

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

In the Matter of)	
)	
FCC Seeks Comment on Adopting)	
Egregious Cases Policy for)	GN Docket No. 13-86
Indecency Enforcement)	

**COMMENTS OF SUN SOUNDS OF ARIZONA,
AN AUDIO INFORMATION SERVICE
PART I**

SUN SOUNDS of ARIZONA

By its attorneys:

**Ernest T. Sanchez
Susan M. Jenkins**

**THE SANCHEZ LAW FIRM, P.C.
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037**

**Telephone: 202-237-2814
Fax: 202-237-5614
Email: ernestsanchez2348@gmail.com**

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Summary

Sun Sounds of Arizona is an Audio Information Service (“AIS”) that provides a 24 hour-a-day, seven-day-a-week audio reading service for persons in Arizona who have a visual disability or other print-disability. Sun Sounds files these Comments in this proceeding to bring to the Commission’s attention the fact that the Commission’s existing indecency enforcement policies threaten the growth and future operations of radio reading and other audio information services. The content of Sun Sounds programming, typical for such services, are newspapers, magazines, books, and other print material. Because these materials are freely available without any form of censorship to sighted persons, Sun Sounds and other AIS entities are committed, as a matter of principle, to read all such materials aloud verbatim. Sun Sounds’ 500 or so readers are not “shock jocks.” The reading of these materials is not presented in a pandering or titillating matter. Nevertheless, the problem, as incongruous as it might seem, is that radio and TV broadcast stations, which might contract with Sun Sounds or other AIS provider to broadcast the reading of these print materials over either FM subcarrier or HD channels, are reluctant to do so because of the Commission’s present indecency and profanity policies. The problem has actually grown worse, not better, with the move to HD, because digital radio interference has further degraded or, in many cases, eroded SCA sound quality. Yet no real alternative technology can effectively replace on-air transmission for AIS, since new technology involving the internet, tablet or smart phone apps, or other tech advances are still too expensive and not yet user-friendly enough for the population served by AIS providers. This is particularly true of the more elderly members of the Sun Sounds audience, whose lack of tech-savvy skills is probably on a par with other members of the older generation – that is, not very savvy.

In these Comments, Sun Sounds argues that, whether analyzed from the perspective of First Amendment strict-scrutiny protection of printed materials from government censorship, or the Commission's application of indecency standards in the context of news and public information programming, an exemption for broadcasts of AIS read-aloud print content is warranted. As the Commission reconsiders its policies for indecency enforcement, including the possibility that it will limit enforcement to so-called "egregious" cases (however that term may be defined), Sun Sounds urges that AIS print content should receive the highest level of deference and should be exempted from enforcement actions.

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Comments of Sun Sounds of Arizona, an Audio Information Service

Sun Sounds of Arizona, Inc., an Audio Information Service¹ operated as a community service of Rio Salado College in Arizona (Sun Sounds), thanks the Federal Communication Commission for the opportunity to file Comments in this proceeding regarding the possible adoption of an “Egregious Cases” policy for future enforcement of the Commission’s broadcast indecency policies. As an Audio Information Service, Sun Sounds – through its volunteer readers – reads aloud newspapers, magazines, books, and other print material to persons who have a print disability, either from blindness, impaired vision, an inability to hold books or turn pages, or other disability. In these Comments, Sun Sounds will focus upon the need for change in the Commission’s indecency policies to the extent that those policies have had the unfortunate and unintended effect of limiting access by persons with print disabilities to the services provided by Sun Sounds and other Audio Information Services.

¹The original term “Radio Reading Services” for entities like Sun Sounds has largely been replaced by “Audio Information Services,” which better encompasses the various media and technology platforms in use to make print accessible to persons whose vision is impaired or who otherwise have a print disability. Rio Salado College is part of the Maricopa County Community College District (“MCCCD”), the licensee of noncommercial educational radio stations KJZZ and KBAQ.

Sun Sounds serves any person in the State of Arizona who finds it difficult to see, hold, or understand printed material due to a disability. Sun Sounds has four broadcast outlets in the State of Arizona – Tempe/Phoenix, Tucson, Flagstaff, and Yuma – and serves approximately 50,000 people. These members of Sun Sounds use the service to hear daily local and national newspapers, magazines, books, grocery ads, and other vital information read aloud and verbatim by its staff of approximately 500 volunteer readers.

Sun Sounds is a member of the International Association of Audio Information Services (IAAIS), an association of community broadcast services which have as their mission “the provision of current print materials in audio format for people who are blind, visually impaired or legally blind, or who have a physical or cognitive disability which prevents them from holding, reading, or understanding the printed page.”² The mission of IAAIS was stated succinctly by former-FCC Chairman Genachowski at the Chairman’s Awards for Advancement in Accessibility in December 2012: “IAAIS members provide access to print-based information for individuals who are print-disabled.”³

Taking our cue from the Chairman’s Remarks, Sun Sounds in these Comments will refer to the audience for audio information services as “persons who are print-disabled” or who “have print-disabilities,” and, to the audio information content that is broadcast as “print-based information” or, at its most basic, simply “print.”

² IAAIS website at <http://iaais.org/aboutiaais.html>. A list of IAAIS members is attached as Exhibit 1.

³ Chairman’s Awards for Advancement in Accessibility: Prepared Remarks of FCC Chairman Genachowski, Federal Communication Commission, December 18, 2012 (<http://www.fcc.gov/document/chairmans-remarks-advancement-accessibility-awards>)

The Chairman's Award, in the category of Consumer Empowerment Information, was given to Project StAR: Accessible Radio 2012 a.k.a The Narrator. As the Chairman described it:

the Insignia Narrator is an AM/FM/HD radio built by Best Buy's exclusive brand Insignia, that follows the principle of universal design by providing simple, tactile controls that talk so that people who are blind or visually impaired can control the user interfaces on their radio. The Narrator was designed in collaboration with the International Association of Audio Information Services (formerly the Association of Radio Reading Services) Project StAR (Standards for Accessible Radios).

Sun Sounds' own employees, together with engineers and marketers at iBiquity and Best Buy, played an important role in both the design and the market development of this innovative new device that will make access to print delivered by radio much more accessible to persons who are print disabled. Demand for the product was nearly instantaneous. Even though an Audio Information Service is, at present, only available in a digital FM broadcast in one market – the greater Phoenix area – the first production of the Insignia Narrator has already sold out at Best Buy outlets and online (*see* Rio Salado College, *Rio News*, "Visually-Impaired Residents Tune Into "Talking" Radio," (July 28, 2012).⁴

Unfortunately, if a person with a print disability lives anywhere else in the United States, he or she is unlikely to benefit from this cutting-edge technological advance because, to date, Sun Sounds and IA AIS have been able to confirm only one FM radio station willing to make an HD channel available to an audio information service – KBAQ-FM in Phoenix. It is possible that at least one additional HD-transmitted service has begun recently – in Florida – but, at the time of filing, this had not yet been confirmed. Although HD radio is, in many respects, the ideal medium for delivering print information to a sizable audience, every other radio licensee

⁴ http://blog.riosalado.edu/2012_07_01_archive.html

that has been approached, to date, has been unwilling to accept responsibility for the audio broadcast of uncensored print due to the Commission's indecency policies.

While the Audio Information Service community is sincerely grateful for the Chairman's Award and the agency's recognition of their work, it must nevertheless be acknowledged that, without a broadcast HD channel to transmit print information over the air, the technological promise of the Narrator will remain unfulfilled. But, based on the negative reaction Sun Sounds and other IA AIS members have received to date, the risk of drawing a complaint of indecency or profanity because of verbatim reading policy of these services threatens to close off access to HD radio for these services. It is therefore appropriate, as the Commission uses this proceeding to reconsider its indecency policies, including the possibility of limiting enforcement to "egregious" cases, for Sun Sounds to request specific relief for those radio and television stations that enable IA AIS members to provide access for the print-disabled. Accordingly, Sun Sounds proposes that the Commission exempt print-based IAS services, and the stations who broadcast the services, from indecency enforcement as a matter of policy.

Sun Sounds of Arizona. Established in 1979, and originally only available over the subcarrier of NCE radio station KJZZ-FM, Sun Sounds was named one of former President Bush's "Thousand Points of Light" in 1992. It continues to provide access to audio-delivered print free of charge, 24 hours a day, seven days a week but, today, the platforms it utilizes have proliferated to include HD radio, designated cable systems, telephone, and the internet. For several months now, Sun Sounds has been broadcast in the Tempe/Phoenix area on the third HD channel of NCE radio station KBAQ-FM.

Yet, despite this multiplicity of delivery formats – which will be discussed in more detail below – the news, public affairs, and other print content Sun Sounds provides to its audience of

persons with print disabilities is necessarily limited to what can be broadcast on its HD 3rd channel and SCA services. Sun Sounds, and most Audio Information Services, read print verbatim, and are unwilling, as a matter of principle, to censor or “bleep” any of the print that is read. To do so would be the functional equivalent, for print-disabled persons, of what would be experienced by sighted persons if they were to encounter blacked-out words, descriptions, or photographs in any of the newspapers or magazines or other material they read.

Self-censorship under these circumstances, therefore, takes the form of channeling, by which is meant adjusting the daily reading schedule so that books, or other content that might make licensees nervous, to the safe-harbor hours from 10 pm to 6 am. Even though sighted citizens of Phoenix can read Playboy or the latest bestseller at 3 pm, or with their morning coffee if they so choose, persons who are print-disabled must stay up late, regardless of health status or age. To protect KJZZ and KBAQ, both public radio stations, and their community college licensee from the risk of financially-ruinous fines, the print content read aloud and verbatim by Sun Sounds volunteers to Arizona adult citizens who are print-disabled is restricted, for 16 hours a day, to what is deemed acceptable for children under the Commission’s indecency and profanity policies.

This proceeding provides an appropriate opportunity for the Commission to re-assure broadcast licensees, the Audio Information Service community and the millions of Americans to whom they read aloud, that it recognizes both the Constitutional and the administrative law principles that support an overall exemption of print-based information read over the air from enforcement of these policies. Failure to do so will continue to deprive millions of adult American citizens of access to content that, both as print and as news and public information, is fully protected by First Amendment rights to free speech and freedom of the press. The content

for which Sun Sounds seeks a policy determination of non-enforcement (or “non-egregious” if that is the term the Commission will adopt) is content to which sighted Americans have ready access 24 hours a day.

For many years, there has been confusion among broadcasters regarding the Commission’s enforcement intentions with respect to subcarrier transmission of radio reading services. The “FCC Encyclopedia” page on the Commission’s website (<http://www.fcc.gov/encyclopedia/broadcast-radio-subcarriers-or-subsidary-communications-authority-sca>) says of subcarrier or SCA service that it was deregulated in 1983, that no license is required to operate an SCA, and that “the Commission does not regulate the programming content of subcarriers.” “However,” the Encyclopedia continues, citing 47 CFR 73.295(e) for FM stations, “the broadcast licensee, not the subcarrier user, must retain control of the programming, with the right to reject any material that it deems inappropriate, undesirable or illegal.” Broadcast licensees, faced with this seeming contradiction and lacking guidance specific to print content, have naturally chosen to play it safe, leaving Audio Information Services little choice but to reserve any less-than-G-rated print content to safe harbor hours or be denied use of a broadcast channel.

In filing these Comments, Sun Sounds urges the Commission to resolve existing confusion within the broadcast community about the applicability of the Commission’s indecency policies to the same newspapers, magazines, books, and other sources of information that are readily available in print format. The chilling effect of the Commission’s indecency policies has created problems for FM subcarrier access for many years,⁵ and now threatens to

⁵ Paul K. McMasters, *Inside the First Amendment: Surrendering our choice to a sense of decency*, [Naplesnews.com](http://www.naplesnews.com) April 11, 2005, http://www.naplesnews.com/news/2005/apr/11/ndn_inside_the_first_amendment_surrendering_our_c/?print=1

close off most HD 2nd and 3rd channels to Audio Information Services – the inevitable result of broadcaster fear of indecency enforcement, given the continuing responsibility of the licensee for content broadcast on its subcarrier or HD second and third channels.⁶

In these Comments, Sun Sounds will focus specifically and exclusively upon the need for and appropriateness of a policy that clearly exempts the broadcast of audio-transmitted print, specifically intended for an audience of persons who have print disabilities, from indecency enforcement, whether broadcast on a subcarrier channel or an HD channel. In print format, the content of these broadcasts enjoys First Amendment protection for freedom of the press and freedom of speech. The fact that this protected content is delivered by audio to a relatively-small minority of citizens rather than by the visual access enjoyed by the majority, should not be determinative here for purpose of Constitutional analysis. Rather, restrictions on the broadcast of audio-delivered print to an audience of citizens with print disabilities should be subject to the same strict scrutiny analysis as any other non-broadcast restriction on free speech or a free press.

I. The Problems Faced by Audio Information Services and the Citizens They Serve

In 2011, the Commission published a comprehensive report entitled *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* (July 2011; www.fcc.gov/infoneedsreport) (hereafter, “*Waldman Report*” or “*Report*”). This *Report*, as its authors wrote, “look(ed) not only at the changing face of media, but at the relevant policy and regulatory situation, including the FCC’s own track record.” The *Report* provides an extensive analysis of the problems and challenges facing both traditional and new media – ranging from newspapers to the internet and cutting-edge technology.

⁶ 47 CFR 295 (e).

The Report also looked closely at several “Key Cross-Cutting Issues,” issues which must be addressed across the spectrum of media and technology. Two of these key issues involved the more limited access available to minorities (Chapter 23) and people with disabilities (Chapter 24), and the resulting information disparities borne by these communities. The Report adopted the broad U.S. Census Bureau definition of the term “people with disabilities” as “an umbrella term to include people who are blind or have low vision, people who are deaf, hard of hearing, or have speech disabilities, those with physical or cognitive disabilities, and persons with multiple disabilities.” Sun Sounds commends the Commission for its enthusiastic efforts to implement the far-reaching 21st Century Communications and Video Access Act of 2010,⁷ which will greatly improve access to technology for people with disabilities, and urges the Commission to recognize that audio access is equally vital to those with print disabilities.

The Executive Summary of the *Waldman Report* highlights several of the author’s “basic conclusions” regarding how the FCC should respond to the identified – and largely unmet – communication and information needs. One such conclusion, most appropriate here, points out that “[w]ith the media landscape shifting as fast as it has been, some current regulations are out of sync with the information needs of communities and the fluid nature of modern local media markets.”⁸ To remedy this problem, the Report recommend that “policymakers should take historically underserved communities into account when crafting strategies and rules.”⁹

⁷ Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.). As the Commission is aware, it is in the process of rulemaking to implement this new and comprehensive law to assure accessibility of technology for persons have disabilities. See <http://www.fcc.gov/document/cvaa-emergency-infovideo-description-report-and-order-fnprm>

⁸ Steven Waldman et al., FCC, *The Information Needs of Communities (2011)* (hereafter, “*Waldman Report*” or “*Report*”), Exec Summary at 6

⁹ *Waldman Report*, Exec. Summary at 7.

Sun Sounds proposes that, in this proceeding to “craft” and reevaluate its indecency policies, the Commission should take into account the information needs of the historically underserved community of persons who have print disabilities. This proceeding provides an opportunity to assess whether the print content of a reading and information service for the print-disabled could really ever be deemed an “egregious” violation. Sun Sounds asks the Commission to likewise consider the negative influence exposure to indecency enforcement has had on the willingness of radio and TV stations to make Audio Information Services available to this community.

Regardless of any other changes that might or might not develop as a result of this proceeding with respect to the Commission’s indecency and profanity policies, Sun Sounds urges the Commission to make it clear that the broadcast transmission in audio format of print materials read by an Audio Information Service will be deemed exempt from indecency enforcement action by the Enforcement Bureau and the Commission. The legal basis for this exemption, which will be discussed below in more detail, can be derived from either the Constitutional protection of speech and press enjoyed by that same content in its print format, or the Commission’s long-acknowledged policy to proceed with “utmost restraint” in the context of news and public affairs programming.¹⁰

In considering the context for audio information service broadcasts, the Commission must recognize that those who are print-disabled rely principally on broadcast media for access to print in the form of newspapers, magazines, books, and other information needed for everyday life. Without an exemption from enforcement of indecency and profanity policies – whatever

¹⁰ *Letter Ruling*, 6 FCC Rcd. 610 (1991); *Peter Branton v. FCC, et al., Respondents*, 993 F.2d 906 (1993); *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 5, 2005*, 21 FCC Rcd 13299 (2006) (hereafter “*Order on Remand*”).

form these may take at the end of this proceeding – access to vital news, public affairs, and other print information by these adult citizens is unconstitutionally constrained to the extent it is limited to what the Enforcement Bureau might deem acceptable for children.

The injury to print-disabled citizens as a result of this deprivation of constitutional rights that are routinely enjoyed by sighted citizens is multiplied by several factors. In the first place, the chilling effect exerted by the risk of indecency enforcement causes many FM licensees to refuse to contract with audio information services under any circumstances. To some extent, this is due to historical confusion among broadcasters regarding the Commission's enforcement intentions with respect to subcarrier transmission of radio reading services. The "FCC Encyclopedia" page on the Commission's website states, with respect to subcarrier or SCA service, that it was deregulated in 1983, that no license is required to operate an SCA, and that "the Commission does not regulate the programming content of subcarriers."¹¹

"However," the Encyclopedia continues, citing 47 CFR 73.295(e), "the broadcast licensee, not the subcarrier user, must retain control of the programming, with the right to reject any material that it deems inappropriate, undesirable or illegal." Broadcast licensees, faced with this contradiction and lacking guidance specific to print content read aloud, have understandably chosen to play it safe, leaving Audio Information Services little choice but to reserve any less-than-G-rated print content to safe harbor hours. Some stations are reluctant to rely even upon safe harbor options, and refuse to broadcast the content at all.

As a result, fewer Americans with print disabilities have access to any radio reading service. Stations like KBAQ-FM (whose HD-3 channel is currently used by Sun Sounds), whose

¹¹See <http://www.fcc.gov/encyclopedia/broadcast-radio-subcarriers-or-subsidiary-communications-authority-sca>

licensee is willing to share its subcarrier or HD channel with an audio reading service, retain responsibility for the content of what they broadcast. KBAQ is one of a very few stations (possibly the only one) that has been willing to do so on an HD channel. At the present time, stations that provide a radio SCA or TV SAP channel have understandably wanted protection from the risk of indecency complaints. This has led to self-censorship and channeling of First Amendment-protected print, leading to such absurd results as adults forced to wait until 10 pm or later to enjoy a favorite magazine or new best-seller.

The scope of the restraint is exacerbated yet further because non-broadcast transmission of this print through unregulated media such as the internet, telephony, or smart phone or tablet apps, is indirectly censored. In addition to radio, Sun Sounds makes its programming available by telephone access, online streaming, cable TV, iPad and smart phones. However, what is available on these other media is necessarily limited to what can be broadcast on SCA and HD. audio information services, with their limited budgets and overworked volunteer staff, cannot realistically be expected to record two versions of what is read – one for audio broadcast and one for transmission via other media. As a result, the entire service is limited to content that can ‘safely’ be broadcast – which means, either censorship of print or channeling the delivery of that print to times safe harbor hours.

Thus, citizens with disabilities are deprived of access to constitutionally-protected print when that content is read aloud and broadcast, but these broadcast-based restrictions likewise constrain their ability to access that content regardless of the media by which it is distributed. An enforcement exemption policy is needed, not only because the growth of audio information services has been stymied by broadcasters’ concern that their responsibility for content on radio subcarrier and HD channels, and audio subcarriers on Digital TV, but – more basically –

because the millions of American citizens who have print disabilities lack the same First Amendment right enjoyed by their fellow citizens – access to print news, public affairs, and information content, without regard to the time of day, without regard to the medium of transmission, and without regard to whether that content would satisfy the FCC’s indecency or profanity standards.

A. The Affected Community: Persons With Print Disabilities.

According to the above-cited *Waldman Report*, at least 11% of Americans, or approximately 25.2 million people, experience some form of visual impairment. These rates increase with age; thus, 14.3% of Americans between the ages of 65 and 74, and 21.1% of those over 75, have visual disabilities. According to the National Eye Institute of the U.S. Institutes of Health, the vision loss rate for those over 80 is 23.7%.¹² As IAAIS has reported:

Millions of people worldwide are qualified to receive IAAIS members' services. Anyone who has an inability to see or hold standard printed materials is eligible to become a radio reading service listener. More people than ever are facing the threat of blindness from age-related eye disease. These numbers are expected to increase over the next 30 years as the Baby Boomer generation ages. Studies show that 1 in 4 persons over the age of 75 and 1 in 6 over 45 have trouble reading because of diminished vision. Dozens of other health and cognitive conditions affect one's ability to read.. (See IAAIS website at <http://www.iaais.org/aboutiaais.html>)

In discussing the unmet information needs of the community of persons with disabilities, the *Waldman Report* explored the history of print access by this community, pointing out that

for most of the 20th century, the blind and visually impaired had little access to newspapers and other printed media. In 1969, Radio Reading Services, a group of non-profit enterprises, started enlisting volunteers to read newspapers and other printed materials over FM subcarriers called subsidiary communications authorizations (“SCAs”). In the 1990s, this service grew into a broader program called Audio Information Services, which, in addition to these FM channels, has used the secondary

¹² *Waldman Report* at 258; see also IAAIS website <http://www.iaais.org/aboutiaais.html>

audio program (“SAP”) – auxiliary audio channels on stereo TVs, telephone and the Internet – for distribution of these audio materials.”¹³

Sun Sounds itself, which was specifically recognized in the *Report* as “the only existing radio reading service being broadcast over digital audio broadcasting,”¹⁴ employs multiple delivery formats, including radio broadcast via SCA, telephone access, online streaming, podcasts, the iBlink Radio app available for iPod, iPad, and Android devices, HD radio (at least in the Tempe/Phoenix area) on the HD third Channel of NCE FM station KBAQ, Time Warner Cable (in the Yuma area), and in certain hospitals, assisted living facilities, and retirement homes in various communities in Arizona. (<http://sunsounds.rio.maricopa.edu/about/DeliveryFormats>)

Information about Audio Information Services. Nationally, there are approximately 100 audio information services, according to IAAIS. IAAIS has been made aware of at least two services which were unable to secure an HD channel from a local broadcaster, with the specific reason for refusal being the possibility of punitive action by the Commission. One instance involving a Tucson station, would have provided 24/7 service to the entire Tucson metropolitan area which, according to the US Census Bureau, is home to more than 500,000 residents¹⁵. As stated earlier, the population of persons with disabilities is indexed at 11% or, in this case, a population of 55,000 visually impaired persons were denied digital access to news from print simply because of fear of FCC sanction.

Other IAAIS member stations have tried to broach the subject of serving their constituents with HD service, but have repeatedly been rebuffed by local broadcasters citing

¹³ *Waldman Report*. Chapter 24, p. 258.

¹⁴ As mentioned above, one or two other HD services may exist, but this has not been confirmed.

¹⁵ See <http://quickfacts.census.gov/qfd/states/04/0477000.html>

these same concerns. Similarly, approaches by reading services that wish to use DTV secondary audio channels have been met with the same concern, and same rejection., by TV broadcasters, closing off this technology also to the print disabled.

B. Technology Issues

The *Waldman Report* points out that while Audio Information Services “exist in various localities, there are huge gaps in their nationwide coverage. Most have threadbare budgets and are locally run, operated by universities, public radio stations, library systems, and non-profit organizations. In recent years, the transition from analog to digital radio and television has threatened the availability of Radio Reading Services and other forms of Audio Information Services.” This thumbnail description is, unfortunately, true of Sun Sounds and, to an even greater extent, most of the other services. Limitations inherent in the technology are a significant aspect of these problems.

HD Radio: HD service in the Phoenix metropolitan area has been welcomed by Sun Sounds’ audience, whose members report that they listen more now due to the higher quality audio and in conjunction with use of the “Narrator,”¹⁶ the nation’s only talking HD radio. These listeners also report that they have found their use of radio for news, information, and entertainment a much more enjoyable experience. One listener, who turned 100 in August 2012, told Sun Sounds that he uses his new “talking radio” to hear the Wall Street Journal read to him, and to keep up with the Arizona Diamondbacks, his favorite sports team. However, HD Radio has been something of a mixed blessing so far and has not yet delivered on its potential.

¹⁶ The Narrator, as described above, won the 2012 FCC Chairmans’ Award for accessibility for Consumer Empowerment/Information. <http://www.fcc.gov/blog/fcc-chairman-hosts-second-chairmans-awards-advancement-accessibility> See below for further discussion of this new technology.

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By its attorneys:

Ernest T. Sanchez
Susan M. Jenkins

THE SANCHEZ LAW FIRM, P.C.
2300 M Street, N.W.
Suite 800
Washington, D.C. 20037

Telephone: 202-237-2814
Fax: 202-237-5614
Email: ernestsanchez2348@gmail.com

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