



July 18, 2013

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Misuse of Internet Protocol (IP) Captioned Telephone Service, CG Docket No. 13-24; Structure and Practices of the Video Relay Service Program, CG Docket No. 10-51; Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities CG Docket No. 03-123

Dear Ms. Dortch:

On July 16, 2013, on behalf of the CaptionCall, LLC subsidiary of Sorenson Communications, Inc. (“CaptionCall”), Bruce Peterson, CaptionCall’s Senior Director of Marketing, Christopher Wright and Walter Anderson, of Wiltshire & Grannis LLP, and I met with the following staff members of the Consumer and Governmental Affairs Bureau: regarding the above-referenced proceedings: Karen Peltz-Strauss, Deputy Bureau Chief; Robert Aldrich, Legal Advisor to the Bureau Chief; Gregory Hlibok, Chief, Disabilities Rights Division, Eliot Greenwald, and Elaine Gardner. We discussed the Commission’s pending rulemaking regarding, among other things, outreach and marketing practices of internet protocol captioned telephone service (“IP CTS”) providers.¹ We also briefly addressed a staff request regarding Sorenson’s reaction to recent petitions parties have filed seeking 120-day waives of the IP Relay speed of answer requirements, and attached to this letter is a declaration that provides further information in response to staff’s request.

CaptionCall has previously commented that the record lacks any justification for the interim and proposed rules targeting referral incentives that compensate third-parties for the time and effort of referring eligible consumers to IP CTS providers,² and this remains the case. Nevertheless, should the Commission choose to restrict referral incentives, the rules must be narrowly tailored and provide reasonable specificity as to the conduct being prohibited, both to comport with the First and Fifth Amendments to United States Constitution and rationally to

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 and Notice of Proposed Rulemaking, FCC 13-13 (rel. Jan. 25, 2013) (“*IP CTS Order and NPRM*”).

² *Id.* at ¶¶ 15, 39; App. D at § 64.604(c)(8)(i); App. E at § 64.604(c)(8).

address the perceived problems while still accommodating the Americans with Disabilities Act's ("ADA") mandate for functionally equivalent service for hard-of-hearing persons.³ During the meeting, we distributed the proposed draft rule language that is attached as Exhibit A.

The attached language accomplishes several objectives. First, consistent with Paragraph 18 of the *IP CTS Order and NPRM*, with respect to subscriber inducements, it maintains a broad prohibition against any direct or indirect inducements, whether financial or otherwise, to any subscriber of IP CTS services to induce the subscription to use of IP CTS services by that person. This would, among other things, prohibit indirect compensation, such as payment to a favored charity or friend, that may result in psychic, if not monetary, compensation to the IP CTS subscriber. The language also expressly precludes payments of examination fees or other charges in connection with obtaining the written certification of an independent third party professional, as set forth in n. 59 of the *IP CTS Order & NPRM*.

Second, again consistent with Paragraph 18, this language would prohibit referral fee payments to a third party as a result of a subscriber's decision to subscribe. This directly proscribes the payments to audiologists, hearing instrument specialists and others that the Commission sought to ban. However, it also is not written so broadly as to conceivably apply to the purchase of advertising, which is the case with the current interim rules. The current interim rule's proscription of "indirect inducements" to any third party for "encourage[ing] the use of or subscription to" IP CTS, as discussed in CaptionCall's July 3, 2013, ex parte letter, could violate the First Amendment by improperly chilling both non-commercial and commercial speech.⁴ The current interim rules also raise Fifth Amendment issues that undermine their enforceability. Certainly, the Commission did not intend to prohibit something as benign as general advertising. But, as drafted, providers have virtually no guidance as to when a practice crosses the line from an allowed to a prohibited "indirect inducement." As a result, it will be virtually impossible for the Commission to enforce such rules without violating the Fifth Amendment's due process clause, as providers will lack sufficient notice that they are engaged in prohibited conduct.⁵

Third, as Hamilton Relay and CaptionCall both commented in response to the NPRM, although we do not believe the Commission meant to ban a standard wholesale/retail distribution contract, the current interim rules could be read to proscribe such a normal commercial

³ 47 U.S.C. § 225.

⁴ See Letter from John T. Nakahata, Counsel to CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24; 03-123 (filed Jul. 3, 2013).

⁵ See *FCC v. Fox Tel. Stations*, 132 S. Ct. 2307, 2317 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *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).

distribution arrangement. Similarly, some state voucher programs provide a voucher to a prescribing health care provider that is redeemable at a rate above the rate for which the health care provider is charged. The proposed language in Appendix A would make clear that neither of these arrangements run afoul of the prohibition on inducements to third parties.

Yet another example is cooperative marketing arrangements. In those arrangements, IP CTS providers and hearing professionals simply share the costs of marketing to overlapping groups of potential customers. For example, IP CTS providers might share the costs of a bulk mailing with (1) manufacturers of hearing-health technology (such as hearing aids); (2) audiologists or other hearing health providers; or (3) assistive-listening device distributors. These arrangements allow IP CTS providers and other parties to reach more potential users in a more efficient manner, and they do not give professionals any incremental incentives to recommend IP CTS to individual patients.

Adopting rules that theoretically prohibit either wholesale margins or co-operative marketing, however, would both severely curtail IP CTS providers' ability to reach eligible consumers and cause drastic increases in marketing costs as providers shift to more expensive and less efficient methods. Thus, an overbroad incentives prohibition restriction will violate the ADA's mandates of ensuring that TRS is available to the extent possible and provided in the most efficient manner.

Fourth, with respect to the definition of an "independent third party professional" who may issue a certification of need with respect to a particular IP CTS subscriber, the attached draft language attempts to provide a clearer definition, which still precludes certification by an employee of an IP CTS provider, by an entity that stands in a wholesale/retail relationship with respect to the provision of IP CTS service or equipment to that subscriber, or that otherwise receives compensation tied to that subscriber's decision to subscribe to IP CTS. This recognizes that a provider will be deemed not to be neutral when he or she earns compensation from that user's subscription, but can be impartial in other circumstances, even if they may have some unrelated transactions with the IP CTS provider. The proscription of any "business agreement," as set forth in n. 72 of the *Order and FNPRM* is too vague to provide reasonable notice and to be implementable across a wide range of real-world settings.

During the meeting, staff inquired about events that IP CTS providers may attend in conjunction with hearing-health providers, as well as other medical professionals. There are a variety of different events, and for the most part, a professional's participation should not undermine his or her ability to provide independent certifications to IP CTS customers. For example, IP CTS and hearing-health providers may attend (1) public-health fairs, which are sponsored by communities or non-profit organizations seeking to promote public health and resources available to address health and well-being, such as hearing tests, eyesight tests, blood-pressure tests, and other screenings; (2) hearing-related events, which focus on hearing health, and which are attended by a large number of companies and organizations that treat hearing loss; or (3) consumer-group events, which are sponsored by consumer-education and advocacy groups. At these events, consumers may have the ability both to receive a hearing test and to register for IP CTS. However, the providers are simply located in geographic proximity to one another—no aspect of these events in any way increases the likelihood that a professional will compromise his or her professional integrity by certifying ineligible consumers for IP CTS.

Fifth, the proposed language more reasonably tailors the loss of compensation that would accompany a finding of the payment of an improper incentive. It is understandable that the Commission would want to declare service to any customer “tainted” by what is concluded to be an unlawful incentive to be refundable, at least to the extent that there is no other evidence that the subscriber is eligible. But that does not explain why service to any non-tainted customer should also be declared to be noncompensable – particularly when the provider is also subject to forfeitures for rule violations in addition to the repayment of the “tainted” compensation. Such a scheme imposes a potentially huge penalty on a strict liability basis, which is so large and disproportionate as to violate due process and to be irrational. Moreover, the rules do not make clear – but should – as to how a “tainted” customer can be cleansed of the “taint.” With respect to inducements to the subscriber, once the inducements cease, if the subscriber is otherwise eligible and has been certified by an independent third party professional, the subscriber should be able to obtain IP CTS, and the IP CTS providers should be able to provide that service, once the subscriber is demonstrated to be eligible. With respect to inducements to a third party, any subscriber certified by an independent third party professionals should be eligible at all times, as the subscriber’s need is not in doubt, and any other subscribers should be eligible and compensable going forward once an independent third party professional certification has been obtained.

Although CaptionCall does not agree with the need for many of the proposed limitations – particularly on incentives in the light of the Commission’s eligibility certification requirements – if the Commission is going to adopt such limitations, it should and must do so in a way that is narrowly tailored, and rationally related, to its objectives. The language contained in Exhibit A does so much better than do the current interim rules.

Finally, staff inquired during the meeting regarding Sorenson’s views on the petitions some IP Relay providers have recently filed seeking 120-day waivers of the speed-of-answer requirements following Sorenson’s exit from IP Relay. Attached as Exhibit B is a declaration from Jason Dunn, CaptionCall’s Vice President of Call Centers, and who has significant experience training communications assistants for IP Relay. As discussed in the declaration, the 120-day waivers that other providers have requested appear to be excessive, for the reasons Mr. Dunn explains.

Sincerely,



John T. Nakahata
Counsel to CaptionCall, LLC

Marlene H. Dortch

July 18, 2013

Page 5

cc: Kris Monteith
Karen Peltz Strauss
Gregory Hlibok
Eliot Greenwald
Robert Aldrich
Priscilla Argeris
Nicholas Degani
Rebekah Goodheart

EXHIBIT A

**CaptionCall July 16, 2013 Ex Parte Meeting
Proposed Text of 47 C.F.R. Part 64, Subpart F, Addressing
IP CTS Outreach and Marketing Practices:**

§ 64.601 Definitions and provisions of general applicability.

(a) ***

(14) Independent Third-Party Professional. An "independent third party professional" is a person qualified to evaluate an individual's hearing loss in accordance with applicable professional standards, including community-based service providers, hearing-related professionals, vocational rehabilitation counselors, occupational therapists, social workers, educators, audiologists, speech pathologists, hearing instrument specialists, doctors, nurses and other medical or health professionals, who is not (i) an employee or independent contractor of an IP CTS provider or its affiliate, (ii) receiving compensation, financial or otherwise, as a result of the decision of the subscriber whose need is being certified to subscribe to or use IP CTS (however, a wholesale price to a third party sales agent or distributor shall not be deemed to be compensation as a result of subscriber's decision to subscribe to or use IP CTS), or (iii) a third-party sales agent or distributor with respect to the IP CTS service or device provided to the subscriber being certified.

§ 64.604 Mandatory minimum standards.

(c) ***

(8) Inducements for the Use of IP CTS. (i) An IP CTS provider shall not offer or provide to any person or entity that subscribes to IP CTS any form of direct or indirect inducements, financial or otherwise, to subscribe to or use IP CTS, including payment of a subscriber's examination fees or other costs related to the provision of a written certification by an Independent Third Party Professional pursuant to subparagraph (9)(v) of this subsection.

(ii) An IP CTS provider shall not provide to a third party any compensation, financial or otherwise, as a result of a subscriber's decision to subscribe to or use IP CTS; provided, however, a wholesale price to a third party sales agent or distributor shall not be deemed to be compensation as a result of subscriber's decision to subscribe to or use IP CTS.

(iii) (A) IP CTS providers violating subparagraph (i) shall be ineligible for any compensation for IP CTS from the TRS Fund with respect to any subscribers to which such inducements were paid until the IP CTS ceases providing such incentive to that subscriber and that subscriber is prospectively re-certified as eligible by an independent third-party professional as provided in section (c)(9)(v) of this sub-part (irrespective of whether the subscriber paid at least \$75 for IP CTS equipment).

(B) IP CTS providers violating subparagraph (ii) shall be ineligible for any compensation for IP CTS from the TRS Fund with respect to any subscribers who subscribed at least in part as a result of the actions of a third party that received compensation in violation of subparagraph (ii), to the extent that the subscriber was not certified by an independent third-party professional

as provided in section (c)(9)(v) of this sub-part. Any subscriber not so certified may be prospectively re-certified as eligible by an independent third-party professional as provided in section (c)(9)(v) of this sub-part (irrespective of whether the subscriber paid at least \$75 for IP CTS equipment).

EXHIBIT B

DECLARATION OF JASON DUNN

I, Jason Dunn, do hereby, under penalty of perjury, declare and state as follows:

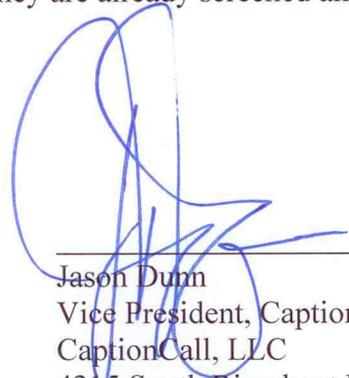
1. My name is Jason Dunn. I am Vice President of CaptionCall Centers for CaptionCall, LLC, which is a wholly owned subsidiary of Sorenson Communications, Inc. and is based in Salt Lake City. I have held this position since I joined CaptionCall in March, 2012. Before joining CaptionCall, I served as Vice President of Operations for all Sorenson Communications operations, including all Sorenson Video Relay Service (SVRS), Sorenson IP Relay (SIPRelay), and Sorenson VRS Canada operations. I received a Bachelor of Science degree in business administration from the University of Utah.
2. In my work as Vice President of Operations for Sorenson, I was involved in all aspects of Sorenson's IP Relay operations, including monitoring changes in call volumes and adjusting staffing to respond to such changes, new employee recruitment and training, and implementation of relevant Federal Communication Commission ("Commission) regulations such as speed-of-answer requirements.
3. On May 17, 2013, the Consumer and Governmental Affairs Bureau released a Public Notice ("PN") seeking comment on RLSA's 2013 rate proposals filed May 1, 2013. Following the conclusion of the comment cycle, on July 1, 2013, the Commission released an Order essentially adopting the RLSA proposals, which reduced IP Relay compensation to \$1.0147 per minute, with additional reductions to occur annually. On July 8, 2013, Sorenson announced its decision to exit the IP Relay business as a result of these regulatory changes.
4. At the time of Sorenson's announcement, I estimate that Purple Communications, Inc. had a market share of 50% or more in IP Relay. Sorenson and Sprint Corporation divided most of the remaining market, with a market share of approximately 25% each.
5. On July 11, 2013, Purple filed an "Emergency Petition for Limited Waiver" of the Commission's speed-of-answer requirements applicable to IP Relay. Purple claims that it needs a 120-day waiver before they can comply with IP Relay speed-of-answer requirements, purportedly primarily as a result of Sorenson's decision to exit the IP Relay market.
6. Purple attempts to justify the 120-day waiver it seeks on the ground that it will need that much time to "quantify" additional demand, and then to recruit and train additional IP Relay staff. Purple further claims that its hiring process includes background checks and testing, including qualifying proficiency testing in typing grammar and language skills and that, once hired, new recruits enter a 160-hour training program covering subjects including grammar, spelling, and punctuation. In my experience supervising IP Relay

operations for Sorenson, the 120-day waiver sought by Purple is excessive for several reasons.

7. First, it is important to note that Purple is the dominant IP Relay provider. While its call volumes likely will increase somewhat as a result of Sorenson's exit from the IP Relay market, any increase will be relatively modest because Sorenson only served about a quarter of that market. Purple has frequently argued in the past that the scope of Sorenson's Video Relay Service operations should permit it to scale those operations relatively readily to adapt to changes in the VRS market. The same, of course, should be true with respect to Purple in the IP Relay market—if there is merit to Purple's scalability argument, the scope of its operations should contribute to scalability.
8. It also is noteworthy that, unlike VRS providers, IP Relay providers have never operated under a tiered rate structure that compensates smaller providers at a higher per-minute rate than larger providers. Purple has argued, in VRS proceedings, that economies of scale justify tiered rates. (Sorenson has provided expert testimony showing that, in the VRS context, any economies of scale are small, exhausted at a low call volume, and do not justify tiered rates in any event.) Given Purple's position, however, it ought to be required to show why, in the IP Relay context, it apparently thinks that there are no economies of scale that contribute to the scalability of Purple's IP Relay operations.
9. Moreover, in my experience, the majority of IP Relay communications assistants are not full-time employees—they are part-time employees who generally have additional capacity in the short run to take on work as increases in call volume demand. Purple should therefore be able to absorb additional call volume due to Sorenson's exit from the IP Relay business relatively readily in the short term.
10. In the longer term, Purple's estimate that it requires 120 days to comply with the Commission's speed-of-answer requirements is grossly excessive. To the extent that Purple does need to add new communications assistants, its hiring needs will be modest. At the most, I could envision Purple hiring perhaps 60 or 70 new recruits. At the peak of Sorenson's IP Relay operations, we were capable of hiring that number of candidates in approximately one week. Plus, Sorenson did give three weeks advance notice of its service closing. So one would assume that Purple could have started preparing for the possibility of greater call volume three weeks in advance by creating staffing and contingency plans.
11. Sorenson's training program for new IP Relay communications assistants was approximately 30 hours from the time they were hired until they were ready to work. Accordingly, Purple's claim that it requires 160 hours to train IP CTS communications assistants is difficult to credit.

12. It is my understanding that Purple has operated and may continue to operate IP Relay call centers outside of the United States, notably in the Philippines. It may be that a considerable number of Purple's communications assistants are non-native speakers of English. This may contribute to the need for Purple to train recruits in basic English skills such as grammar, spelling, and punctuation as stated in their filing. Sorenson's IP Relay call centers are located in the United States and employ individuals with high school diplomas, many of whom attend college. These individuals generally do not require training in basic English skills because they are already screened and tested before hiring.

Executed on July 18, 2013.



Jason Dunn
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