

**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
)	
Sorenson Communications., Inc. and CaptionCall, LLC Application for Review of an Action Taken Pursuant to Delegated Authority)	

APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115(a), Sorenson Communications, Inc. and its wholly owned subsidiary, CaptionCall, LLC (collectively “CaptionCall”) hereby submit this application for review of an action taken by the Consumer and Governmental Affairs Bureau (the “Bureau”) pursuant to delegated authority.¹ The Bureau’s *Waiver Denial* is contrary to the public interest because it ignores the needs of vulnerable hard-of-hearing consumers, and the *Waiver Denial* violates the Administrative Procedure Act’s prohibition on arbitrary administrative decisions. The Commission should vacate the *Waiver Denial* and grant the relief described herein.

On January 25, 2013, the Commission issued, without notice and comment, an interim order that required providers of Internet Protocol Captioned Telephone Services (“IP CTS”),

¹ See *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24; 03-123, Order, DA 13-1045 (rel. May 9, 2013) (“*Waiver Denial*”).

among other things, to ensure that every call begins with captions turned off.² Providers had only five weeks to comply with this requirement. CaptionCall’s customers are generally more than seventy years old, experience hearing loss, and may have dementia or some other form of cognitive impairment.³ CaptionCall generally takes substantially longer than five weeks to develop changes to its software user interface, to ensure that it develops functional solutions, is able to test them thoroughly to resolve any bugs,⁴ and has time to train its users to ensure that they know how to use new features,⁵ a task that is difficult for elderly users with some form of cognitive impairment. Because of the tight timeline, however, CaptionCall was forced to abandon much of its testing process, and could only distribute a flyer summarizing the new default-off feature.⁶ CaptionCall developed and began deploying new firmware before the deadline, but it began receiving complaints of technical glitches and consumer confusion immediately after it deployed the firmware to tens of thousands of phones.⁷ The bugs and confusion had the effect of denying consumers access to a service to which they are entitled under the Americans with Disabilities Act of 1990 (“ADA”), which added 47 U.S.C. § 225 to the Communications Act. These problems are especially dangerous in an emergency situation, when people are likely to be anxious and/or disoriented and will be less likely to remember to turn captions on. As a result, CaptionCall began restoring the old firmware to its customers’ phones.

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*, CG Docket Nos. 13-24; 03-123, Order and Notice of Proposed Rulemaking, FCC 13-13 (rel. Jan. 25, 2013) (“*IP CTS Order*”).

³ See CaptionCall Emergency Petition for Waiver, CG Docket Nos. 13-24; 03-123, at 7 n.14 (filed Mar. 7, 2013) (“*Waiver Request*”).

⁴ *Id.* at 5.

⁵ *Id.* at Att. 1, ¶ 5.

⁶ *Id.* at ¶ 6.

⁷ *Id.* at ¶ 8.

CaptionCall immediately sought a waiver from the Bureau. As part of its Waiver Request, CaptionCall proposed receiving reduced compensation for phones with default-on settings.⁸ The Bureau, however, denied CaptionCall's Waiver Request in full.⁹ The Bureau's denial was contrary to the public interest because it prioritized an arbitrarily set deadline over a proper development, testing, and training process to minimize the impact on IP CTS customers. In addition, the Bureau's outright denial was arbitrary and capricious because it will deny CaptionCall 100% of its compensation for default-on minutes, most if not all of which are generated by hard-of-hearing individuals who are plainly entitled to use IP CTS. This is an excessive penalty that is grossly disproportionate to CaptionCall's actions. Accordingly, the Commission should reverse the *Waiver Denial* and grant the waiver CaptionCall requested.

I. Background

CaptionCall is one of the leading providers of IP CTS, a form of Telecommunications Relay Service ("TRS") that allows hard-of-hearing consumers to use a telephone while viewing captions of what the other party is saying. IP CTS is a life-changing technology for CaptionCall's customers, who on average are 74 years-old and have at least one hearing aid. One third of these customers are over 80 years-old, and may have dementia or some other form of cognitive impairment. CaptionCall has provided service since 2011, and from the outset CaptionCall has been fully committed to complying with the Commission's rules and regulations.

When CaptionCall launched its service, its phones allowed users to turn captions on and off, but the caption settings would not change without customer intervention. Thus, for example, if a user had captions turned on at the conclusion of a call, the captions would be on at the

⁸ Waiver Request at 3, 11.

⁹ See *Waiver Denial* at ¶ 21.

beginning of the next call. But if the user turned captions off during a call, captions would remain off at the beginning of the next call, and would remain off until the user turned captions back on. Over time, CaptionCall discovered that this feature caused confusion, as users would inadvertently turn captions off during a call, then think the phone was malfunctioning when captions did not turn back on. To remedy this confusion, in 2012 CaptionCall modified its phones so that captions were turned on by default. This “default on” setting was fully compliant with the Commission’s rules when implemented and made CaptionCall’s service more functionally equivalent to normal telephone service, where consumers can simply pick up the phone and talk without taking an intervening action.

In late 2012, IP CTS compensation began rising above the projections of the TRS Fund Administrator.¹⁰ However, instead of simply implementing a mid-year TRS Fund contribution factor increase—as the Commission has done at least twice before¹¹—the Commission, without notice and comment, released an emergency order designed to curb growth in IP CTS expenditures. The Commission speculated that IP CTS growth may have resulted from ineligible usage,¹² but the only evidence in the record to date shows just the opposite. Indeed, the independent Rehabilitation Engineering Research Center on Telecommunications Access (“RERC-TA”) surveyed IP CTS users and concluded that the results do “not support either fraud

¹⁰ *IP CTS Order* at ¶ 7.

¹¹ *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CG Docket No. 03-123, 23 FCC Rcd. 1680, 1682 ¶ 7 (2008) (“[G]ood cause exists to waive our rules to the extent they require that the carrier contribution factor be determined on an annual basis.”) (citing a 2004 Order similarly waiving the requirement that the contribution factor be set on an annual basis).

¹² *See IP CTS Order* at ¶¶ 6, 9.

or misuse as the source of growth in IP-CTS.”¹³ Thus, IP CTS growth resulted from additions of new eligible subscribers, following the expected S-Curve of a new technology, which generally sees slow initial growth followed by rapid growth as the technology matures and more consumers learn of it.¹⁴

The *IP CTS Order*, therefore, broadly attempts to mitigate only hypothetical possibilities of misuse. Among other requirements, IP CTS providers must “ensure that equipment and software used in conjunction with their service have a default setting of captions off at the beginning of each call...”¹⁵ This “default-off” rule was ostensibly motivated by a fear that ineligible consumers such as persons who are not hard-of-hearing, but live with or visit someone who is, would use a telephone with captions on by default and fail to turn them off, causing improper submissions for compensation from the TRS Fund.¹⁶ However, prior to implementation of the default-off rule, the record contradicted that fear. Indeed, an October 2012 CaptionCall survey showed that average IP CTS usage in hard-of-hearing only homes was 54% *higher* than in “mixed” homes, where a hard-of-hearing person lived with at least one

¹³ *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24; 03-123, Initial IP-CTS Survey Analysis by the Rehabilitation Engineering Research Center on Telecommunications Access, at 2 (filed Apr. 12, 2013) (“RERC-TA Study”).

¹⁴ *See, e.g., Int’l 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.”).

¹⁵ *IP CTS Order* at ¶ 1.

¹⁶ *See id.* at ¶ 27 (seeking to prevent “billing of the TRS Fund for casual or inadvertent use of IP CTS by other individuals who do not need IP CTS to communicate by phone, in particular those who may be living in a subscriber’s household or visiting a subscriber’s house or office.”).

hearing person.¹⁷ In addition, while average usage per CaptionCall customer increased modestly following implementation of the default-on feature, average usage increased approximately ten percent *more* in hard-of-hearing-only households than in mixed households.¹⁸ If default-on captioning increased ineligible usage, the results would have been reversed—usage would have increased more in mixed households than in hard-of-hearing only households. In addition, the RERC-TA Study confirms that default-on does not increase improper usage, as it concluded that only about six percent of IP CTS users who “share their equipment” even *potentially* misuse IP CTS.¹⁹ Over the past weeks, hundreds of eligible IP CTS consumers have filed comments in this matter with many indicating that they are the only person who uses the IP CTS device.²⁰ Thus, the fear of ineligible use was unfounded, and any reduction caused by the default-off rule resulted primarily from making the service harder for eligible consumers to use.

The “default-off” rule became effective on March 7, 2013, which was 30 days after the *IP CTS Order* was published in the Federal Register²¹ and only 5 weeks after CaptionCall learned of the new requirement upon release of the *IP CTS Order* on January 25, 2013. The default-off feature, however, required a major revision to CaptionCall’s user interface, which required significantly more time than CaptionCall was allowed to implement the new feature.

¹⁷ See Letter from John T. Nakahata, Counsel for CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51; 03-123, at 3 (filed Jan. 15, 2013).

¹⁸ *Id.* Some of the increase in usage—whether in hard-of-hearing-only households or in mixed households—may be due to the other service improvements that were part of CaptionCall’s June 25, 2012 firmware release.

¹⁹ See RERC-TA Study at 18.

²⁰ See, e.g., Comments of Gerald Johnson, CG Docket No. 13-24 (filed Apr. 18, 2013); Comments of Federico Vaquer, CG Docket No. 13-24 (filed May 1, 2013).

²¹ See *IP CTS Order* at ¶ 69.

Nevertheless, CaptionCall embarked on a herculean effort to develop and implement the new feature. In the short time allotted, CaptionCall was able to develop a new user interface, which included a green bar that instructed users, “Touch here to caption this call.” CaptionCall, however, was unable to conduct adequate testing and, thus, did not identify bugs or potential consumer confusion in advance of release. In addition, CaptionCall generally phases rollouts of a new user interface, so that, as problems arise, they affect only a small group of users and can be fixed before all users receive the new firmware. Here, however, to meet the Commission’s deadline CaptionCall was forced to roll its new firmware out to all customers at once. Moreover, CaptionCall generally conducts extensive outreach and training to ensure that users understand and are able to use new features. Here, CaptionCall could only send out a flyer in advance of the default-off deadline.

CaptionCall began deploying its new firmware on March 3, 2013, four days in advance of the default-off deadline, and by midnight on March 4 had completed automatic installation on tens of thousands of phones. Almost immediately, however, CaptionCall began to receive large volumes of complaints about bugs in the firmware and confusion with the default-off feature. Customers complained of various technical glitches, such as a 20-second delay in captioning, static on the line, and captions that simply never came on.²² In addition, many customers experienced significant confusion and frustration with the new feature.²³ Based on the volume and nature of the complaints, CaptionCall concluded that its new firmware was a “dud,” and that allowing the firmware to remain on customers’ phones presented an unacceptable risk of undermining its customers’ ability to communicate in a functionally equivalent manner to

²² See Declaration of Bruce Peterson, CG Docket Nos. 13-24; 03-123, at ¶ 11 (filed Apr. 22, 2013) (“Peterson Declaration”).

²³ *Id.*

hearing persons. Accordingly, CaptionCall ceased its rollout and began reinstalling the old firmware to its customers' phones. CaptionCall filed its Waiver Request on March 7, 2013, the date of the default-off deadline.

Though technical glitches and customer confusion prevented CaptionCall from implementing the default-off feature, the vast majority of CaptionCall's minutes of use—if not all—come from hard-of-hearing IP CTS users who are plainly eligible to use the service. CaptionCall recognized, however, that because a default-off setting makes captioning harder to use, successful implementation would have caused its minutes to drop. Therefore, CaptionCall proposed receiving compensation for only 85% of the minutes associated with default-on phones—which reflected the approximate increase CaptionCall observed when it first implemented the default-on feature. Put simply, CaptionCall was willing to accept less than full compensation for minutes of use that were otherwise eligible for compensation.

Subsequently, CaptionCall met with the Bureau to address any concerns and provide additional information.²⁴ CaptionCall provided a supplemental declaration on April 22, 2013, to inform the Bureau of its progress.²⁵ Though CaptionCall repeated its compensation-reduction proposal,²⁶ the Bureau never countered with a different remedy.

On May 9, 2013, the Bureau denied the Waiver Request in full. The Bureau acknowledged CaptionCall's reduced-compensation proposal, but summarily rejected it, stating simply that CaptionCall did “not indicate how this figure was developed, and there is no

²⁴ See Letter from John T. Nakahata, Counsel for CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24; 03-123 (filed Apr. 15, 2013); Letter from John T. Nakahata, Counsel for CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24; 03-123 (filed Mar. 21, 2013) (“Mar. 21 Ex Parte”).

²⁵ See Peterson Declaration.

²⁶ Mar. 21 Ex Parte at 1-2.

quantitative evidence as to the amount of unauthorized use that will result from CaptionCall's noncompliance.²⁷ The Bureau did not suggest an alternative proposal. By that time, however, the Bureau likely had access to compensation data from every provider that had implemented default-off captioning. Thus, the Bureau could have derived a reduction based on the reductions that other providers experienced. The Bureau declined to take that step.

II. The Bureau Should Have Granted CaptionCall's Waiver Request.

CaptionCall amply demonstrated that waiver of the default-off rule's tight deadline was in the public interest, as a rushed effort to implement the default-off requirement harmed IP CTS customers. The Commission may waive its rules when there is "good cause" to do so.²⁸ Good cause exists when circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.²⁹

Good cause exists here because a waiver allowing CaptionCall to comply with the default-off rule would have benefited the public interest far more than strict adherence to the *IP CTS Order's* arbitrary deadline. Most alarmingly, the rushed firmware development and deployment processes disproportionately affected CaptionCall's most vulnerable customers. Indeed, consumers with more significant cognitive impairment have more difficulty adjusting to changes in the technology on which they rely. For these consumers, an untested and flawed feature that stands between them and captioned service, and that is deployed with minimal training, presents a significant barrier to usage of IP CTS. This barrier is especially dangerous in emergency situations, where the consumer is likely to be panicked or disoriented and likely to

²⁷ *Waiver Denial* at ¶ 26.

²⁸ 47 C.F.R. § 1.3.

²⁹ *Ne. Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

have significant difficulty remembering to turn captions on during a 911 call. Indeed, this is a reason why the Commission should determine not to require a default-off setting as a final rule.

The additional time would have allowed the company to evaluate and address the technical glitches that ensued following the initial firmware rollout, to address consumer complaints and inquiries about the change, to develop (and test) any additional patches necessary to achieve full but non-disruptive compliance, and to provide customers with detailed information about the change.

The requested waiver extension presented virtually no risk to the public interest. To the contrary, a waiver would clearly have advanced the public interest as it would have mitigated the disruptive impact of the default-off rule. Rather than subject users to a flash-cut solution that contained technical glitches, an extension would allow CaptionCall to roll out a tested and vetted firmware update in conjunction with detailed outreach designed to educate consumers fully about the transition. And CaptionCall's proposed reduction in compensation would protect the TRS Fund.

Instead, the Bureau completely disregarded the harms that CaptionCall cited and denied CaptionCall's Waiver Request. Apparently, the Bureau preferred a rushed and flawed solution to a thoroughly tested and effective solution. That decision does not serve the public interest, and the Bureau improperly denied CaptionCall's Waiver Request.

III. The Bureau's Outright Denial Is Arbitrary and Imposes Excessive Punishment on CaptionCall.

When considering a waiver application, an agency cannot act “arbitrarily.”³⁰ In addition, an agency cannot issue a waiver denial that will cause a “grossly excessive” penalty “wholly disproportionate” to the party’s error.³¹ An agency’s action is thus arbitrary when it fails to examine “other remedies” that are “more fairly proportional” to the party’s error.³² Finally, an agency must take into account factors such as a “lack of profit” for the party applying for the waiver.³³

The *Waiver Denial* is arbitrary and threatens severe financial harm to CaptionCall. The default-off rule is considered a “mandatory minimum standard,”³⁴ which means that any provider who does not fully comply may be denied compensation for *all* of its IP CTS minutes.³⁵ This equates to tens of millions of dollars in lost compensation for CaptionCall. This draconian penalty, however, denies CaptionCall compensation for minutes of use of which the vast majority if not all are eligible for compensation but for the default-off rule. The Bureau has provided no justification for such a severe penalty for an implementation delay.

Moreover, CaptionCall took pains to act in good faith throughout this process. CaptionCall expended significant time and resources to develop a default-off solution in the extraordinarily compressed timeframe created by the default-off implementation deadline.

³⁰ See *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099 (D.C. Cir. 1993).

³¹ See *id.*

³² See *id.* at 1101.

³³ See *id.* at 1100.

³⁴ See *IP CTS Order*, App. D (placing the default-off rule under 47 C.F.R. § 64.604, titled “Mandatory minimum standard”).

³⁵ See 47 C.F.R. § 64.604(c)(5)(iii)(E)(4) (“The TRS Fund administrator shall make payments only to eligible TRS providers operating pursuant to the mandatory minimum standards...”).

CaptionCall reversed its default-off rollout only after realizing that the new firmware was compromising hard-of-hearing users' ability to obtain functionally equivalent telecommunications services as mandated by the ADA. CaptionCall immediately notified the Bureau and kept the Bureau informed of its progress. CaptionCall even proposed a voluntary reduction in its compensation.

The Commission should note that the other major supplier of IP CTS phones did not bear the same burden of firmware development as CaptionCall. Captel already had a tested, verified default-off version of its firmware available due to various states' regulations requiring the same long prior to the Commission's interim IP CTS rules. Rather than being required to create and test new firmware, Captel simply rolled this existing user interface design out more broadly.³⁶

Under these circumstances, a full denial of tens of millions of dollars of compensation is "grossly excessive" and "wholly disproportionate" to a good-faith act that caused minimal or no harm. In addition, CaptionCall, by volunteering to reduce its compensation, did not stand to profit from the delay in its default-on implementation. Yet, the Bureau summarily dismissed CaptionCall's compensation-reduction proposal and failed to consider any "alternative remedies." Accordingly, the Bureau's outright *Waiver Denial* was arbitrary and must be reversed.

³⁶ See Comments of Pamela Y. Holmes, Docket No. 03-123, at 7 (filed Sept. 21, 2012).

IV. Conclusion

The Commission should reverse the Bureau's *Waiver Denial* and grant the waiver that CaptionCall requested.

Respectfully submitted,

/s/ John T. Nakahata
John T. Nakahata
Christopher J. Wright
Walter E. Anderson
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
T: (202) 730-1300
jnakahata@wiltshiregrannis.com

*Counsel to CaptionCall, LLC and Sorenson
Communications, Inc.*

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