

August 5, 2013

Ex Parte

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

Re: *Misuse of Internet Protocol Captioned Telephone Service*, CG Docket No. 13-24;  
*Telecommunications Relay Service and Speech-to-Speech Services for Individuals with  
Hearing and Speech Disabilities*, CG Docket No. 03-123

Dear Ms. Dortch:

On August 2, 2013, on behalf of the CaptionCall, LLC subsidiary of Sorenson Communications, Inc., Bruce Peterson of CaptionCall and John Nakahata and I met with Dave Grimaldi, Senior Legal Advisor to Chairwoman Clyburn, and Eliot Greenwald of the Consumer and Governmental Affairs Bureau, regarding the above-referenced proceeding. We also met separately with Priscilla Argeris, Legal Advisor to Commissioner Rosenworcel.

As a general matter, we pointed out that in promulgating regulations the Commission needs to consider carefully the burden any particular rule would place on captioned telephone users compared to the reduction in misuse likely to result from the rule. Because 47 U.S.C. ¶ 225 is a civil rights statute that gives hard-of-hearing Americans the right to functionally equivalent telecommunications service, before adopting a rule the Commission must be sure that a substantial amount of misuse will be prevented compared to the amount of legitimate use that will be burdened. And in making that comparison, the Commission needs to keep in mind that users of captioned telephone service are predominantly elderly and many suffer from cognitive and physical disabilities in addition to being hard of hearing. Mere suspicion of use of captioned telephone service by persons who do not need it, coupled with a conclusory statement that the benefit in preventing misuse outweighs the burden placed on legitimate use, is not a sufficient justification for interfering with the rights conferred by section 225. Moreover, the Commission must consider whether there are alternatives available that will lessen the burden on legitimate use. Failure to consider these alternatives or to articulate how the benefits in preventing misuse outweigh the burdens placed on legitimate use would be arbitrary and capricious because the Commission would have “entirely failed to consider an important aspect of the problem.” *Motor Vehicles Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In addition, as we have explained in prior written comments on the record, section 225 does not give the Commission broad authority to balance away the rights of deaf and hard-of-hearing individuals. Rather, section 225 is a remedial statute that is to be broadly construed to effectuate its purposes. Before adopting any limitation on the right to functionally equivalent communications service under section 225, the Commission needs to conclude that the misuse

being deterred is “clearly disproportionate” to the burden imposed. *See* Ex parte letter from Christopher J. Wright to Marlene H. Dortch, CG Docket No. 03-123 (Dec. 19, 2012), at 6-8.

Some of the proposals the Commission is considering cannot be justified under these principles. In particular, a requirement that a person must purchase a captioned telephone for at least \$75 cannot be justified on the record before the Commission. As we understand it, the proposal before the Commission would require a hard-of-hearing individual to purchase a captioned telephone for at least \$75 even if, for example, the person had an audiogram showing severe hearing loss or a certification of need from an expert physician. That is unreasonable under any standard. But it certainly does not satisfy the functional equivalence standard. Like any voice service user of the public switched telephone network, a hard-of-hearing person would have already purchased an ordinary telephone, local telephone service, long-distance telephone service, and perhaps international telephone service. The hard-of-hearing user of IP CTS would also need to purchase broadband Internet access service, which the fully-abled user does not need to do to be able to use voice services. Requiring an additional \$75 payment irrespective of any other evidence of need thus violates the functional equivalence standard by imposing yet another burden on hard-of-hearing individuals—a payment requirement beyond that needed to obtain plain old telephone service.

It is noteworthy that the proposal to require payment of at least \$75 for the captioning hardware and software necessary to use captioned telephone service completely inverts the certification rules as they were contained in the interim rules. Under those rules, although the Commission “generally believe[d] that the most effective means of verifying a user’s need for this service is to have an independent certification for all users, in order to ease the burden of compliance, we will accept just a self-certification in those instance in which the user has either made a significant financial investment in IP CTS equipment, or received that equipment through a governmental program.” *In re Misuse of Internet Protocol (IP) Captioned Telephone Service*, CG Docket Nos. 13-24 and 03-123, Order and Notice of Proposed Rulemaking, FCC No. 13-13 at ¶ 22. In other words, payment of \$75 was an exception of convenience to, and a proxy for, a demonstration of need. It stands the logic of the \$75 payment exception on its head to make it the *sine qua non* of a demonstration of need. Rather, when a consumer can obtain an independent third party certification, a \$75 payment requirement is simply an unnecessary barrier—a price placed on access to the statutory accommodation required by section 225. This remains the case even if the Commission were to create some kind of “low income” exception: there is still no rational basis for a rule requiring those with an independent third party certification to have to demonstrate financial need in order to avoid paying \$75. If adopted, the proposed requirement to pay at least \$75 for the equipment that is necessary to use IP CTS would fail any standard of review, and it certainly cannot be shown to be likely to deter abuse that is clearly disproportionate to the burden it would impose. That is especially so since there is no evidence in the record showing that there is significant usage of IP captioned telephone services by persons who do not need captions.

Similarly, we understand the Commission to be considering two issues relating to the default off rule that are unreasonable under the ordinary arbitrary and capricious standard and certainly do not satisfy the higher standard applicable to interference with the rights created by section 225. One proposal would permit the use of a default captions-on setting only if a

physician (or perhaps other health care provider) made a detailed finding relating to the need for the setting, certifying that the user had a mental or physical disability that precluded operation of the “button” to activate captions. Such a requirement imposes substantial burdens, including the cost of such an appointment on the hard-of-hearing user and the need for physicians (or other health care providers) to become familiar with a hearing loss issue and captioning service that they may have had no reason to have studied. And there are alternatives that are plainly less burdensome, including certification by other expert professionals or proof that an individual has been diagnosed with a condition likely to interfere with their ability to operate and change settings on electronic devices more generally. We understand that the Commission is concerned that there has been certification by persons who do not appear to be knowledgeable on hearing issues, but that can be cured by better defining who can be a third party certifier rather than using an anecdote to impose an unnecessary burden.

We also understand that the proposal before the Commission does not permit the use of a default captions-on setting even when everyone in a household is hard of hearing, or when the captioning telephone (on which the Commission will already be requiring stickers or other notifications warning against by someone who is not eligible) is adjacent to a non-captioning telephone. Again, the failure to permit captions on in these circumstances is unreasonable under any standard. The Commission justified the decision to adopt the interim default off rule on the basis that it deters use of captioned telephones by persons who are not hard of hearing. Whatever the merits of the rule when there are persons in the household who are not hard of hearing, the rule cannot be justified when everyone is hard of hearing. It is true that it is possible that someone might visit a household and make a call without turning the captions off. But there is no evidence in the record concerning the quantity of such misuse that would be avoided by the rule and such misuse is likely to be minimal compared to the burden imposed by the default off rule—and the burden is particularly significant with respect to inbound calls, where hard of hearing persons are likely to miss the name of the person calling them and the purpose of the call because it takes time to connect with a communications assistant after the captioning button is pushed. Again, the failure to create an exception for hard-of-hearing only households is unreasonable and certainly does not justify the burden placed on the rights created by section 225.

The same is true when the captioning telephone and a non-captioning telephone are placed physically adjacent to one another. As we understand it, the Commission is already going to require that the IP CTS telephone bear stickers or other notifications warning against use by ineligible persons. Continuing to impose a ban on default captions-on in that circumstance presupposes that there will be a material number of minutes in which a non-eligible person ignores the stickers/notifications and nonetheless uses the captioning telephone rather than picking up the non-captioning telephone that is right next to it. Not only is there no data to support that assumption, it is entirely counterintuitive. The default-off mandate cannot curb deliberate misuse – only unintentional misuse. Placing a non-captioned handset adjacent to a captioning handset with warnings against ineligible use serves the same purpose.

Moreover, it is important to recall why default-on is a superior service to default-off, from the standpoint of functional equivalence. With default-on, captioning set-up begins as soon as the handset is picked up by the IP CTS subscriber. On an incoming call, default-on means

that captions are available for many more of the initial, critical few seconds of a call in which the context is established. Default off means that the IP CTS user will more frequently be asking the caller to re-identify themselves and their purpose. The same is true when a hard-of-hearing user wants to enter into a telephone conversation already underway between two other non-hard-of-hearing people, such as on an extension. Perhaps most importantly, although we understand that the Commission may mandate default-on for all 911 calls if it is feasible to do so for only that subset of calls, expanding the number of permissible "default-on" situations reduces the instances in which feasibility may be an impediment. As both consumer groups and providers have documented, "default off" creates a barrier to legitimate use of IP CTS. The Commission should not decline to adopt these reasonable additional circumstances for a default-on accommodation unless it has a reasonable and non-speculative basis for concluding that the amount of misuse exceeds the amount of legitimate use that is curtailed.

In addition, we understand that the proposal the Commission is considering would prohibit hearing healthcare providers from serving as retailers of captioned telephones if they made any profit. Specifically, as we understand the proposal, the Commission recognizes that it should be permissible to sell captioned telephones to retailers at a price less than \$75 and the retailer would then sell the telephone for \$75 or more. But a hearing healthcare provider would have to buy a captioned telephone for \$75 or more and sell it at the same price. This requirement apparently is based on the assumption that hearing healthcare providers will sell equipment to patients who do not need the equipment in order to make a small markup. There is no evidence in the record to support this assumption. In fact, there is no evidence that any current users do not need captioned telephone service. Moreover, any such problem is better addressed through certification requirements and notices making clear that users must have a medically-diagnosed need to use captions. Thus, redundant requirements that make it more difficult to users to obtain captioned telephones would fail any standard of review, and certainly the heightened standard applicable under section 225.

Finally, we discussed the points raised in our ex parte letter of July 3, 2013, and distributed copies of that letter, which is also highly relevant to the Commission's further consideration.

Sincerely,



Christopher J. Wright  
*Counsel to CaptionCall, LLC*

cc: Dave Grimaldi  
Priscilla Argeris  
Nicolas Degani  
Sean Lev  
Kris Monteith  
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