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August 9, 2013

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Letter, CG Docket Nos. 13-24 & 03-123

Dear Ms. Dortch:

Telecommunications for the Deaf and Hard of Hearing, Inc. (“TDI”), Deaf and Hard of Hearing Consumer Advocacy Network (“DHHCAN”), Hearing Loss Association of America (“HLAA”), Association of Late-Deafened Adults (“ALDA”), Cerebral Palsy and Deaf Organization (“CPADO”), California Coalition of Agencies Serving the Deaf and Hard of Hearing (“CCASDHH”) and Gallaudet University Technology Access Program (“TAP”), (together, the “Consumer Groups and TAP”), submit this *ex parte* letter to urge revisions to certain proposals made in a draft order regarding the final Internet Protocol Captioned Telephone Service (“IP CTS”) rules that the Consumer Groups and TAP understand the Commission is considering in the above-referenced proceedings.¹ The Consumer Groups and TAP emphasize that the revisions requested herein to the draft order reflect the interests of IP CTS consumers and not those of IP CTS providers.

The Commission Should Not Eliminate the Third Party Professional Certification Requirement

The Consumer Groups and TAP understand that the draft order proposes to eliminate the independent, third party professional certification that is required

¹ See *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services for Individuals with Hearing and Speech Disabilities*, CG Docket Nos. 13-24 & 03-123, Order and Notice of Proposed Rulemaking, 28 FCC Rcd 703 (2013) (“*Interim IP CTS Order*”).

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when a consumer accepts IP CTS equipment for less than \$75 from any source other than a governmental program that distributes the equipment. Instead, the draft order proposes to require that IP CTS phones be priced at \$75 or more in order for providers to be eligible to receive compensation from the Interstate Telecommunications Relay Service Fund (“TRS Fund”).² Because this proposed requirement effectively imposes a minimum charge of \$75 on IP CTS users seeking to purchase IP CTS phones³ and because a \$75 minimum charge requirement is not imposed on users of conventional voice telephones, this proposal violates Section 225 of the Americans with Disabilities Act (“ADA”), which mandates that “users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communications services.”⁴ This potential ADA violation is exacerbated by the fact that IP CTS users—unlike users of conventional voice telephone service—already have to purchase broadband Internet access service in order to use IP CTS. In addition, requiring IP CTS consumers to pay yet another fee to obtain functionally equivalent phone service, which is in addition to the ordinary telephone, local telephone service, long-distance telephone service, and perhaps international telephone service costs a hard-of-hearing IP CTS user already incurs, would be flatly inappropriate under the ADA.

Moreover, state distribution programs cannot be solely relied upon to resolve this problem. In particular, while the rule would not apply to equipment obtained through a governmental program, state distribution programs would not ameliorate the overall harm caused by imposing a minimum charge of \$75 on IP CTS users seeking to purchase IP CTS phones. A number of states do not have equipment distribution programs. And those that do often contract with one provider and therefore, IP CTS consumers in those states only have the option of using the IP CTS telephones offered by each state’s designated IP CTS provider. As a result, if an IP CTS consumer in a particular state preferred an IP CTS phone that was offered by a provider that was not the state’s designated IP CTS provider, that consumer could not obtain that phone under that state’s program. Stated differently, state distribution programs that do exist generally fail to promote competition among IP CTS providers and some even require that when a recipient

² For the reasons discussed below, the Consumer Groups and TAP urge the Commission to maintain the *status quo* with respect to the third party professional certification requirement. Specifically, if an IP CTS consumer gets a third party certification, the user should be able to get the IP CTS phone for less than \$75.00.

³ No IP CTS phones would be available at a price of less than \$75.

⁴ 47 U.S.C. § 225(d)(1)(D).

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of an IP CTS phone moves out of state that the phone be returned. To make matters worse, a state cannot be relied on to continue or properly fund its distribution program because a state legislature could change or suspend the funding at any time.

Finally, there is no need to eliminate independent, third party certification requirement under the *Interim IP CTS Order* because a less drastic measure could be taken to address the Commission's concerns. Specifically, while the Commission is concerned that certifications are being provided by third parties who are not knowledgeable on hearing issues, the Commission could readily address this concern by simply requiring that certifying parties who are "qualified to evaluate an individual's hearing loss in accordance with applicable professional standards"⁵ attest that they have an understanding of hearing loss. If certifying third parties and/or IP CTS providers engage in fraud or otherwise abuse the certification process, the Commission could bring enforcement actions against these parties and/or providers.⁶

The Commission Should Eliminate the Default-Off Rule

As discussed in previous filings,⁷ the Consumer Groups and TAP reiterate that the Commission should not impose a default captioning-off rule. Apart from the fact

⁵ *Interim IP CTS Order* ¶ 24.

⁶ In the event that the Commission decides to eliminate the independent, third party certification requirement and require all IP CTS users to pay a minimum charge of \$75 for IP CTS phones (which it should not for the reasons discussed above), the Commission should, as a last alternative, make an exception for low-income consumers whose income falls below four times the federal poverty guidelines.

⁷ See Comments of TDI *et al.*, CG Docket Nos. 13-24 and 03-123, at 12-13 (filed Feb. 26, 2013); Reply Comments of TDI *et al.*, CG Docket Nos. 13-24 and 03-123, at 2-5 (filed Mar. 12, 2013); Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24 and 03-123 (filed Apr. 26, 2013); Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24 and 03-123 (filed May 13, 2013); Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 10-51, and 03-123 (filed June 20, 2013); Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 10-51, and 03-123 (filed June 26, 2013); Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24 and 03-123 (filed Jul. 30, 2013).

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that the record is devoid of sufficient evidence to justify this requirement, the interim default captioning-off rule has proven highly disruptive to many IP CTS consumers, thereby depriving them of their ability to secure functionally equivalent telecommunications services through IP CTS. The default captioning-off rule would also contravene Section 225 of the ADA because forcing IP CTS consumers to turn captions on for every call is not functionally equivalent to a hearing user's ability to pick up a telephone and place a call.⁸

Moreover, as indicated in previous filings, the default captioning-off rule may be inconsistent with other FCC rules and policy objectives as well.⁹ For instance, because default captioning on is readily achievable, the default-off rule violates the "readily achievable" and "accessibility" mandate under Section 255¹⁰ that prohibits manufacturers from "decreasing [the] accessibility" or usability of customer premises equipment, such as an IP CTS telephone.¹¹ Consequently, the Commission's default-off requirement brazenly contravenes this Congressional mandate.

The default captioning-off rule is especially problematic to IP CTS users who live alone or live in a household where everyone is hard of hearing. While the Commission adopted the interim default-off rule to deter use of captioned telephones by persons who are not hard of hearing, such a deterrent is not appropriate and cannot be justified for inclusion in the final rules in these circumstances. Any Commission concern that someone might visit such a household and make a call without turning the captions off is too remote. In fact, no record evidence exists that a sufficient quantity of such misuse supports the default-off rule in these circumstances. Moreover, as a general matter, the burden the default-off rule imposes on IP CTS users far outweighs concerns about misuse, which are likely minimal.¹² The rule also sets the stage for potentially dangerous consequences to IP CTS users in emergency situations.

⁸ See, e.g., Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24 and 03-123 (filed Apr. 26, 2013).

⁹ See, e.g., Reply Comments of TDI *et al.*, CG Docket Nos. 13-24 and 03-123, at 2-5 (filed Mar. 12, 2013).

¹⁰ 47 U.S.C. § 255.

¹¹ See Reply Comments of TDI *et al.*, CG Docket Nos. 13-24 and 03-123, at 3 (filed Mar. 12, 2013).

¹² See, e.g., Letter from Philip J. Macres to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 13-24, 10-51, and 03-123 (filed June 26, 2013).

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The default-off rule was also haphazardly instituted because the Commission never proved through usability studies or other means that a default-off rule would not unduly burden consumers prior to adopting such a rule.¹³ While the Commission imposed the default off rule to prevent misuse of IP CTS phones,¹⁴ the Commission's strengthened notification and labeling requirements should allay those concerns. For these reasons, the default-off rule should be eliminated.

While Consumer Groups and TAP understand that the Commission is considering a hardship exception to the default-off rule that would permit the use of default captions on if an IP CTS user obtains a certification from a physician that the user has difficulty pushing a button to activate the captions due to a cognitive or mobility disability, Consumer Groups and TAP believe that such a requirement would be tremendously burdensome. IP CTS consumers would have to bear the cost and burden of having an appointment with a physician to obtain the certification. Physicians would also have to bear the burden of having to familiarize themselves with this hearing loss issue and IP CTS. Less burdensome alternatives are clearly available, such as allowing other expert professionals to provide the certification or a diagnosis that an IP CTS user has a condition that likely interferes with his or her ability to operate and change settings on electronic devices.

For the foregoing reasons, the Commission should revise the draft IP CTS order and rules as requested herein.

Respectfully submitted,

/s/ Philip Macres

Philip J. Macres
Daniel P. Brooks

Counsel for TDI

cc (via email):

Acting Chairwoman Clyburn
Commissioner Pai

¹³ See Comments of TDI *et al.*, CG Docket Nos. 13-24 and 03-123, at 13 (filed Feb. 26, 2013).

¹⁴ See *Interim IP CTS Order* at ¶ 55.

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