer chooses to engage in this process. Providers should not be punished simply because a group of customers delays getting their certification or submitting applicable paperwork until just before the final deadline.

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("ALOHA Comments") (suggesting that the Commission grant providers six months to certify existing users).

<sup>61</sup> See Consumer Groups Comments at 12.

**V. The Commission Should Revisit and Reject Its Default-Off Requirement for Captions Because it Undermines Functional Equivalence.**

In its opening comments, CaptionCall proposed a rule that requires providers to ship phones in default-off mode, but that allows customers to switch them to default-on if desired.<sup>62</sup> Other providers have made similar proposals in the past.<sup>63</sup> Here, every commenter that represents hard-of-hearing groups opposes the default-off requirement.<sup>64</sup> CaptionCall agrees with those commenters and notes that CaptionCall’s proposal puts the choice in consumers’ hands and allows them to enjoy a more functionally equivalent experience. Indeed, a hearing user need only pick up a phone and dial a number to make a call—a hard-of-hearing user should have the same opportunity, as the ADA requires. Moreover, CaptionCall’s survey data reveals that 75% of CaptionCall’s customers prefer “default-on” captions. Many elderly consumers suffer from dementia, Alzheimer’s, and other memory-loss afflictions that make it difficult to remember to turn captions on. Forcing such consumers to turn captions on for every call is not functionally equivalent to a hearing user’s ability to pick up a telephone and make a call.

If, however, the Commission implements a default-off mandate, it should recognize that any subsequent reduction in minutes results not from a reduction in ineligible usage, but from artificial obstacles to eligible usage. CaptionCall’s experience demonstrates that the IP CTS demographic is the most likely to struggle with changes to a high-tech service.<sup>65</sup> When the

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<sup>62</sup> See CaptionCall Comments at 28-30.

<sup>63</sup> See Letter from David A. O’Connor, Counsel, Hamilton Relay, Inc., to Marlene H. Dortch, Secretary, Federal Communications Systems, at 2-3, CG Docket No. 03-123 (filed Jan. 10, 2013).

<sup>64</sup> See Consumer Groups Comments at 12-13; HLAA Comments at 4, 14-15; ALOHA Comments at 6.

<sup>65</sup> See CaptionCall Emergency Petition for Waiver at 7-8; Attachment 1 ¶¶ 7, 8, CG Docket Nos. 13-24; 03-123 (filed Mar. 7, 2013) (explaining confusion and frustration that customers

service becomes more difficult to use, some eligible customers will simply choose not to use it, instead of adapting to the new steps they must follow to use captions. As CaptionCall and others have noted, there is no evidence that IP CTS growth has resulted from ineligible use.<sup>66</sup> The Commission must recognize that default-off captioning solves a problem that does not exist, and any usage reduction serves as evidence that the Commission, contrary to ADA mandates, has erected barriers to usage of the service by the people with the very disability IP CTS accommodates.

**VI. A Speed-of-Answer Requirement of 85% Within Five Seconds, Averaged Within a Day, is Unrealistic, But Would be Workable if Averaged Over a Month.**

CaptionCall opposes the proposal that the Commission require that 85% of all IP CTS calls be answered within three to five seconds (presumably on a daily basis).<sup>67</sup> Whether set at three seconds or five, this blanket rule would leave no room for unexpected spikes in usage or for natural disasters like the East Coast experienced with Hurricane Sandy in 2012. CaptionCall, would, however, support an IP CTS requirement that 85% of calls be answered in 5 seconds or less, averaged on a monthly basis. This requirement would accommodate unexpected usage spikes or facilities downtime, and would mitigate the impact of such events on a provider's speed-of-answer calculation, while still holding providers to a higher minimum speed-of-answer standard than exists today.

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experienced when CaptionCall loaded new firmware with the default-off feature onto their phones).

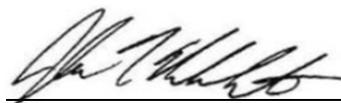
<sup>66</sup> See RERC-TA Comments at 9; ALOHA Comments at 3-4.

<sup>67</sup> See Consumer Groups Comments at 13.

## VII. Conclusion

CaptionCall fully agrees that the Commission must take steps to ensure that TRS programs, including IP CTS, are free from waste, fraud, and abuse, and CaptionCall will, of course, implement any rules the Commission adopts. CaptionCall, however, urges the Commission to review its interim and proposed rules with an open mind. As the record reflects, many aspects of the *Order and NPRM* unnecessarily impede access to or degrade the quality of a vital service for hard-of-hearing consumers. Accordingly, the Commission should 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,



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