



1200 18TH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.WILTSHIREGRANNIS.COM

ATTORNEYS AT LAW

September 23, 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; Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123

Dear Ms. Dortch:

Sorenson Communications, Inc. and its wholly owned subsidiary CaptionCall, LLC (collectively “CaptionCall”) request, pursuant to Sections 0.457 and 0.459 of the Commission’s rules, 47 C.F.R. §§ 0.457, 0.459, that the Commission withhold from any future public inspection and accord confidential treatment to sensitive business information included in the enclosed Request for Stay. The information, which has been redacted from the publicly available version filed on ECFS, could, if disclosed, cause significant competitive harm to CaptionCall.

In support of this request and pursuant to Section 0.459(b) of the Commission’s rules, CaptionCall hereby states as follows:

1. Identification of the Specific Information for Which Confidential Treatment Is Sought (Section 0.459(b)(1))

CaptionCall seeks confidential treatment with respect to new-subscriber additions, service usage data, and revenues—which has been redacted from the public version of the attached Request for Stay.

2. Description of the Circumstances Giving Rise to the Submission (Section 0.459(b)(2))

CaptionCall is submitting the attached Request for Stay as a result of the Commission’s decision to adopt permanent rules related to the provision of IP CTS.

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged (Section 0.459(b)(3))

The redacted information merits confidential treatment because it constitutes CaptionCall's non-public commercial information that could, if disclosed, cause significant competitive harm to CaptionCall.

4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition (Section 0.459(b)(4))

The IP CTS market is highly competitive throughout the United States.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm (Section 0.459(b)(5))

Disclosure would result in revealing non-public commercial information to CaptionCall's competitors, which would cause significant competitive harm to CaptionCall.

6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure (Section 0.459(b)(6))

CaptionCall does not make this information publicly available.

7. Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties (Section 0.459(b)(7))

CaptionCall does not make this information publicly available.

Sincerely,

/s/ Christopher J. Wright

Christopher J. Wright
John T. Nakahata
Walter E. Anderson
*Counsel to Sorenson Communications, Inc.
and CaptionCall, LLC*

**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
)	

REQUEST FOR STAY

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

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

September 23, 2013

SUMMARY

Nearly twenty-five years after Congress passed the Americans with Disabilities Act (“ADA”), one of its pillars has reached an inflection point. Title IV of the ADA sought to eliminate structural barriers that denied deaf and hard-of-hearing individuals access to basic communications services. Nevertheless, hard-of-hearing individuals have remained underserved by TRS providers. From 2007, when the FCC first authorized internet protocol captioned telephone service (“IP CTS”) compensation, until CaptionCall, LLC, a wholly owned subsidiary of Sorenson Communications, Inc. (collectively “CaptionCall”), entered the market in 2011, CapTel or its licensees performed nearly all IP CTS services. When CaptionCall entered, competition among IP CTS providers began to correct this deficiency. However, the rules adopted in the Commission’s recent IP CTS *Order* threaten the swift reversal of a trend that promised to fulfill the ADA’s goal of allowing all hard-of-hearing consumers to obtain functionally equivalent access to communications services. Therefore, CaptionCall has petitioned the United States Court of Appeals for the District of Columbia for review of the *Order*, and now seeks a stay from the Commission.

A petition for review is likely to succeed on the merits. The *Order* seeks explicitly to curb IP CTS growth and use based on the *assumption* that misuse caused the recent IP CTS expansion—while the *evidence* does not support any

finding of misuse. This infirmity infects every rule adopted in the *Order*, but three rules are particularly harmful. *First*, and most alarmingly, the Commission concluded that, to use IP CTS, every user must pay \$75 for a captioned telephone, even though the ADA requires the Commission to issue regulations that “require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communications services.” Thus, even if, as CaptionCall proposed, a user shows that he or she has a hearing aid or a cochlear implant and a physician certifies that the user nevertheless needs captioning to obtain functionally equivalent service, the *Order* requires the user to pay \$75 as well. The Commission based this rule on its belief that willingness to pay \$75 is a better test of need for captioning than the use of hearing aids or implants combined with a physician’s certification of need. The rule is a textbook example of unreasoned decisionmaking in violation of the Administrative Procedure Act (“APA”). In addition, it violates the ADA, which requires the Commission to ensure that disabled users pay “no more” than hearing users and that the availability of IP CTS to the extent possible and prohibits financial barriers to the use of services needed by disabled persons.

Second, the Commission speculated, without citing any evidence, that default-on captioning has caused and will continue to cause IP CTS misuse and required captions to be turned off at the beginning of every call. But the

Commission failed to balance its speculation against the burden a default-off rule places on consumers' ability to access and use IP CTS.

Third, the Commission severely restricted communications among potential users, IP CTS providers, and hearing-health professionals, who are best positioned to inform eligible consumers of the benefits of IP CTS. The Commission did so without citing any evidence connecting existing marketing practices with IP CTS misuse, and without considering that its rules will constrain IP CTS availability.

Together, these and the *Order's* other provisions combine to violate the ADA because, without justification, they burden the right of hard-of-hearing consumers to access functionally equivalent communications services at rates no higher than those paid by consumers without hearing impairments, and the APA because the Commission has not engaged in reasoned decisionmaking.

Unless stayed, the *Order* will cause irreparable harm. Telephone use is a central aspect to an individual's ability to lead a normal life. Without it, consumers cannot communicate with friends, family, and coworkers, and they are isolated during an emergency. No remedy can repair the damage inflicted on each day that these rules deny hard-of-hearing persons access to functionally equivalent telephone service. In addition, the *Order* threatens CaptionCall's near-term viability. Without CaptionCall, consumers will be denied the competition has caused exponential improvements in the quality and availability of IP CTS.

On the other hand, a stay will not cause any harm. The Commission cannot cite any evidence that the prohibited practices caused any harm whatsoever. Rather, the *Order* will only prevent eligible hard-of-hearing consumers from accessing a life-changing, ADA-mandated technology. A stay is also in the public interest because allowing more hard-of-hearing individuals access to communications services will advance long-standing universal-service goals.

Accordingly, the merits and the equities weigh heavily against allowing the *Order* to become effective. The Commission should issue a stay that remains in effect until the D.C. Circuit has ruled on CaptionCall's petition for review.¹

¹ If the Commission has not acted on this request by September 30, 2013, CaptionCall intends to treat the motion as denied and seek a stay from the D.C. Circuit.

TABLE OF CONTENTS

SUMMARY i

BACKGROUND2

ARGUMENT10

I. A Petition for Review Is Likely to Succeed on the Merits.11

 A. The Commission Failed to Consider More Effective and Less
 Burdensome Options to Ensure Eligible IP CTS Use, in Violation of
 the ADA and the APA.....12

 B. The Order Lacks a Rational Basis.20

II. The *Order* Will Cause Irreparable Harm.22

III. A Stay Will not Harm Any Party and Is in the Public Interest.....25

CONCLUSION26

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

In the Matter of)	
)	
of Internet Protocol (IP) Captioned)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	
)	

REQUEST FOR STAY

CaptionCall, LLC, and its parent, Sorenson Communications, Inc. (collectively “CaptionCall”) have petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the recent internet protocol captioned telephone service (“IP CTS”) Order.² CaptionCall urges the Commission to stay the *Order* because it erects unlawful barriers to IP CTS availability and use and, without a stay, the rules adopted in the *Order* will effectively deny thousands of hard-of-hearing consumers access to the telephone.

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, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-118 (rel. Aug. 26, 2013) (“*Order*”).

BACKGROUND

IP CTS serves a basic but profound goal: to allow hard-of-hearing individuals to use the telephone. For consumers, IP CTS functions like a normal telephone, with a screen that displays captions. The technology, however, differs significantly from basic telephone service. IP CTS relies on a broadband connection to a live communications assistant, who repeats the hearing user's words into voice-recognition software. IP CTS phones display the resulting captions. Without broadband and equipment, consumers cannot use IP CTS.

Hard-of-hearing consumers can use IP CTS thanks to provisions that ADA Title IV added to the Communications Act in 1990, when “a handful of states” offered intrastate relay programs, and interstate programs were “virtually nonexistent.”³ The situation was “incompatible both with the universal service goal embodied in the Communications Act and with other actions taken by the Congress in recent years to improve telephone service for the hearing- and speech-impaired.”⁴ As Sen. Paul Simon, a cosponsor and ardent supporter of the ADA, observed,

One of the most pervasive aspects of our lives, in our personal and business affairs, is the telephone. Not being able to use this communication tool is one of the major barriers to productive, normal life for more than 26 million Americans with hearing or speech

³ H.R. Rep. No. 101-485(IV), at 27 (1990), *reprinted in* U.S.C.C.A.N. 512.

⁴ *Id.* at 27-28.

impairments. The requirements of the ADA for interstate and intrastate relay systems for these individuals will open a new world of possibilities for millions—a world that includes the ability to schedule an appointment, conclude a business deal, or check on people at home while you are out of town.⁵

To fulfill the ADA’s mission, Congress directed the FCC to ensure that “telecommunications relay services are available, to the extent possible”⁶ and that “users of telecommunications relay services pay rates no greater than the rates” paid by consumers without hearing impairments.⁷ Under the ADA, telecommunications relay services allow hard-of-hearing consumers to communicate “in a manner that is functionally equivalent to the ability of a hearing individual ... to communicate using voice communication services by wire or radio.”⁸ Although the statute technically requires telephone companies to provide TRS,⁹ specialized companies generally provide the services, which the telephone companies fund through contributions to the Telecommunications Relay Fund.

⁵ 135 Cong. Rec. S10765 (daily ed. Sept. 7, 1989) (statement of Sen. Simon).

⁶ 47 U.S.C. § 225(b)(1)(2010).

⁷ *Id.* § 225(d)(1)(D).

⁸ *Id.* § 225(a)(3).

⁹ *Id.* § 225(c).

The Commission has compensated CTS providers since 2003¹⁰ and IP CTS providers since 2007.¹¹ Until CaptionCall began offering IP CTS in 2011, the market had been dominated by a single provider that had reached only a small percentage of the individuals who would benefit from captioned telephone service. Furthermore, IP CTS consumers are predominantly elderly, a demographic group that is generally hesitant to seek out and adopt new technology. Without user-friendly technology and effective outreach efforts, these consumers are unlikely to discover and subscribe to a service that could greatly improve their quality of life.

Thus, as of 2011, hard-of-hearing consumers were largely underserved by TRS, despite the ADA's directive to extend relay services to *all* deaf *and* hard-of-hearing consumers. Indeed, a recent study indicates that as many as 16 million Americans could benefit from IP CTS.¹² However, only about 100,000 to 150,000 consumers—less than 1%— currently subscribe to the service.

¹⁰ See *Telecommunications. Relay Services. & Speech-to-Speech Services. for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Declaratory Ruling, FCC 03-190 ¶ 16 (rel. Aug. 1, 2003).

¹¹ See *Telecommunications Relay Services & Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Internet-Based Captioned Telephone Services*, Declaratory Ruling, FCC 06-182, 22 FCC Rcd. 379, 387 ¶ 19 (2007).

¹² See Sergei Kochkin, *The Importance of Captioned Telephone Service in Meeting the Communication Needs of People with Hearing Loss*, The Hearing Review, at 28 (Mar. 2013), attached as Ex. A Letter from John T. Nakahata, Counsel to CaptionCall, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket No. 13-24 (filed Aug. 22, 2013) (“CaptionCall 8/22/2013 Ex Parte”).

CaptionCall began offering state-of-art technology while engaging in robust, effective marketing efforts. As the Hearing Loss Association of America observed earlier this year, since CaptionCall entered the market,

providers have been more aggressive in marketing IP CTS to consumers. They are reaching out to retirement villages, nonprofit organizations, audiologists and hearing aid dispensers. They are installing phones for seniors who are not comfortable with technology. They are demystifying the phone for seniors and even installing the equipment, making it a product people feel comfortable using.¹³

These efforts helped hard-of-hearing consumers discover and feel comfortable using IP CTS. Given the number of eligible consumers and the low number of subscribers at the time, it should not surprise that CaptionCall's efforts caused a significant number of new IP CTS subscriptions. As CaptionCall and others have explained, however, the subsequent growth matched the S-Curve typically seen with a nascent technology.¹⁴ In short, as HLAA stated, “[f]inally people with

¹³ *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Comments of Hearing Loss Association of America (HLAA) at 5, CG Docket Nos. 13-24; 03-123, (filed Feb. 26, 2013) (“HLAA 2/26/2013 Comments”).

¹⁴ *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, Comments of CaptionCall, LLC, at 7; Comments of RERC-TA, at 9 (filed Feb. 26, 2013).

hearing loss [were] getting access to the phones they need.”¹⁵ CaptionCall removed “one of the major barriers to productive, normal life.”

The Commission, however, did not celebrate this successful Title IV implementation. Rather, it began a systematic effort to halt IP CTS in its tracks. In January 2013, the Commission adopted an emergency order designed explicitly to stem IP CTS growth and use.¹⁶ The Commission did so without notice and comment and cited no evidence that IP CTS growth was anything other than the natural result of improvements in technology, marketing, and customer outreach.

Upon the *Order*'s release, the Commission, contrary to the ADA's mission, *boasted* of *reduced* IP CTS growth: “[S]ince publication of the interim rules, the program has seen an average 3.7% decline per month.”¹⁷ The Commission, however, cannot cite evidence that the interim rules reduced *illegitimate* use of the service. Indeed, as independent survey data shows, the record “does not support either fraud or misuse as the source of growth in IP CTS.”¹⁸ Nevertheless, the

¹⁵ HLAA 2/26/2013 Comments at 2.

¹⁶ *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 Rule Making, FCC 13-13, ¶ 6 (rel. Jan. 25, 2013) (“[I]f unchecked, this growth threatens in the very near term to overwhelm the Fund”) (*Interim IP CTS Order*).

¹⁷ *Order* ¶ 96.

¹⁸ Initial IP-CTS Survey Analysis by RERC-TA, at 2 CG Docket No. 13-24, (filed Apr. 12, 2013).

Commission continues to insist, despite all evidence to the contrary, that it must address “certain improper practices that, if left unaddressed, will adversely impact both the service and the Fund.”¹⁹ This unsupported assertion is the foundation for each of the *Order*’s provisions, but three rules are particularly troublesome.

First, the *Order* requires all consumers to pay at least \$75 for IP CTS equipment that does not come through a state program.²⁰ Such programs, however, do not exist in all states. Moreover, state programs are often underfunded, and consumers are at the mercy of state politicians and administrators, who may—and do—curtail and cut such programs depending on the direction of political winds. The Commission adopted these rules despite proposals from a number of Consumer Groups and CaptionCall of alternative measures—such as the presence of a hearing aid or cochlear implant and a third-party certification—that would serve as better evidence of hearing loss than a \$75 payment, with less curtailment of consumers’ right to access IP CTS.²¹ CaptionCall also warned that a mandatory \$75 equipment price, which would require CaptionCall to develop a wholly new distribution channel, could cause losses that would threaten CaptionCall’s

¹⁹ *Order* ¶ 1.

²⁰ *See Order* ¶ 41.

²¹ *See* Letter from Philip J. Macres, Counsel for TDI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 13-24, at 3 (filed Aug. 13, 2013) (“Consumer Groups 8/13/2013 Ex Parte”); CaptionCall 8/22/2013 Ex Parte at 3-4.

viability.²² A CaptionCall exit would subject consumers to the same monopolistic conditions that existed during the first eight years captioning services existed.

Second, the *Order* places severe restrictions on the ability of hearing-health professionals to promote IP CTS. For example, the *Order* allows wholesalers to make a profit on IP CTS equipment, but prohibits hearing-health professionals from doing so.²³ The *Order* also prohibits co-operative marketing arrangements between IP CTS providers and hearing-health professionals,²⁴ and it prohibits what could be virtually any contact, including mere referrals, between IP CTS providers and the professionals that provide third-party certifications.²⁵ Consistent with its general approach, the Commission only speculates that the prohibited practices will cause any IP CTS misuse. On the other hand, the Commission fails to acknowledge that these rules will limit hearing health professionals' ability and incentive to inform eligible consumers about IP CTS. Without such efforts, many consumers will never learn about a technology that could significantly improve their quality of life.

²² CaptionCall 8/22/2013 Ex Parte at 2-3. The affidavit attached as Ex. A provides additional detail on the threat to CaptionCall's viability.

²³ *See Order* ¶ 26.

²⁴ *Id.* ¶ 28.

²⁵ *See id.* ¶ 73 (prohibiting certifications from any professional whom the IP CTS provider "referred to" the professional, or who has a "business, family, or social relationship with" the IP CTS provider).

Finally, the *Order* requires that all IP CTS calls begin with captions turned off, even though the Commission acknowledged strong opposition to this rule from consumer groups as well as providers.²⁶ The Commission not only failed to cite evidence connecting default-on captions to IP CTS misuse, but also conceded that “we are unable to quantify the amount of IP CTS usage attributable to casual or inadvertent use of captions”²⁷ Instead, the Commission based this rule on a belief that “it stands to reason” default-on captions “may” lead to IP CTS misuse.²⁸ On the other hand, the Commission effectively waved its hand at the burden elderly consumers will face by having to activate captions each time they use the phone²⁹—a step that persons who are not hard of hearing do not have to take before making or receiving a call.

As a result of the Commission’s actions, IP CTS, which only recently began fulfilling the ADA’s goals for hard-of-hearing consumers, has reached an inflection point. Despite provider efforts that began extending the service to millions of unserved hard-of-hearing consumers, the Commission rejoices in subscription declines. IP CTS users cannot access the service without equipment,

²⁶ *See id.* ¶ 96; *see also id.* ¶ 93 nn. 292, 293 (noting default-off opposition from Hamilton, CaptionCall, ALOHA, HLAA, and a group of Consumer Groups).

²⁷ *Id.* ¶ 97.

²⁸ *See id.*

²⁹ *See id.* ¶ 98 (speculating that activating captions will “becom[e] familiar” for elderly consumers, without further explanation).

and basic economics dictate that a \$75 price increase will reduce demand from consumers who need the service—especially when the target users are predominantly older Americans on fixed incomes (41% of CaptionCall’s users are over 80 years old). Some consumers will never learn about IP CTS because the Commission has severely limited relationships between hearing-health professionals and IP CTS providers. And default-off captioning will cause consumers to miss the beginning of each call, while denying access to consumers who forget or are unable to activate captions. The ADA promised to make functionally equivalent communications services available to 100% of hard-of-hearing consumers. Without a stay, many hard-of-hearing consumers will forego this life-changing, ADA-mandated service

ARGUMENT

The Commission generally considers four factors when deciding whether to issue a stay: (1) the likelihood of success on the merits by a party challenging the rule at issue; (2) the threat of irreparable harm in the absence of a stay; (3) the harm the stay would cause to other parties; and (4) whether a stay is in the public interest. Each of these factors supports the conclusion that the Commission should stay implementation of the equipment-distribution rules.

I. A Petition for Review Is Likely to Succeed on the Merits.

Throughout this proceeding, the Commission has cited a desire to protect the TRS Fund from compensation for ineligible use. The Commission, however, cannot cite any evidence connecting the *Order's* targeted practices to misuse, while the record demonstrates that the *Order's* rules will restrict IP CTS access for eligible hard-of-hearing consumers. As exemplified by analysis of the *Order's* three most harmful aspects, the record contains alternatives that could have both ensured eligible IP CTS use and avoided unreasonable burdens on disabled consumers. The Commission's failure to consider these alternatives is unreasoned decisionmaking in violation of the APA, and it restricts the rights of disabled consumers in violation of the ADA. Moreover, even apart from the Commission's failure to adopt the superior alternative proposals, the record simply lacks a rational basis for the *Order's* efforts to curb IP CTS use. Thus, the entire *Order* is invalid under the APA and ADA. In the declaration attached here to as Exhibit B, Samuel Bagenstos, a tenured professor at the University of Michigan Law School and former Deputy Assistant Attorney General for Civil Rights who oversaw disabilities enforcement, explains in detail that the *Order* runs directly contrary to the letter and intent of the ADA. We provide additional analysis below.

A. *The Commission Failed to Consider More Effective and Less Burdensome Options to Ensure Eligible IP CTS Use, in Violation of the ADA and the APA.*

The Commission could not consider its proposed rules in a vacuum. Rather, the APA requires the Commission to act “in accordance with law.”³⁰ The “law”—the ADA—requires that the FCC “shall ensure” TRS is “available, to the extent possible,”³¹ and hard-of-hearing consumers shall “pay rates no greater than the rates paid” by fully hearing individuals.³² Moreover, it “shall . . . require that users of telecommunications services pay rates no greater than the rates paid for functionally equivalent telecommunications services.”³³ When considering its rules against the ADA’s backdrop, the Commission must engage in “reasoned decisionmaking,” which requires it to “give reasoned consideration to all material facts and issues . . . and articulate a rational connection between facts found and the choice made.”³⁴ The Commission cannot make decisions marked by “a dearth of

³⁰ 5 U.S.C. § 706(2)(A).

³¹ 47 U.S.C. § 225(b)(1)(2010) (emphasis added).

³² *Id.* § 225(d)(1)(D). The Commission is mistaken in its belief that these provisions apply only to “service,” and not “equipment.” *See Order* ¶ 56. Consistent with the over-arching purpose of Title IV, the availability and pricing statutes are designed to eliminate barriers between the hard-of-hearing and communications services. An upfront cost creates an economic barrier just as recurring costs do, in violation of the ADA’s mandates.

³³ 47 U.S.C. § 225(d)(1)(D)

³⁴ *Cross-Sound Ferry Servs., Inc. v. ICC*, 738 F.2d 481, 484 (D.C. Cir. 1984).

supporting record evidence.”³⁵ In short, the Commission cannot “modify or balance away what Congress has required”³⁶ in the name of an abstract desire to prevent ineligible IP CTS use. By summarily dismissing alternatives that are less restrictive of ADA-mandated rights, the Commission violated both the APA’s reasoned decisionmaking requirement and the ADA’s availability and cost mandates.

The \$75 Requirement. As discussed above, the Commission faced a choice among its favored \$75 requirement and alternative proposals for rules that would ensure eligible subscriptions without unreasonably restricting IP CTS access. Specifically, the Consumer Groups proposed a rule that would require “(1) the independent third-party professionals to certify to the FCC that they are qualified to evaluate an individual’s hearing loss and (2) IP CTS providers to educate consumers to use captioning only if they cannot communicate effectively with amplification alone.”³⁷ CaptionCall proposed requiring “that all IP CTS users (1) have at least one hearing aid or a cochlear implant, and (2) either (i) have an independent third party medical professional certification that, even with a hearing aid or cochlear implant, they need captions to use the telephone in a functionally-equivalent manner to a person without hearing disabilities, or (ii) pay at least \$75

³⁵ *Id.*

³⁶ *Elec. Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1266 (D.C. Cir. 2004).

³⁷ Consumer Groups 8/13/2013 Ex Parte at 3.

for the necessary equipment.”³⁸ CaptionCall’s proposal also included a requirement that only physicians, audiologists, or hearing instrument specialists could provide certifications.³⁹

The Commission conceded that “the fact that a consumer has a hearing aid or a cochlear implant certainly makes it more likely that he or she may need IP CTS....”⁴⁰ The Commission, however, ignored that hearing aids and cochlear implants relate directly to hearing, while a \$75 payment does not. The Commission also ignored that a doctor’s certification would screen out ineligible consumers who have hearing aids or cochlear implants. Although the Commission asserted that “there may be consumers who do not use either of these technologies, yet would still need IP CTS to communicate by telephone”—which is undoubtedly true—the Commission failed to explain why the presence of a hearing aid or cochlear implant is an insufficient *alternative* to a \$75 payment. Moreover, courts have held that similar requirements in other ADA titles prohibit fees far smaller than \$75 for access to an accommodation.⁴¹ This was unreasoned decisionmaking.

³⁸ CaptionCall 8/22/2013 Ex Parte at 3-4.

³⁹ *Id* at 3.

⁴⁰ *Order* ¶ 49 n. 151.

⁴¹ *See, e.g., Dare v. California*, 191 F.3d 1167 (9th Cir. 1999) (\$6 fee paid every two years for a handicapped parking placard was an impermissible surcharge because it was for a required accommodation and nondisabled people did not have to pay the same fee for an equivalent service).

The Commission’s rejection of third-party eligibility certifications is also deficient. The Commission waxed hypothetical, stating that third-party certifications “*may not* be very effective in achieving adequate screening....”⁴² The Commission failed to explain why any of its hypotheticals, even if true, support eliminating third-party certifications, which serve as better evidence of need for captioning than a willingness to pay \$75.

By adopting the \$75 requirement and rejecting the alternatives without any legitimate justification, the Commission unreasonably restricted hard-of-hearing consumers’ rights under the ADA. The FCC does not and cannot dispute that its mandatory \$75 fee will limit the availability of IP CTS. As discussed above, consumers cannot use IP CTS without specialized equipment that can communicate with a provider’s call center and display captions of what the other party is saying. Nor does the FCC credibly argue that hearing persons bear a cost resembling the \$75 requirement. Indeed, in addition to a phone line, hard-of-hearing consumers must already purchase, broadband service, which a hearing person need not purchase just to use the telephone—facts ignored by the FCC. Moreover, hearing persons can purchase telephones for less than \$10—another fact ignored by the FCC.⁴³ By contrast, the *Order* requires, at minimum, seven times

⁴² *Order* ¶ 44 (emphasis added).

⁴³ *See, e.g.*, CaptionCall 8/12/2013 Ex Parte, Attachment (listing prices for various phones available at Walmart); <http://www.walmart.com/ip/Uniden-1100BK->

more than a hearing person just for access to an ADA-mandated service.⁴⁴ The Commission has breached its statutory requirement to issue rules to require that “users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communications services.”

Availability of free equipment through state programs does not cure this problem, as such programs do not exist in all states, provide varying levels of support, and are often underfunded. The ADA, however, mandates *nationwide* availability of TRS. Title IV exists, not to create a state-by-state relay system, but rather a “seamless interstate and intrastate relay system... that will allow a communications-impaired caller to communicate with anyone who has a telephone, anywhere in the country.”⁴⁵ Moreover, the ADA obligates *the Commission* to ensure the availability of IP CTS—it cannot delegate this critical statutory mandate to the whims of state politicians and administrators. And the FCC was well aware that state programs do not meet close to 100% of IP CTS equipment demand.⁴⁶

Slimline-Corded-Phone-Black/21805373 (advertising corded black telephone for \$6.45) (last visited Sept. 11, 2013).

⁴⁴ See *Dare*, *supra* note 40.

⁴⁵ H.R. Rep. No. 101-485(IV), at 28 (1990).

⁴⁶ See HLAA 2/26/2013 Comments at 8 (noting significant limitations of state-distribution programs).

Restrictions on Hearing-Health Professionals. The consumer groups' and CaptionCall's proposals served as alternatives not only for the \$75 requirement, but also for the thicket of rules restricting communications among users, providers, and hearing-health professionals. That is, if reasonable criteria show that a user needs captions to obtain functionally equivalent telephone service, it should not matter how the user learned about the service. For example, reasonable documentation of need eliminates any need to prohibit audiologists and providers from splitting the cost of a mailing to persons likely to have hearing problems. On the other hand, the restrictions on hearing-health professional marketing practices unreasonably impede the availability of IP CTS through such professionals. The severe limitations on contact between providers and professionals will limit the number of professionals willing and able to promote IP CTS to eligible consumers, and the prohibition on professionals selling IP CTS equipment at a profit unnecessarily removes an incentive for professionals to recommend the service. Thus, these restrictions violate the APA and ADA for the same reasons as the \$75 requirement.

The Default-Off Requirement. Finally, the Commission had a viable alternative to the default-off requirement, which faced tremendous opposition: abandon it. The Commission noted the Consumer Groups' observation that "no record evidence exists that a sufficient quantity of misuse supports the default-off

rule” and acknowledged “hundreds of complaints” from consumers to their providers, and thousands of complaints from consumers to the Commission, about default-off captions.⁴⁷ On the other hand, the Commission cited only platitudes from an applicant who has yet to provide IP CTS service and Fund contributors with incentives to protect their own bottom lines over the rights of the disabled.⁴⁸ The Commission cannot cite evidence that default-on captions cause misuse, but the record is replete with evidence that the default-off requirement will cause elderly consumers to miss the beginnings of calls, where critical information—such as who is calling and why—is conveyed, and to miss entire calls where they forget or are unable to turn on the captions. By ignoring the record on default-off, the Commission engaged in unreasoned decisionmaking. By limiting access to IP CTS, the Commission violated the ADA.

The “hardship exemption,” which requires a physician’s certification that “the consumer has a physical or mental disability or functional limitation that significantly impedes the consumer’s ability to activate captioning at the start of each call,”⁴⁹ does not cure the problems with default off, for three reasons. First, the rule unreasonably restricts IP CTS access for all hard-of-hearing consumers, not just those with a medically recognized “physical or mental disability.” Second,

⁴⁷ *Order* ¶ 93 (citing Consumer Groups August 9, 2013 Ex Parte at 4).

⁴⁸ *See id.* ¶ 92 (citing comments from Miracom, USTA, and CTIA).

⁴⁹ *Id.* ¶ 99.

it will be difficult for consumers to obtain the required certifications, as doctors (a) may have difficulty determining whether a disability “significantly impedes” a patient’s ability to use IP CTS and, (b) fearing the “penalty of perjury” in light of such a vague standard, will likely refuse to sign the form. Finally, many elderly consumers struggle to maintain their independence, and they may simply be unwilling to obtain a document that certifies some sort of limiting disability. As a result of these issues, the hardship exemption will likely benefit only a small fraction of IP CTS users, while the remainder will be stuck with an unreasonable barrier to accessing the service.

The Commission cannot save any of these rules through its obligation to ensure that service is provided “in the most efficient manner.”⁵⁰ That phrase does not limit the rights of deaf and hard-of-hearing people, but rather instructs the Commission to ensure that providers are efficient in providing TRS. Moreover, the Commission’s fixation on “in the most efficient manner” is comparable to the error recently identified by Judge Kozinski in an ADA case involving Disney, where the court concluded that “Disney’s (and the district court’s) error lies in fixating on a single word in the statute rather than reading all of the relevant words together.”⁵¹ The Commission’s role is to “ensure” the availability of functionally

⁵⁰ 47 U.S.C. § 225(b)(1).

⁵¹ *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9thCir. 2012). The court in that case also warned against cramped interpretations of the ADA,

equivalent communications services “to the extent possible and in the most efficient manner.” Reading all the words together, the Commission should not be trying to limit the availability of IP CTS, but should be seeking to make it available to every hard-of-hearing person who needs it while compensating providers at reasonable but not excessive rates.

B. The Order Lacks a Rational Basis.

Moreover, even in the absence of alternative proposals, the *Order* is arbitrary and capricious because of “a dearth of supporting record evidence”⁵² that it targets any practice that *actually leads* to the use of IP CTS by persons who do not need it. The Commission insists that the new rules are necessary to protect the “Telecommunications Relay Services Fund...from certain improper practices....”⁵³ The Commission’s justification for this assertion, however, is laced with terms and phrases such as “tend to be perceived,” “may result,” “could be perceived,” “potential for abuse,” “concern,” “likelihood,” “may,” “potential effect,” “it stands

saying: “Read as Disney suggests, the ADA would require very few accommodations indeed. After all, a paraplegic *can* enter a courthouse by dragging himself up the front steps, ... so lifts and ramps would not be ‘necessary’ under Disney’s reading of the term. And no facility would be required to provide wheelchair accessible doors or bathrooms, because disabled individuals could be carried in litters or on the backs of their friends. That’s not the world we live in, and we are disappointed to see such a retrograde position taken by a company whose reputation is built on service to the public.”

⁵² *Cross-Sound Ferry Servs., Inc. v. ICC*, 738 F.2d 481, 484 (D.C. Cir. 1984).

⁵³ *Order* ¶ 1.

to reason,” and “we anticipate.”⁵⁴ On the other hand, the Commission has routinely ignored CaptionCall’s concrete data showing that virtually all of its customers have one hearing aid, two hearing aids, or a cochlear implant—all of which indicate significant hearing loss.⁵⁵ Nor has the Commission addressed the fact that CaptionCall has always required its users to certify their need for IP CTS.⁵⁶ The Commission does not even attempt to address survey data showing that record evidence “does not support either fraud or misuse as the source of growth in IP CTS.”⁵⁷ In short, the record lacks any evidence supporting the Commission’s conclusions but contains ample evidence refuting them.

The Commission cannot rescue its deficient findings by calling them “predictive judgments.”⁵⁸ In the controlling *BellSouth* case, the D.C. Circuit reversed a Commission order anchored in a “predictive judgment” that (1) was based on an “absence of record evidence,” (2) “cast its analysis as a prediction of

⁵⁴ See, e.g., *Order* ¶¶ 26, 27, 28, 29, 42, 44, 97, 98.

⁵⁵ See Letter from John T. Nakahata, Counsel, CaptionCall, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 13-24 at 3 (filed Dec. 19, 2012); see also Declaration of Pat Nola, Ex. A.

⁵⁶ See *id.*

⁵⁷ Initial IP-CTS Survey Analysis by Rehabilitation Engineering Research Center on Telecommunications Access (RERC-TA), CG Docket No. 13-24 at 2 (filed Apr. 12, 2013).

⁵⁸ *Order* ¶ 14 n. 41.

future trends”; and (3) ignored evidence of alternative causes of the injury the Commission asserted.⁵⁹

The *Order* suffers from the same infirmities. There is “an absence of record evidence” connecting the targeted practices to IP CTS misuse. The Commission attempts to evade this obstacle by inventing “predictive judgments” of future misuse. And the Commission ignores the evidence—CaptionCall’s customer data, historical self-certification requirement, and survey data from an unbiased third party—that contradicts its speculations. Accordingly, the Commission’s attempt to justify its findings as “predictive judgments” falls short.

In sum, a petition for review of the *Order* is likely to succeed on the merits. The *Order*’s entire premise is arbitrary, capricious, and contrary to law because of a lack of record evidence and an unjustified failure to consider key alternatives. Thus, the *Order* unreasonably burdens hard-of-hearing consumers’ right to access IP CTS at rates no greater than those paid by persons without a hearing impairment.

II. The *Order* Will Cause Irreparable Harm.

Courts have held that irreparable harm exists when a disabled person loses “the chance to engage in a normal life activity”⁶⁰ as the result of a “violation of the

⁵⁹ *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1059-60 (D.C. Cir. 2006).

⁶⁰ *D’Amico v. N.Y. State Bd. of Examiners*, 813 F. Supp. 217, 220 (W.D.N.Y. 1993).

ADA.”⁶¹ Courts are especially likely to find irreparable harm where a consumer suffers “the very injury Congress sought to avert....”⁶²

When Congress passed the ADA, it cited telephone usage as “[o]ne of the most pervasive aspects of our lives, in our personal and business affairs,” while noting that “[n]ot being able to use this communication tool is one of the major barriers to productive, normal life.”⁶³ Through Title IV, Congress sought to eliminate this major barrier to a productive, normal life.

The *Order* will prevent thousands of consumers from learning about, subscribing to, and using IP CTS, in violation of the ADA. For each day this barrier exists, those consumers will suffer the very injury Congress sought to avert: the inability to utilize one of the most pervasive aspects of our lives. Accordingly, without a stay of this rule, hard-of-hearing consumers will suffer quintessential irreparable harm pending appellate review.

In addition, CaptionCall itself will suffer grievous and irreparable injury at the hands of the *Order*. CaptionCall currently does not have sales, marketing, or distribution practices in place to deliver equipment for a fee to a large market. The expansion of this channel will take significant time to develop and implement, and

⁶¹ *Enyart v. Nat’l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011);

⁶² *EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 70 (E.D. Mich. 1982), *aff’d* 733 F.2d 1183 (6th Cir. 1984).

⁶³ 135 Cong. Rec. S10765 (daily ed. Sept. 7, 1989) (statement of Sen. Simon).

in the interim, CaptionCall will be ineffectual in its efforts to add new customers. In addition, the marketing restrictions will constrain legitimate subscriptions, and the default-off rule will continue to reduce legitimate use. After the harm inflicted by the interim rules, CaptionCall cannot weather significant business degradation.

Courts have recognized that monetary loss may constitute irreparable harm “where the loss threatens the very existence of the movant’s business.”⁶⁴ In addition, courts have found that a litigant is “likely to suffer irreparable harm” when it cannot obtain “adequate compensatory or other corrective relief... at a later date....”⁶⁵

As established in the attached affidavit from its CEO, CaptionCall has already suffered severe losses. The anticipated additional losses caused by its compliance with unlawful rules will threaten CaptionCall’s viability. In that event, hard-of-hearing consumers would once again face a monopolistic provider that, in the eight years before CaptionCall entered the market, was unable to generate the availability or customer experience that CaptionCall was able to create in just two years. In addition, CaptionCall will suffer revenue losses that it simply cannot recover from any party, as there is no cause of action that will allow it to recover lost revenue from the FCC.

⁶⁴ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

⁶⁵ *Id.*

Accordingly, without a stay, unserved hard-of-hearing consumers face the prospect of barriers to the adoption and use of an ADA-mandated service that could fundamentally improve the quality of their lives. Both unserved consumers and existing IP CTS customers face the loss of a provider that has brought access and innovation that the remaining provider cannot and will not match. These injuries are the embodiment of “irreparable harm.”

III. A Stay Will not Harm Any Party and Is in the Public Interest

On the other hand, a stay will not harm any party. The FCC claims the *Order* will prevent IP CTS use by persons who do not need captions. Yet, as discussed, the FCC has not and cannot present evidence of IP CTS misuse in the first instance. Thus, this factor weighs in favor of a stay.

For those same reasons, a stay is in the public interest, as it will ensure that the effects of discrimination against hard-of-hearing consumers are not extended. Moreover, through Title IV of the ADA, Congress sought to advance the goal of achieving universal service. As the Commission has long recognized, universal service is in the public interest, because the telecommunications networks generate greater public benefits as we move closer to true universal service. Thus, this factor weighs in favor of a stay as well.

CONCLUSION

The Commission should stay the *Order* until the D.C. Circuit has ruled on CaptionCall's petition for review.

Respectfully submitted,

/s/ Christopher J. Wright

Christopher J. Wright

John T. Nakahata

Walter E. Anderson

Wiltshire & Grannis, LLP

1200 18th Street NW

Washington, DC 20036

202-730-1325

cwright@wiltshiregrannis.com

September 23, 2013

EXHIBIT A

Declaration of Pat Nola

**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
)	

DECLARATION OF PAT NOLA

I, Pat Nola, do hereby affirm under penalty of perjury:

1. I am the Chief Executive Officer of Sorenson Communications, Inc. and CaptionCall, LLC. I have been CEO of Sorenson since 2005, and CEO of CaptionCall since its inception in 2011. As CEO of CaptionCall, I am responsible for overseeing all aspects of the operations and finances of the business, and am intimately familiar with the company's operations and financial status.
2. CaptionCall is a wholly-owned subsidiary of Sorenson Communications, Inc. Sorenson is provisionally certified by the FCC as a provider of two forms of Telecommunications Relay Services, Internet Protocol Captioned Telephone Service ("IP CTS") and Video Relay Service ("VRS"). IP CTS is a relay service in which, for a call between a hearing-impaired person and a non-hearing impaired person, a communications assistant listens to the portion of the call being spoken by the non-hearing-impaired party, and transcribes that portion of the call to create captions that are displayed on a special captioning telephone. CaptionCall provides IP-CTS on behalf of Sorenson. Sorenson, as the FCC

certified TRS provider, submits claims to the FCC's TRS Fund Administrator for payment for the IP CTS service provided through CaptionCall, and remits IP CTS compensation to CaptionCall. At this time, this is CaptionCall's sole business. Sorenson provides another form of TRS, Video Relay Service, as its principal line of business.

3. Although IP CTS was authorized by the Federal Communications Commission for compensation as a form of TRS in 2007, CaptionCall is one of the more recent providers of IP CTS, launching its service commercially in January 2011. As such, it is critical to CaptionCall to continue to increase its subscriber base by adding new users. This is consistent with the Americans with Disabilities Act's goal of providing telecommunications relay services that "provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communications services by wire or radio." Moreover, because hearing loss occurs predominantly in the elderly, many of whom pass away each year, CaptionCall remains viable only to the extent it can provide service to new users who replace deceased ones.
4. We launched CaptionCall in response to a need in the hard-of-hearing community for a technology that would make telephone use less difficult. Because telephones transmit and reproduce only a limited range of audio frequencies and because users cannot see each other's facial or body cues, telephone use often presents a particular challenge to those with partial hearing loss. This is true even for consumers with T-Coils that allow them to work with hearing aid compatible telephones because the hearing aid wearer

must remember to turn the T-Coil on. By captioning telephone conversations, CaptionCall provides a much-needed service to a largely underserved community, and permits tens of thousands of Americans to communicate by telephone where such communication was difficult or impossible before. We also designed our phones with advanced amplification features to further assist users in understanding telephone conversations, and with a “hi-tech” non-clinical appearance to reduce the social stigma that users might perceive from having a captioning telephone.

5. A CaptionCall user must have a CaptionCall phone in order to use CaptionCall’s IP CTS service. No one can use any IP CTS service (whether provided by CaptionCall or any of its competitors) without obtaining specialized hardware or software from that user’s specific IP CTS provider to transmit the non-hearing-impaired party’s speech to the Communications Assistant for transcription, and to receive and display the captions. When CaptionCall first began operations, it sold the use of its captioning telephones for a fee. CaptionCall quickly discovered that the equipment fee was an impediment to adoption of IP CTS service by individuals who objectively appeared to needed it to communicate effectively by telephone. Many of the potential users of IP CTS are retired and on fixed incomes, and thus were sensitive to being asked to pay \$100 or \$150 for a captioning phone that they were not necessarily sure would solve their problem of hearing on the telephone. CaptionCall thus began offering the use of the captioning telephone equipment for free to users of its IP CTS service. This reduced the reluctance of potential IP CTS users to accept the service. Many customers have told CaptionCall that they found that IP CTS restored their ability to communicate effectively using the

telephone, minimizing the extent to which they had been guessing at the content of conversations.

6. CaptionCall also experimented with a variety of ways to identify and attract new users. It tried television advertising, which it found to be incredibly expensive and inefficient. CaptionCall discovered—not surprisingly—that the best way to identify individuals who could benefit from captioned telephone service was through hearing health professionals, principally audiologists and hearing instrument specialists who conduct hearing screenings and sell hearing aids and other assistive listening devices. In addition to providing these professionals with information and demonstrations of its service, CaptionCall also began providing these professionals modest compensation—generally \$50—per referral that resulted in a user subscribing to CaptionCall’s service. This turned out to be a highly efficient way to identify potential users of IP CTS, promoting adoption of the service by those who need it and will benefit from it. At no time did CaptionCall pay new users themselves to subscribe to its service.
7. Aware of the need to ensure that its users actually needed IP CTS service, CaptionCall very early in its operations voluntarily and without any regulatory mandate began requiring its users to self-certify that they had a medically-recognized hearing impairment. CaptionCall patterned this self-certification after the one the FCC had required for two other forms of TRS, VRS and IP Relay. CaptionCall’s users need for IP CTS is also supported by the fact that approximately 95% of CaptionCall’s customers have at least one hearing aid or a cochlear implant. The small percentage of remaining users also have significant hearing loss but may be unable to benefit from most hearing

aid or implant technologies, may choose not to use a hearing aid or implant, or may be unable to afford them.

8. In addition, as CaptionCall gained experience with providing service to its users, it discovered that its initial design—in which captions were turned on or off simply by touching the CaptionCall icon on the telephone unit—led to many consumers inadvertently turning off captions without knowing how to then restart them. Because captions once turned off stayed off until they were turned on again, many users became frustrated. CaptionCall’s customers are predominantly older Americans—41% of its subscribers are over 80 years old—and due to conditions incident to advancing age have difficulty activating captions once they are turned off. To address this, CaptionCall redesigned its firmware—a project which took over six months to design and implement—so that captioning was always on, unless deactivated through a two-step menu. This made the service easier for CaptionCall’s customers to use.
9. In January 2013, the FCC without notice and comment issued an interim rulemaking order, titled *Misuse of Internet Protocol (IP) Captioned Telephone Service; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities* (the “Interim Order”). The Interim Order, among other things, prohibited payments to third parties for referrals, mandated that all IP CTS phones be configured to default to captions off with captions manually activated each time a user desired captioning, and required that, with the exception of equipment distributed through state programs, users either pay \$75 or obtain a certification from an independent third party hearing health professional that the individual has a hearing loss that necessitates IP

CTS to communicate in a manner that is functionally equivalent to communication by conventional voice telephone users.

10. Following the issuance of the Interim Order, actual new customer equipment installations decreased from ***** BEGIN CONFIDENTIAL ***** [REDACTED] ***** END CONFIDENTIAL ***** to ***** BEGIN CONFIDENTIAL ***** [REDACTED] ***** END CONFIDENTIAL *****.

11. Likewise, CaptionCall saw the average monthly minutes of use per customer drop from ***** BEGIN CONFIDENTIAL ***** [REDACTED] ***** END CONFIDENTIAL ***** before the Interim Order to ***** BEGIN CONFIDENTIAL ***** [REDACTED] ***** END CONFIDENTIAL *****.

12. CaptionCall was also denied approximately ***** BEGIN CONFIDENTIAL ***** [REDACTED] ***** END CONFIDENTIAL ***** in revenue when it modified its service to comply with the requirement that captions are set to “default off.” The FCC refused to grant a waiver allowing sufficient time to make the necessary changes and denied compensation for every call made from a phone that was not set to default off, even though it was clear that CaptionCall made a herculean effort to comply with the default-off rule in an extraordinarily compressed timeframe, installed new firmware on almost all of its phones prior to the deadline, and rolled back the firmware only after it became clear that it degraded the user experience to a degree that effectively denied access to the service. The decision to roll back CaptionCall’s firmware was made entirely after a good faith assessment that its firmware was woefully deficient: it would have been irrational otherwise because of the risk that the FCC would deny any waiver request, resulting in no compensation being paid – as actually happened.

13. The changes in the Interim Order have reduced CaptionCall's profitability to the point of threatening its financial viability. CaptionCall's monthly revenue run rate—that is, revenue from newly added customers each month—decreased by *** BEGIN CONFIDENTIAL *** [REDACTED] *** END CONFIDENTIAL *** following the Interim Order.
14. Significantly, the level of hearing disability among CaptionCall's customers did not change materially after the Interim Order was issued. Prior to the Interim Order, about 78% percent of customers had two hearing aids, 17% had one hearing aid, 3% had cochlear implants, and about 3% had no assistive hearing device. (The numbers add up to 101% due to rounding.) After the Emergency Order, the percentage of individuals with two hearing aids decreased slightly to 77%, the percentage with one hearing aid decreased slightly to 15%, the percentage with cochlear implants decreased slightly to 2%, and the percentage without an assistive hearing device increased slightly to 6%—none of which reflects substantial a substantial change in the makeup of CaptionCall's customers. This suggests that there are now individuals who would benefit from CaptionCall's services, but who are not receiving these services because of the changes effected by the Interim Order.
15. On August 26, 2013, the FCC released the Report and Order that CaptionCall now appeals (the "Final Order"). The Final Order further modifies the rules presently governing IP CTS, and, among other things, requires new customers that do not receive equipment from a state program to pay \$75 per telephone for CaptionCall to qualify to receive compensation for that customer from the TRS Fund. The Final Order eliminated the ability for a new consumer to obtain equipment for less than \$75 based on the

certification of a hearing health professional, and required that all existing users either pay \$75 or obtain a certification from a hearing health professional.

16. Because of its history and experience with attempting to charge consumers for captioning telephones, CaptionCall does not have significant distribution channels that charge a fee of \$75 or more. As I noted above, in the very early days of its operation, CaptionCall experimented with charging customers for telephone equipment, but found that this practice was unsustainable, and that individuals who otherwise needed the technology were deterred from participating in the program. In the time since the Interim Order required individuals to either pay for equipment or to obtain a hearing health professional's certification of a user's need, only about ***** BEGIN CONFIDENTIAL ***** **██████████** ***** END CONFIDENTIAL ***** per month have ever been from users that paid at least \$75 for equipment, as compared to around ***** BEGIN CONFIDENTIAL ***** **██████████** ***** END CONFIDENTIAL ***** per month after the Emergency Order for customers who obtained a hearing health professional's certification of need in lieu of paying \$75.

17. Based on my general knowledge of CaptionCall's finances and operations, and particularly of the effect of the Emergency Order, I expect the changes made in the Final Order to further reduce new customer installs by ***** BEGIN CONFIDENTIAL ***** **██████████** ***** END CONFIDENTIAL *****. ***** END CONFIDENTIAL ***** The Final Rules once again put hearing impaired persons who need captions in the position of paying a substantial amount of money before being able to use the service in their home. Moreover, the Final Rules prohibit an IP CTS provider from obtaining compensation for any minutes of service provided before payment of \$75—effectively precluding providers

from allowing consumers to ensure they are comfortable using the CaptionCall phone before making a financial commitment.

18. These changes will put CaptionCall at serious risk of ceasing to be able to do business. If CaptionCall ceases to do business before the appeal concludes, it is unlikely to be possible for CaptionCall to resume business if it subsequently prevails on appeal because of the loss of relationships and goodwill it will have incurred by going out of business.
19. Likewise, the further reduction in CaptionCall customers is likely to reflect an increase in individuals who are eligible for and would benefit from IP CTS not obtaining service because they cannot or will not pay the cost of purchasing the necessary equipment. The decrease is unlikely to reflect the weeding out of individuals who are not eligible for and will not benefit from IP CTS. It will not be possible for individuals who do not obtain service until after the rules are vacated by the court of appeals to retroactively understand the calls they did not understand because they lacked captioning or make the calls they would have made but avoided making due to their hearing problems.
20. CaptionCall will make every effort to comply with the relevant IP CTS rules, and will attempt to remain a going concern. Even if CaptionCall were to succeed at this, however, and CaptionCall were also to later prevail on its present appeal, CaptionCall would have lost millions of dollars in business. Because that business is compensated through the TRS Fund for minutes of service actually provided, CaptionCall would have no means of recouping that financial loss.

Executed on 23 SEP 2013

A handwritten signature in black ink, appearing to read 'Pat Nola', written over a horizontal line.

Pat Nola
Chief Executive Officer
CaptionCall, LLC
4215 South Riverboat Road
Salt Lake City, Utah 84123

EXHIBIT B

Declaration of Samuel Bagenstos

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

In the Matter of)	
)	
Misuse of Internet Protocol (IP) Captioned)	CG Docket No. 13-24
Telephone Service)	
)	
Telecommunications Relay Services and)	CG Docket No. 03-123
Speech-to-Speech Services for Individuals)	
with Hearing and Speech Disabilities)	
)	

DECLARATION OF SAMUEL BAGENSTOS

I, Samuel Bagenstos, do hereby affirm under penalty of perjury:

1. I hold an appointment as Professor of Law, with tenure, at the University of Michigan Law School. In this declaration, I speak only for myself as an individual and not on behalf of the University.
2. I have extensive experience with and expertise in the Americans with Disabilities Act (ADA) and disability discrimination more generally. I have published a casebook on disability discrimination law (DISABILITY RIGHTS LAW: CASES AND MATERIALS (Foundation Press 2010)), an academic book on the disability rights movement and the law (LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT (Yale University Press, 2009)), and numerous articles on topics relating to disability discrimination and the ADA.
3. From 2009-2011, as a Deputy Assistant Attorney General at the United States Department of Justice, I supervised all of the Civil Rights Division's disability rights enforcement. In that role, I supervised the promulgation of the Department's 2010 ADA

regulations, the first comprehensive update to those regulations since 1991; I made decisions regarding whether the Division should participate in ADA litigation and what its litigating positions and enforcement policies should be; and I conducted extensive outreach to people with various disabilities and to state and local governments and businesses regulated by the statute.

4. Both in my time at the Department of Justice and in private life, I have participated extensively in ADA litigation, including personally arguing ADA cases in federal district courts, courts of appeals, and the Supreme Court of the United States. I have also testified before congressional committees on disability rights issues on three occasions.
5. This declaration is based on my review of the Federal Communications Commission's order in the above-captioned matter and materials in the Commission's docket in that matter, as well as on my general knowledge of and experience with disability accommodations and the implementation of the ADA. Based on that review and my knowledge and experience, my opinion is that the Commission's order will impede the full and equal access of individuals with hearing impairments to communications and deny those individuals functionally equivalent telephone service, in contravention of basic ADA principles.
6. The ADA is a broad and comprehensive statute that guarantees people with disabilities full and equal access to public, civic, and economic life. It contains four substantive titles. Title I applies to employment. Title II applies to the services, programs, and activities of state and local governments. Title III applies to privately-owned places of public accommodation. Title IV applies to telecommunications services.

7. In enacting the ADA, Congress expressed a purpose “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1), (2). Congress specifically identified “the discriminatory effects of * * * communications barriers” as among the “various forms of discrimination” that “individuals with disabilities continually encounter.” *Id.* § 12101(a)(5). Barriers to equally effective communication are, in my experience, among the most significant barriers that limit the opportunities of people with disabilities to participate in the life of the community. Eliminating those barriers has been a significant focus of ADA enforcement efforts by the Department of Justice and individuals with disabilities.
8. The ADA recognizes that a prohibition of intentional discrimination will not be sufficient to ensure that people with disabilities will have equal access to the life of the community. It thus requires the entities it regulates to make changes to their existing practices to achieve that goal. Each of its four substantive titles imposes such a requirement. Title I requires an employer to make reasonable accommodations for an employee with a disability, unless the employer can show that providing the accommodation will impose an undue hardship on it. 42 U.S.C. § 12112(b)(5). Title II requires a government entity to make reasonable modifications to enable individuals with disabilities to fully participate in the entity’s services, programs, and activities, unless it can show that those modifications would fundamentally alter the nature of those services, programs, or activities. 28 C.F.R. § 35.130(b)(7). And Title III requires a public accommodation to make reasonable modifications to ensure individuals with disabilities the full and equal

- enjoyment of its goods, services, and facilities, unless it can show that those modifications would work a fundamental alteration. 42 U.S.C. § 12182(b)(2)(A)(ii).
9. Both Title II (in its implementing regulations) and Title III (in the statute itself) contain provisions that specifically apply these principles to communications barriers. Title II requires state and local governments to provide appropriate “auxiliary aids” to ensure that its communications with individuals with disabilities are as effective as its communications with others. 28 C.F.R. § 35.160. See also *id.* § 35.104 (defining “auxiliary aids” to include a variety of communications aids, including, *inter alia*, “captioned telephones”). Title III requires a private place of public accommodation to provide auxiliary aids unless the business can show that doing so “would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” 42 U.S.C. § 12182(b)(2)(A)(iii).
10. These provisions recognize that a person with a disability might not access the opportunity at issue in precisely the same way as do people without disabilities. A nondisabled patient might speak vocally to an intake nurse at a hospital, for example, while a patient with a hearing impairment might use a sign language interpreter. But the hospital must provide the interpreter so that the patient with the hearing impairment has an equal opportunity to perform the same function as the nondisabled patient—the function of communicating with the intake nurse.
11. The provisions of Titles I through III of the ADA differ in the relevance they place on the costs of an accommodation. But all follow a similar structure. In all cases, the necessary analysis asks first whether the accommodation requested by an individual with a disability will provide an equal opportunity to participate in the job, government

program, or retail sales at issue. Only then, and only to the extent that the relevant provision allows it, will the regulated entity be entitled to show that the costs of the requested accommodation impose an undue burden or hardship on it. And because the ADA “seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation’s life,” *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002), a showing of undue hardship demands real evidence, rather than mere assumptions or projections, of hardship.

12. ADA Title IV, which mandates accessible telecommunications for people with hearing and speech impairments, imposes requirements that are parallel to those of the statute’s other titles. Just as the other titles of the ADA require regulated entities to make accommodations to their standard practices in order to ensure that people with disabilities can participate in jobs, government programs, or public accommodations, Title IV requires the Commission to “ensure,” “to the extent possible and in the most efficient manner,” that relay services are available to individuals with hearing or speech impairments. 47 U.S.C. § 225(b)(1). Just as the other titles of the ADA require regulated entities to give people with disabilities an equal opportunity to perform the same functions as nondisabled individuals, Title IV provides that relay services must enable individuals with hearing or speech impairments to “engage in communication by wire or radio * * * in a manner that is functionally equivalent to the ability of a hearing individual who does not have a speech disability” to do so. *Id.* § 225(a)(3).
13. The analysis in the Commission’s order, in my opinion, gets the analysis required by the ADA backwards. Under standard ADA principles, the Commission should have begun

its analysis by asking what requirements for captioned telephones will ensure that people with hearing impairments have an equal opportunity (compared to nondisabled consumers) to use all of the functions of a telephone. Only then would it be proper, under standard ADA principles, to consider whether the requested accommodation imposed an undue burden—and the relevant burden would be the burden to the entity that has been asked to provide the accommodation. Instead of asking what accommodations will provide functionally equivalent service, the order takes for granted the importance of “deter[ring]” users of captioned phones. Aug. 26, 2013, Order ¶ 41. And instead of requiring those accommodations unless they impose an undue hardship on the entities *providing* them, the order asks only whether the *limitations* it imposes on those accommodations will be “overly burdensome” to the *individuals with disabilities* who use captioned telephones. *Id.* But the relevant question is whether the order provides individuals with disabilities an equal opportunity to use the telephone (perhaps without imposing an undue burden on others), not whether the burdens the order places on individuals with disabilities seem acceptable.

14. The order’s requirement that users pay at least \$75 for their captioned telephone equipment, and its requirement that users manually turn on the caption functions each time they use the phone will, in my opinion, preclude people with hearing impairments from having an equal opportunity to use telephone services.
15. The Commission’s order primarily justifies the \$75 requirement as a proxy for whether the user “need[s] the service” of captioned telephony. Aug. 26, 2013, Order ¶ 41. The order explains that a user’s decision to pay at least \$75 “provides a concrete indication that the consumer has thought the transaction through sufficiently to have concluded that

she or he needs IP CTS for effective communication.” ¶ 43. That analysis disregards three core ADA principles.

16. First, the notion that people with disabilities can be forced to pay a fee to ensure that they really need the accommodations they seek contravenes basic principles of disability discrimination law. The ADA generally prohibits covered entities from charging an individual with a disability for an accommodation—even where the charge does nothing more than defray the cost of providing the accommodation. See, e.g., *Klingler v. Director, Dept. of Revenue*, 433 F.3d 1078 (8th Cir. 2006); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999). That same principle is implicit in Title IV’s requirement of functional equivalence. A payment requirement imposed exclusively on people who use a technological accommodation is, by definition, not equivalent to the fees charged nondisabled consumers. And Title IV expressly recognizes the principle by prohibiting any requirement that the users of relay services pay greater rates than nondisabled users pay for functionally equivalent voice communication services. 47 U.S.C. § 225(d)(1)(D).
17. The general prohibition on charging people with disabilities for their accommodations reflects two key judgments. First, it reflects the judgment that accommodations are a civil right, the costs of which should be broadly shared rather than borne exclusively by individuals with disabilities. Second, it reflects the judgment that even relatively small surcharges can make it extremely difficult for people with disabilities to use the accommodations that will enable them to achieve the equal opportunities that the ADA guarantees. People with disabilities have much higher rates of poverty, and much lower rates of workforce participation, than the general population. As a result, individuals

with disabilities are much more likely to be sensitive to even relatively small fees and surcharges.

18. Unlike most surcharges that have been the subject of litigation under the ADA, the \$75 fee the Commission's order requires is not even designed to defray the costs of providing the statutorily mandated accommodation. Rather, the Commission's order explicitly justifies the required fee as a *disincentive* to using captioned telephone service. But the same principles that prohibit an entity regulated by the ADA from taxing individuals with disabilities to pay the costs of the accommodations they need would apply even more strongly to prohibit entities from taxing individuals with disabilities for the express purpose of creating a financial disincentive to using those accommodations. For an individual with a disability who is poor, or who is elderly and living on a fixed income, a \$75 fee could easily deter that individual from using captioned telephone service—even if that service is the only way to provide her the same opportunity to communicate over the telephone as nondisabled individuals enjoy. Courts have found much smaller fees to be impermissible surcharges under the ADA. See, e.g., *Klingler, supra* (\$4.00 fee paid every two years for a disabled parking placard was impermissible surcharge); *Dare, supra* (\$6.00 fee paid every two years for a disabled parking placard was impermissible surcharge). I believe that in many cases the fee required by the Commission's order will screen out individuals who cannot easily pay \$75 but in fact need to use a captioned telephone to obtain service that is functionally equivalent to that provided to nondisabled telephone users.

19. The second flaw in the order's analysis of the \$75 requirement is in its determination of necessity. The order states that “where consumers must make an investment in an IP

CTS equipment purchase, they are far less likely to acquire such equipment if they do not need the service.” Aug. 26, 2013, Order ¶ 41. But the question under the ADA is not whether captioned telephones are absolutely essential for individuals with disabilities to communicate. The question is whether captioned telephones provide those individuals an equal opportunity to perform the same functions performed by nondisabled telephone users. A ramp or elevator may not be necessary to enable an individual with paraplegia to reach the second floor of a building, because he may crawl or be carried up steps. But those accommodations do ensure that the individual will have an equal opportunity to participate in the services or activities provided at that building. See *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1134-1135 (9th Cir. 2012). Similarly, a sign language interpreter may not be necessary to enable a Deaf patient to communicate with medical personnel, because she may read lips or pass written notes. But lipreading and passing notes “may be ineffective in ensuring that a hearing-impaired patient receives equal opportunity to benefit from the treatment.” *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334, 343 (11th Cir. 2012). The \$75 fee requirement will encourage individuals with hearing impairments to forgo using captioned telephones and choose some other, inferior way of communicating, even where captioned telephones are necessary to provide those individuals an equal opportunity. Using financial incentives to encourage individuals with disabilities to accept second-class accommodations is not consistent with basic principles of disability discrimination law.

20. The third flaw in the order’s analysis of the \$75 requirement rests in the assertion that the fee is necessary to ensure that an individual with a disability “has thought the transaction through sufficiently to have concluded that she or he needs IP CTS for effective

communication.” ¶ 43. The suggestion that individuals with disabilities will not think through the decision of what communications aids to use is undeniably, and unjustifiably, paternalistic. The ADA was intended to counter just such paternalism. Congress explicitly listed “overprotective rules and policies” as among the “various forms of discrimination” that people with disabilities “continually encounter[ed].” 42 U.S.C. § 12101(a)(5). The order’s conclusion that people with hearing impairments cannot be trusted to think through their decisions, and that they must therefore pay a substantial fee to prove they are serious about their choices, is precisely the sort of “refusal[] to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes” that the ADA was designed to prohibit. See *Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 85 (2002). Individuals with disabilities, like those without disabilities, often rely on professionals and others for support, information, and advice. But a basic premise of disability discrimination law is that, except in extreme circumstances in which decisionmaking power has been vested in a guardian or where the choice involves a direct threat to health or safety, people with disabilities are entitled to make their own choices without second-guessing from others. I am aware of no principle or doctrine of disability rights law that would permit a government agency to require individuals with disabilities to be charged a fee to ensure that they have taken a decision sufficiently seriously. Such a requirement flies in the face of the ADA’s basic opposition to paternalism.

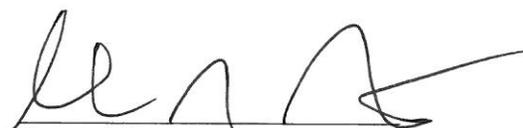
21. The order’s requirement that users manually turn on captioning in each call also will deny functionally equivalent service. Nondisabled telephone users can place and answer calls simply by picking up the phone. They do not need to take an additional “affirmative

step” (Aug. 26, 2013, Order ¶ 96) before they may communicate with the person on the other end of the line. The requirement that individuals with hearing impairments take such a step places them in an inferior position vis-à-vis nondisabled individuals and denies them an equal opportunity to use the functions of the telephone.

22. This is not merely a technical point. The submissions in the rulemaking docket by individuals with disabilities and consumer groups highlight many occasions in which callers have hung up during the time it took the user to turn on captioning. And, because crucial information describing the identity of the caller and the purpose of a call is typically presented at the beginning of a conversation, a delay in captioning at that time can make communication particularly difficult.
23. In the analogous context of providing access to web sites and electronic readers provided by places of public accommodation, the Department of Justice has taken the position that accommodations for people with disabilities must do more than simply provide access to the same information that nondisabled individuals receive. The accommodations must provide access in a manner that is as convenient and easily manageable as the manner in which nondisabled individuals receive access. See *Achieving the Promises of the Americans with Disabilities Act in the Digital Age—Current Issues, Challenges, and Opportunities*, Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Judiciary Comm. 16-17 (Apr. 22, 2010). That position implements a basic principle of disability rights law—one also reflected in Title IV’s requirement of functional equivalence. That principle is that the purpose of disability accommodations is to give individuals with disabilities all of the substantive opportunities that nondisabled individuals receive. A telephone does not merely provide

the opportunity to communicate with others. For people without hearing impairments, it provides the opportunity to engage in two-way, back-and-forth communication with a high degree of immediacy and spontaneity. The requirement that users manually turn on captions in each call denies a substantial amount of that immediacy and spontaneity to individuals with hearing impairments. It thus denies functionally equivalent service to those individuals.

Executed on September 23, 2013.

A handwritten signature in black ink, appearing to read 'S. Bagenstos', with a long horizontal stroke extending to the right.

Samuel Bagenstos
625 S. State St.
Ann Arbor, MI 48109